WORKMEN'S COMPENSATION: THIRD PARTY'S ACTION OVER AGAINST EMPLOYER

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Perhaps the most evenly-balanced controversy in all of workmen's compensation law is the question whether a third party in an action by the employee can recover over against the employer, when the employer's fault has caused or contributed to the injury.

The typical fact situation is that presented in American District Telegraph Co. v. Kittleson. Kittleson was an employee of Armour and Company. American District Telegraph Company had contracted with Armour to repair a signal system. One of American's employees fell through a skylight and landed on Kittleson, injuring him severely. Kittleson accepted workmen's compensation from Armour and also sued American, as he was entitled to do under the Iowa Act. The negligence alleged was that of American's employee in failing to ascertain whether the skylight would carry his weight. American brought a third-party complaint against Armour, asserting that the injury was primarily due to Armour's negligence in allowing the skylight to become so encrusted with dirt that it was indistinguishable from the roof around it. Armour moved to dismiss the third-party complaint on the ground that Armour's compensation liability was exclusive. It is interesting to note that the compensa-

tion liability amounted to $6,800, while the judgment recovered against American was almost $60,000.

The district court dismissed the third-party complaint. The court of appeals reversed and held that Armour could be held liable to American for the damages that American had to pay Armour's employee.

Each side to this controversy has an argument in its favor which, considered alone, sounds irresistible. The employer 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 workmen's compensation 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 that system by assuming liabilities that he could normally shift to, or share with, the employer?

The law on this subject is of recent and rapid development. A high proportion of the law has been made in the federal courts, and of this law a very high proportion has grown out of the triangular relation between (1) an injured longshoreman, (2) a shipowner sued by the longshoreman for unseaworthiness of the vessel on which the work was performed, and (3) the longshoreman's employer, a stevedoring company, to whom the shipowner attempts to transfer the burden of his own liability on some theory of indemnity or contribution based on the stevedoring company's fault. It is evidence of the closeness of the question that at one time there were four different rules standing side by side, produced by the four courts of appeals that had been confronted with the issue. The Supreme Court then took a hand in the matter and put to rest some of the un-


certainties and conflicts existing in the lower courts; nevertheless, in many respects the law is still in a formative stage.\(^4\)

The cases dealt with in this article can best be considered by identifying three possible situations:

A. The third party seeks a tort-type of recovery over against the employer (contribution).

B. The third party seeks a contract-type recovery over against the employer; the source of the employer's relation to the third party is contractual.

C. The third party seeks a contract-type recovery over against the employer; the relation between the third party and the employer is not contractual in origin.

In commencing the main analysis of the recovery-over problem, we may first note that there is broad agreement that a distinction must be observed between recovery over in the form of contribution and recovery over in the form of indemnity. The right of contribution is based either upon contribution-between-tortfeasor statutes or upon common law or admiralty contribution, where available and applicable. The right of indemnity is based upon an independent duty or obligation owed by the employer to the third party, either as the result of express contract or as the result of an implication raised by law.

**CONTRIBUTION**

The great majority of jurisdictions have held that the employer whose concurring negligence contributed to the employee's injury cannot be sued or joined by the third party as a joint tortfeasor, whether under contribution statutes or at common law.\(^5\) The ra-

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\(^4\) This is particularly true of the interesting implications of Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404 (1969). This case held that the employer's rights against a third party whose negligence caused the injury for which the employer had been required to pay workmen's compensation are not necessarily confined to his statutory rights of subrogation to or reimbursement from the employee's cause of action. The decision opens up interesting new possibilities for suits by the employer-stevedore against the third-party shipowner—rather than the other way round, which has been the usual pattern—and raises a number of yet-to-be answered questions about the interplay between this kind of suit and the shipowner-versus-stevedoring-company suit that will develop when everyone, including the longshoreman, finally asserts his rights to the hilt against everyone else. See detailed discussion at 2 A. Larson, The Law of Workmen's Compensation § 77 (Supp. 1969).

tionale is a simple one: the employer is not jointly liable⁶ to the


Maryland: Standard Wholesale Phosphate & Acid Works, Inc. v. Rukert Terminals Corp., 193 Md. 20, 65 A.2d 304 (1949) (applying Longshoremen's Act and ruling out not only contribution but also indemnity, unless assumed by express contract); Baltimore Transit Co. v. State, 183 Md. 674, 39 A.2d 858 (1944).


⁶ The accent here is on "liable." Thus, statutes based on the Uniform Contri-
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employee in tort; therefore he cannot be a joint tortfeasor. The liability that rests upon the employer is an absolute liability irrespective of negligence, and this is the only kind of liability that can devolve upon him whether he is negligent or not. The claim of the employee against the employer is solely for statutory benefits; his claim against the third person is for damages. The two are different in kind and cannot result in a common liability.

Except for a few holdings to the contrary in federal district courts, this view went unchallenged until the appearance of the Third Circuit's opinion in Baccile v. Halcyon Lines in 1951. Although the case itself was reversed by the Supreme Court, the views expressed in the court of appeals' decision are sufficiently stimulating in themselves to deserve careful attention—particularly since this was 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. The court points out at once that the tort liability here is in admiralty, a system that has developed rules according to its own sense of right, including its distinctive "moiety rule" applicable to mutual wrongdoers. The requirement of common liability is not, therefore, quite so sacred in an admiralty setting as it might be at common law. The court then states the heart of its position and its answer to the conventional reasoning summarized above:

While Haenn [the employer] was responsible to Baccile [the employee] regardless of its fault, Haenn's negligence in fact brought to fruition his right to compensation. In a pragmatic sense, therefore, Haenn and Halcyon [the third party] were, to use the preferable admiralty law description, "mutual wrongdoers."

The court goes on to observe that a contrary rule would permit the employee, at his election, to cast the entire burden of loss upon one of two wrongdoers, the employer going completely free since he has even been relieved of his compensation obligation by the employee's election. It is interesting to reflect that the employer is thus

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10 Id. at 405.
in a better position if both he and a third person are negligent than if no one was negligent.

It is next stressed that the policy of compensation acts is not to relieve the employer of all liability, but rather to limit his liability to the amounts specified in the act. Hence the court, pragmatic to the last, concludes that although it will allow the third party a recovery of contribution from the employer, it will limit the amount to that sum which the employer would have been liable to pay the employee in compensation. The court thus partly avoids the dilemma posed by the two irreconcilable positions described at the outset; at least the third party is not left to bear the entire burden alone.

The actual basis of the Supreme Court's reversal of this case did not reach this issue, but rather involved a narrow point of admiralty law. The Supreme Court ruled that the admiralty doctrine under which mutual wrongdoers share the damages equally does not extend to noncollision cases such as this one. At the same time, by way of dictum, the Court cast a cloud over the arbitrary selection of the amount of compensation liability as the amount of contribution liability when it observed that, even if there were a fresh legislative solution of the problem of contribution in noncollision cases,

there would still be much doubt as to whether application of the rule or the amount of contribution should be limited by the Longshoremen's and Harbor Workers' Compensation Act, or should be based on an equal division of damages, or should be relatively apportioned in accordance with the degree of fault of the parties.11

Sooner or later a case had to come along that involved a collision, and thus make it impossible for the Court to avoid deciding the conflict between the admiralty moiety rule and the compensation exclusive-liability defense. The case, Weyerhaeuser Steamship Co. v. United States,12 reached the Supreme Court in 1963. A United States ship and a Weyerhaeuser vessel collided at sea and both were found to have been at fault. Ostrom, a seaman on the United States ship, received $329.01 in benefits under the Federal Employees' Compensation Act. In a third-party negligence suit against the

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12 372 U.S. 597 (1963), rev'g United States v. Weyerhaeuser S.S. Co., 294 F.2d 179 (9th Cir. 1961). This case will be referred to in text as Weyerhaeuser I to distinguish it from Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563 (1958), which will be referred to as Weyerhaeuser II.
steamship company, he agreed to a $16,000 settlement. Then, in an action brought under the admiralty moiety rule against the United States, the steamship company included the $16,000 settlement in its list of costs. The United States resisted the item on the ground that if it were included the United States would be indirectly liable for one-half of the settlement under the moiety rule, even though the Federal Employees' Compensation Act states that the liability of the United States for injuries to its employees is limited to the Act and that the Act is "exclusive and in place of all other liability of the United States . . . to the employee . . . and anyone otherwise entitled to recover damages from the United States on account of such injury . . . ." The Ninth Circuit recognized that either the admiralty rule requiring division of damages when both vessels are at fault, or the exclusive remedy rule in the F.E.C.A., must give way to the other. The court felt that that which could not be done directly should not be done indirectly, that sovereign immunity existed unless waived, and that the exclusive-remedy provision prevailed. The United States was found not liable for one-half the amount paid to the federal employee by the steamship company as a result of the collision.

The Supreme Court reversed, in a decision whose precise holding and implications require the most careful analysis to avoid reading more into the case than is really there. So important is this precaution that the heart of the opinion is set out here in full:

In Ryan v. Pan-Atlantic Corporation, 350 U.S. 124, it was held that despite this exclusive liability provision, a shipowner was entitled to reimbursement from a longshoreman's employer for damages recovered against the shipowner by the longshoreman injured by the employer's negligence. The Court's decision in Ryan was based upon the existence of a contractual relationship between the shipowner and the employer . . . .

In the present case there was no contractual relationship between the United States and the petitioner, governing their correlative rights and duties. There is involved here, instead, a rule of admiralty law which, for more than 100 years, has governed with at least equal clarity the correlative rights and duties of two shipowners whose vessels have been involved in a collision in which both were at fault. The Schooner Catharine v. Dickinson, 17 How. 170, 177; The North Star, 106 U.S. 17, 21. See Halcyon Lines v. Haenn Ship Corporation, 342 U.S. 284. Long ago this court held that the full scope of the divided damages rule must prevail over a statutory provision which, like the one

involved in the present case, limited the liability of one of the
shipowners with respect to an element of damages incurred by
the other in a mutual fault collision. *The Chattahoochee*, 173
U.S. 540. . . .

In this case, as in *The Chattahoochee*, we hold that the
scope of the divided damages rule in mutual fault collisions is un-
affected by a statute enacted to limit the liability of one of the
shipowners to unrelated third parties.\(^{14}\)

A careful reading of this passage indicates that the case cannot
be relied on as authority for more than the proposition that the
moiety rule in admiralty takes precedence over the exclusive-liability
defense under a compensation act. Cases involving the moiety rule
are, in effect, excluded from the branch of contribution cases and,
instead, assimilated into the *Ryan* type of independent-indemnity-
duty cases. The key factor here is that the moiety obligation, unlike
collection 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. This point was crisply brought
out in the first leading case to interpret the scope of *Weyerhaeuser I*.

In *United Air Lines, Inc. v. Wiener*,\(^{15}\) as a result of a collision be-
tween a military plane and a United Air Lines plane, compensation
was paid by the United States for the deaths of the government
employees aboard the airline’s plane under the Federal Employees’
Compensation Act. In a third-party suit against United by repre-
sentatives of the deceased employees, United sought recovery over
against the United States. This was resisted on the ground that the
exclusive-remedy clause of the Federal Employees’ Compensation
Act, which is indistinguishable from that of the Longshoremen’s and
Harbor Workers’ Act, barred recovery over. The court held the re-
covered over barred, both on the theory of indemnity (which will be
returned to later)\(^{16}\) and on the theory of contribution, as to which
*Weyerhaeuser I* had been heavily relied on by the airline. In dis-
tinguishing it, the court said:

The admiralty rule of divided damages is to be distinguished
from the rule of indemnity urged upon us by United since under
admiralty law there arises from a collision involving mutual fault
the right to apportionment of all damages resulting therefrom,
including personal injuries, cargo damage, and damage to ships.
The divided damage rule is based upon the duty which each
shipowner owes the other to navigate safely irrespective of any

\(^{14}\) *372* U.S. at 602-04.

\(^{15}\) *335 F.2d 379* (9th Cir.), *cert. denied*, *379* U.S. 951 (1964).

\(^{16}\) See text accompanying note 55 et seq. infra.
duty to the person injured. On the other hand neither contribution nor indemnity may be awarded without the support of liability on the part of the indemnitor to the person injured. The courts have consistently held that in the absence of an express or implied contract of indemnity, or in the absence of the indemnitor’s liability to the injured party, there can be no recovery for indemnity.17

The key words in this quotation are the italicized words: “irrespective of any duty to the person injured.” This, it will be readily seen, is the exact opposite of the phrase in the compensation act which must be satisfied: “liability . . . on account of such injury (to the employee).”

The United States Supreme Court at this writing has not explicitly passed on the accuracy of this interpretation of the scope of its opinion in Weyerhaeuser I, but it has had ample opportunity to disavow it, if it had chosen to. In the United Air Lines case, certiorari was dismissed.18 Later the Ninth Circuit reaffirmed its position on essentially similar facts in Wien Alaska Airlines, Inc. v. United States.19 Indeed, the cases were so similar that the airline did not even attempt to distinguish the United Airlines case, but sought certiorari, which was denied.20

17 335 F.2d at 403 (emphasis added).
19 375 F.2d 736 (9th Cir.), cert. denied, 389 U.S. 940 (1967).
20 Nevertheless, some uncertainty and disagreement persisted as to where the law stood after Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597 (1963) (Weyerhaeuser I), rev’g United States v. Weyerhaeuser S.S. Co., 294 F.2d 179 (9th Cir. 1961). One reason was the history of the Treadwell litigation. The Third Circuit in Drake v. Treadwell Constr. Co., 299 F.2d 789 (3d Cir. 1962), had held that the exclusive-remedy clause of the Federal Employees’ Compensation Act precluded a claim for contribution over against the United States by a joint tortfeasor against whom a government employee had successfully brought a third-party suit. The Supreme Court, within a month after handing down Weyerhaeuser I, remanded Treadwell for further consideration in the light of that case. Treadwell Constr. Co. v. United States, 372 U.S. 772 (1963). On remand, the district court allowed contribution. The government at first appealed, but later moved for dismissal of the appeal “for the reason that the Solicitor General of the United States has recommended against appeal.” By order of the court dated September 23, 1963, the appeal was dismissed. C.A. 14517, W.D. Pa., Gourley J. Note that this case arose under Pennsylvania law, with its unique results in this area. See note 22 infra.

Then came Hart v. Simons, 223 F. Supp. 109 (E.D. Pa. 1963). This was a suit by an employee of the National Aeronautics and Space Administration against a manufacturer of a machine through whose defects she alleged she was injured. The manufacturer filed a third-party complaint against the United States. The plaintiff (not the United States) moved to dismiss the United States. The court traced the Treadwell history, followed the Supreme Court’s instruction to look at Weyerhaeuser...
One may round out this series of cases with the one that is perhaps the most remarkable of all, *Newport Air Park, Inc. v. United States.* The facts were quite similar to those in the *United Airlines* case: a government employee was killed in an air collision, and the widow, having accepted compensation, sued the third-party owner of the other aircraft, who in turn sued the United States under the Federal Tort Claims Act as joint tortfeasor. The law of Rhode Island applied, and was found to have no controlling precedent on the exact issue. The court then deliberately adopted the minority "Pennsylvania contribution rule," on the theory that this is what Rhode Island would do if the question were presented, and permitted a claim for contribution.

To understand why the court felt it necessary to adopt the Pennsylvania rule, one must bear in mind that there are two barricades by which the typical exclusive-remedy clause might ward off an action by the third party against the employer. The more familiar one is the barring of suits against the employer by the employee or his dependents on account of the injury; the destruction of this liability to the employee means in turn that there can be no joint liability of the employer with the third party for tort leading to that injury. In the vast majority of cases, this is as far as a court needs to look. If for some special reason this formula does not apply, however, there is a second hurdle that must be cleared if con-

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1 and, having done so, concluded that a contribution claim against the United States was permissible. The government, however, did not abandon its position that the claim was barred, and in the ultimate settlement between Hart and Simons, it was stipulated that the complaint against the government should be dismissed. Civil No. 27953 (E.D. Pa., stipulation of dismissal filed November 2, 1964).


22 The formula did not apply in Pennsylvania because of the peculiar "Pennsylvania rule" on contribution. This rule, unique to Pennsylvania except as *Newport Air Park, Inc. v. United States*, 293 F. Supp. 809 (D.R.I. 1968), can be taken as importing it to Rhode Island, is that contribution between joint tortfeasors under the Uniform Act depends not on joint liability but on joint negligence. To put the matter a little more exactly, one may quote Justice Roberts of the Pennsylvania Supreme Court: "Implicit in these holdings is the view that the definition of 'joint tortfeasors' does not require that they have a common liability toward the injured party but only that their combined conduct be the cause of the injury." *Elston v. Industrial Lift Truck Co.*, 420 Pa. 97, 102 n.2, 216 A.2d 318, 320 n.2 (1966). It will be readily observed that this rule is in conflict with that described earlier as the normal rule, based as it is on the fact that the Uniform Act actually uses the term "jointly liable in tort." See note 6 supra. See also *Sanderson v. Binnings Constr. Co.*, 172 So. 2d 721 (La. App. 1965); *Farren v. New Jersey Turnpike Authority*, 31 N.J. Super. 356, 106 A.2d 752 (1954). Judge Pettine in the *Newport Air Park* opinion regretfully recognized that another district judge,
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tribution is to be allowed against the employer. The typical exclusiveness statute also says that the employer's compensation liability on account of the injury shall be exclusive, not only as to the employee, his dependents, and perhaps other listed persons, but also as to "any other person." On the strength of this catchall clause, the employer may argue that the third person is directly barred, even in situations or jurisdictions that would not bar him in his capacity as one whose incapacity to recover over is derivative from the employee's incapacity to sue his own employer.

It is as to this second hurdle that language in Weyerhaeuser I has been pressed into service. The court in Newport Air Park recognized that Weyerhaeuser I was of no help on the joint tortfeasor approach, being limited to the impact of the distinctive maritime rule of divided damages. It did, however, quote this passage from Weyerhaeuser I:

[A]s between the Government on the one hand and its employees and their representatives or dependents on the other, the statutory remedy was to be exclusive. There is no evidence whatever that Congress was concerned with the rights of unrelated third parties . . . .23

A similar expression by the United States Supreme Court may be found in Ryan, when it said that the obvious purpose of the exclusive remedy 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 employees, or to anyone claiming under or through

Judge Day, in the same district, applying Rhode Island law, had ruled out contribution against the employer on similar facts, on the ground that an employer could not be a joint tortfeasor under the Uniform Act, because not jointly liable. Rowe v. John C. Motter Printing Press Co., 273 F. Supp. 363 (D.R.I. 1967).

Once the requirement of joint liability is removed, the employer's defense based on absence of liability to the employee collapses. Pennsylvania has accordingly produced a series of cases allowing the third-party action over against the employer in contribution—but it has also arbitrarily limited the amount of contribution to the amount of the employer's compensation liability. Kim v. Michigan Ladder Co., 208 F. Supp. 298 (W.D. Pa. 1962); Winters v. Herdt, 400 Pa. 452, 162 A.2d 392 (1960); Brown v. Dickey, 397 Pa. 454, 155 A.2d 836 (1959); Socha v. Metz, 385 Pa. 632, 123 A.2d 837 (1956); Maio v. Fohn, 339 Pa. 180, 14 A.2d 105 (1940); Stark v. Posh Constr. Co., 192 Pa. Super. 409, 162 A.2d 9 (1960). But, as just indicated, this is only half the battle. There remains the argument that the third party comes within the term "any other person" barred from suing the employer "on account of such injury." It is this argument that is of general interest and is discussed in the text.

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.24

There are two serious flaws in this quotation, which were not necessary to the Ryan decision, and therefore could probably be considered dicta. The first flaw is the gratuitous insertion of the words "claiming under or through such employee." These words do not appear in the statute and, although they did no harm in Ryan, they could greatly complicate the exact issue now under discussion. The test provided by the statute is clear and adequate, and it lies in the words "on account of such injury." This provided all that was needed in the actual Ryan decision to sidestep the exclusive-remedy bar, since the stevedore's liability was on account of his contract. The second flaw is the equation of barred plaintiffs with persons getting a quid pro quo in the form of compensation. The statute imposes no such limitation, and it is quite common for various relatives and dependents to have their common-law rights barred although they get nothing in return in the form of compensation benefits.25

Judge Pettine, in Newport Air Park, having decided to accept

25 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 66 (Supp. 1969). The court in Newport Air Park, Inc. v. United States, 293 F. Supp. 809 (D.R.I. 1968), also invoked the doctrine of ejusdem generis to support a conclusion that "any other person" meant only any other person such as other relatives not named. The court conceded that some courts had decided differently, citing Rhoades v. United States, 216 F. Supp. 732 (S.D. Cal. 1962), and Christie v. Powder Power Tool Corp., 124 F. Supp. 693 (D.D.C. 1954). It bolstered this with an appeal to legislative history, observing that there was nothing in the legislative history of the exclusiveness clause to indicate that it was for the benefit of third parties. This may be true, but two comments are in order: (1) an examination of legislative history is appropriate only when a statute is ambiguous, which this one is not; and (2) while legislative history does not reveal an intent that third parties should be embraced within the words "any other persons," neither does it reveal an intent that they should not. With matters in this posture, a sweeping catchall phrase like "any other person" should not be judicially cut down, especially when the Congress further indicated its desire to achieve maximum inclusiveness by adding the word "otherwise," making the total phrase "any other person otherwise entitled to recover damages." The court candidly admits that its construction "does not seem to account for the use of the term 'otherwise' in the statute," but sticks to the construction anyway. Here again it must be stressed that the act itself supplies an adequate limitation on these words. The relevance of the barred action to the compensation act is fully assured by requiring that the barred action be "on account of such injury."
contribution against the employer in principle, then went on to accept also the Pennsylvania limitation on the employer's contribution liability to the amount he would be liable for in compensation. The rationale for this limitation is unabashedly pragmatic. He said:

No doubt, if open-ended contribution over against employer was permitted, the social and economic policies underlying the compensation scheme would be subverted. Indeed, such limitless contribution would probably compel a complete reconsideration of the actuarial basis of compensation insurance. In so far as the plaintiff here seeks such an open-ended recovery, it must be denied. However, the Pennsylvania rule which permits their compensation liability has much to commend it: (1) it preserves the economics of the compensation system; (2) it effectuates the policy of contribution which the passage of the uniform law suggests; (3) it harmonizes the compensation law with the law of contribution and (4) it protects the non-employer tortfeasor from the possible gross inequity of carrying the whole liability for wrongs caused in perhaps major part by the employer tortfeasor.

It must be acknowledged that this is an impressive list of advantages of the end result achieved. Indeed, if a court were free to start with a clean slate, leaving aside for the moment the problem of reconciling the result with legal theory and statutory language, and were able to postulate an optimum result and work back from it, the rule in *Newport Air Park* would probably be the fairest available compromise in the light of all the conflicting policy interests. At least it can be said of this division that the employer pays no more than he is obliged to pay under compensation law, as he might if some fuller contribution were allowed, but also that he pays no less, as he might if no recovery over were allowed.

How to get from here to there legally is another matter. The

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26 At this point the opinion contains the following footnote:

As the court stated in Elston v. Industrial Lift Truck Co., 420 Pa. 97, 216 A.2d 318, 319 and n.3 (1966):

Absent such a limitation on contribution, the employer could complain with considerable cogency that he has been compelled to contribute to a recovery by the employee beyond the amount the latter would be entitled to under workmen's compensation. Thus, he would be exposed to a potentially larger liability in those circumstances in which a third-party tortfeasor was involved than where his own negligence was the sole cause of the injury. The limited liability feature of workmen's compensation would be subverted under such circumstance. See 2 Larson, Workmen's Compensation Law § 76.10 (1961 ed.).

27 The court's footnote here states: "After a thorough search of the law, this court can find no case which goes so far." *Id.* at 815 n.16.

28 293 F. Supp. at 815 [numbers of court's footnotes changed to conform to footnote numbers in this article].
Pennsylvania route involves not one *tour de force* but two. First, to get contribution at all, the statutory language "liable in tort" must be held to mean not "liable," but guilty of having contributed to a tort. Second, to keep the amount of contribution from being open-ended, it must be limited to the employer's compensation liability; and, since there is really no strictly legal rationale requiring this, the limitation must be arbitrarily imposed for reasons of policy.

It is interesting to recall that this result is exactly what the Third Circuit set out to produce and did produce in the *Baccile* case. It got past the no-contribution problem by applying the admiralty moiety rule and, like Judge Pettine, surmounted the limitation problem by the simple expedient of decreeing the limitation for practical and policy reasons. The Supreme Court, as we have seen, reversed on the first point and cast doubt on the second, saying that even if there were a legislative treatment of the problem, there would still be a question whether the amount of contribution should be the amount of compensation, or half, or an amount proportioned to degree of fault. *Weyerhaeuser I* made it clear that the right of moiety contribution was still available against the employer in collision cases. Since Congress in the meantime has not responded to the Supreme Court's invitation to investigate the total tangle of interests and come up with a legislative decision on how the loss should be shared, there remains one special area, that of collision cases under admiralty law, where the employer can be liable for a sort of "contribution" going beyond his compensation liability—if it should happen that that liability is less than half the damages recovered by the employee against the third party.

If it is postulated that the compromise result achieved in Pennsylvania, in Rhode Island by *Newport Air Park*, and temporarily in the Third Circuit by *Baccile* is desirable, there is a short cut that puts all the parties in this same position with less waste of motion. This is the rule adopted in North Carolina and California under which, when the employer's negligence contributed to the injury, the

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31 See quotation in text accompanying note 11 *supra*.
32 Hunsucker v. High Point Bending & Chair Co., 237 N.C. 559, 75 S.E.2d 768 (1953). In North Carolina the reduction applies when there is an actively negligent employer.
employee's third-party recovery is merely reduced by the amount of compensation. Suppose the third-party verdict is $10,000 and the compensation outlay is $3,000. Under the Pennsylvania contribution rule, the employer would pay the employee $3,000, the third party would pay the employee $10,000, the employee would pay back the $3,000 to his own employer, and the third party would recover $3,000 from the employer as contribution. At the end of the process, the employee would have $10,000, the employer would have parted with $3,000, and the third party would have paid $7,000. Under the North Carolina rule, the employee would merely keep his $3,000 and then collect $7,000 from the third person.\(^{34}\)

The determination and ingenuity displayed in *Baccile, Murray*,\(^{35}\) *Weyerhaeuser I*, and the Pennsylvania, North Carolina and

\(^{34}\) This is a judge-made rule, based heavily on the general idea that no one should profit by his own wrong. In California, the decision was based also on approval of the results in both North Carolina and Pennsylvania precedents. Witt v. Jackson, 57 Cal. 2d 57, 366 P.2d 641, 17 Cal. Rptr. 369 (1961). It is significant that the opinion lumps together the North Carolina and Pennsylvania doctrines, as is in effect done here, in spite of the different mechanisms involved in reaching a comparable end product. Moreover, since the California decision involved overruling earlier precedents, the court cited the intervening legislative abrogation of the noncontribution rule as a ground for the new holding. Cal. Code Civ. P. §§ 875-80 (West 1969 Supp.). One reason that had been given for the older rule, denying any reduction of the third party's liability to the employee when the employer was negligent, was that the third party at that time could not have recovered contribution from the employer in any case. Pacific Indem. Co. v. California Elec. Works, Ltd., 29 Cal. App. 2d 260, 84 P.2d 313 (1938). Of course, quite apart from the availability or nonavailability of contribution, the earlier rule could also have been arrived at on the familiar legal theory that the cause of action is the employee's in any event, and, therefore, his full recovery should not be affected by his employer's negligence. 2 Larson, The Law of Workmen's Compensation §§ 75.21-22 (1969). However, the intervention of the contribution amendment did give California a legal handle with which to steer its rule in what it was convinced was a more equitable direction.

\(^{35}\) Murray v. United States, 405 F.2d 1361 (D.C. Cir. 1968). A quite different legal path to a somewhat different compromise solution was adumbrated in this opinion in a passage which is something more than a dictum and something less than the ratio decidendi of this case. The plaintiff employee was injured in the fall of an elevator and received compensation under the Federal Employees' Compensation Act. He then sued the building owner, Murray, who had leased the building to the United States. Murray counterclaimed against the United States both for contribution and for indemnity under the provisions of the lease. Summary judgments dismissing both counts were affirmed. As to contribution, the issue of interest to the present discussion, Judge Leventhal emphatically concluded that it was ruled out by the exclusive-remedy principle, since contribution is only possible "when the tortfeasors have a concurring liability to the same victim." Judge Leventhal traced the story of the impact of Weyerhaeuser S.S. Co. v. United
California 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 this class of cases. The disadvantage of most dispositions of this total problem is one that is characteristic of the common-law system: the inability to share a loss adjustment because of the legal imperative of granting total victory to plaintiff or defendant. Thus, the usual rule that contribution by the negligent employer is impossible because conceptually he cannot be a joint tortfeasor, or that his negligence is not a defense in a third-party action, is too absolute a victory for the employer, who actually comes out ahead by being reimbursed for his compensation outlay. Then, States, 372 U.S. 597 (1963) (Weyerhaeuser I), along the lines of the discussion in this article, including the initial confusion about its scope, and concluded that subsequent cases, notably United Airlines, Inc. v. Wiener, 335 F.2d 379 (9th Cir.), petition for cert. dismissed, 379 U.S. 951 (1964), and Wien Alas. Airlines, Inc. v. United States, 375 F.2d 736 (9th Cir.), cert. denied, 389 U.S. 940 (1967), were persuasive in limiting the contribution aspects of Weyerhaeuser I to the peculiar admiralty contribution rule there involved, based as it is on a duty between the shipowners as distinguished from a mutual duty to the plaintiff. At this point, however, without any warning that a really sensational legal innovation was about to be unveiled, Judge Leventhal said:

Any inequity residing in the denial of contribution against the employer is mitigated if not eliminated by our rule in Martello v. Hawley, 112 U.S. App. D.C. 129, 300 F.2d 721 (1962). Martello holds 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 the 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. 405 F.2d at 1365-66. The legal basis for this reduction is criticized in detail in 2 A. Larson, The Law of Workmen's Compensation § 76.22 (Supp. 1969).

On the practical and policy side, the prime defect of the Murray result is that there is no rational relation between the 50% reduction in plaintiff's recovery and the interests of either the employee or the employer. Consider, for example, the facts of American Dist. Tel. Co. v. Kittleson, 179 F.2d 946 (8th Cir. 1950), rev'd 81 F. Supp. 25 (N.D. Iowa 1948), with which this article opened. The compensation liability there was $6,800 and the third-party recovery was $60,000. If this situation were to arise under Murray, the plaintiff, instead of recovering $60,000 and reimbursing the employer for $6,800, thus retaining $53,200, would recover only $30,000 from the third party, plus his $6,800 compensation, for a total of $36,800—in spite of the fact that at the trial he must be assumed to have established actual damages of $60,000. By what logic can he be told that he should absorb a loss of $16,400 for the benefit of the third-party tortfeasor? A rule capable of producing such a result is unacceptable, particularly since its legal underpinnings are as unsound as its practical result.
by perhaps unavoidably over-reacting to this inequity, the courts, including the United States Supreme Court, have resorted to the concept of indemnity, which will be discussed in the remainder of this article. If the indemnity remedy succeeds, however, again we witness an all-or-nothing solution, this time with the employer paying the whole bill, despite his supposed limitation of liability under the compensation act. Finally, as if to restore the balance somewhat in the opposite direction, we see the United States Supreme Court in the Burnside case\textsuperscript{86} opening up a field of litigation by the employer over against the third party, entirely independent of the employer's subrogation rights under the act. Here, of course, the employer's damages would be limited to his compensation liability and consequently, in the limited area in which a Burnside type of claim is possible, we may witness yet one more avenue by which to reach the compromise solution arrived at in Baccile, and in the Pennsylvania, North Carolina and California cases.

What is needed is legislative study followed by a statutory arrangement carefully tailored to deal fairly with all the competing interests and policies at stake. Although the Supreme Court issued just such a call to Congress in 1952,\textsuperscript{87} neither Congress nor any state legislature has touched the problem. Meanwhile a luxuriant jungle growth of court decisions, struggling with the controversy, has sprung up and the rate of growth shows no signs of abating. Even more lively than the developments concerned with contribution have been those swirling around the concept of indemnity to which we now turn.

\textbf{INDEMNITY AS EXCEPTION TO EXCLUSIVE-REMEDY CLAUSE}

The third party may recover over against the employer whenever it can be said that the employer breached an independent duty toward the third party and thus acquired an obligation to indemnify the third party.

The initial question is whether the exclusive-remedy clause is broad enough to grant immunity to the employer for all causes of action growing out of the accident, regardless of the question of independent breach of duty. This issue requires careful examination of the language used in the particular exclusive-liability provision.


The statutory language directly relevant in most of these cases is a familiar passage similar or identical to that in the Longshoremen's Act, the New York Act, and many of the other acts applied in these cases:

The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representatives, husband, parents, dependents or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise on account of such injury or death . . . .

At first glance, this language seems broad enough to cover almost any claim against the employer relating to the injury. It has been taken by several judges to be broad enough to embrace any recovery over against the employer by the third party, on the theory that it must have been intended to limit the employer's overall liability to exactly the same degree that it limited the employee's rights against the employer.

A closer reading of the passage, however, makes this interpretation questionable, and the majority of courts have preferred a narrower construction. They reason as follows: the immunity con-

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38 N.Y. WORKMEN'S COMP. LAW § 11 (McKinney 1965) (emphasis added); Longshoremen's Act § 5, 33 U.S.C. § 905 (1964). The latter is substantially the same as the quoted provision, except that it specifically names the "wife" and, in place of "at common law or otherwise," has "at law or in admiralty."

39 See Westchester Lighting Co. v. Westchester County Small Estates Corp., 278 N.Y. 175, 180, 15 N.E.2d 567, 569 (1938) (Crane, C.J., dissenting) and district court opinions in American Dist. Tel. Co. v. Kittleson, 81 F. Supp. 25 (N.D. Iowa 1948), rev'd, 179 F.2d 946 (8th Cir. 1950), and Rich v. United States, 81 F. Supp. 587 (S.D.N.Y. 1948), rev'd, 177 F.2d 688 (2d Cir. 1949). See also Royal Indem. Co. v. Southern Cal. Petroleum Corp., 67 N.M. 137, 353 P.2d 358 (1960). The court held that the statutory language "[a]ny employer . . . shall not be subject to any other liability whatsoever . . . and all causes of action . . . accruing to any and all persons whomsoever are hereby abolished," N.M. STAT. ANN. §§ 59-10-5, 6 (1953), barred a suit against the employer based upon an implied agreement to indemnify a third party. The court did not extend its decision to include an express agreement to indemnify, nor would the court recognize a distinction between indemnity and contribution of joint tortfeasors.

In American Radiator & Standard Sanitary Corp. v. Mark Eng'r Co., 230 Md. 584, 187 A.2d 864 (1963), an employee of a subcontractor was injured and brought suit against the property owner, who sought indemnity from the general contractor on the theory of Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956), for alleged breach of contract to perform the work in a careful and workmanlike manner. The right of a third party to such indemnity had been specifically rejected by the court of appeals of Maryland as not permissible under the employers' exclusive-liability provision of the Maryland Workmen's Compensation Act. The immunity was applied in American Radiator to the general contractor as a statutory employer. See also Engel v. Bindel, 27 Wis. 2d 456, 134 N.W.2d 404 (1965).
ferred is only against actions for damages on account of the employee's injury; a third party's action for indemnity is not exactly for "damages" but for reimbursement, and it is not "on account of" the employee's injury, but on account of breach of an independent duty owed by the employer to the third party.  

Express Contract of Indemnity

The clearest exception to the exclusive-liability clause is the third party's right to enforce an express contract in which the employer agrees to indemnify the third party for the very kind of loss that the third party has been made to pay to the employee. A

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42 The third-party tortfeasor cannot, of course, defend on the ground that the employee's employer has contracted to indemnify defendant, and will thus have to pay both workmen's compensation and tort damages. If the employer wants to make that kind of contract, that is his affair; the employee's rights cannot be affected by such an agreement. Umns v. Wisconsin Pub. Serv. Corp., 260 Wis. 433, 51 N.W.2d 42 (1952). Moreover, having made this kind of agreement, the employer cannot then undo its effect and pass the burden back to the employee by piling yet another agreement on this relationship—an agreement by the employee that he will not exercise his rights against the third party for liabilities that the employer has indemnified. Since the statute itself casts ultimate liability on the third party, a contractual provision in the employment contract that in this situation the employee's exclusive remedy shall be workmen's compensation is void, and an attempt to enforce such a provision through an injunction against further prosecution at law by the employee of his rights against the third-party indemnitee.
familiar example is the situation in which an employee is injured because of the condition of the premises, and recovers from the landlord who leased the premises to the employer. If the landlord in the lease has exacted a covenant from the employer to hold the landlord harmless in the event of such claims, the enforcement of this covenant does not violate the exclusive-remedy provision of the compensation act.\(^{43}\) Another increasingly familiar example is the hold-harmless agreement assumed by a contractor doing work for a city\(^{44}\) or other owner,\(^{45}\) or by a subcontractor for the benefit of the general contractor.\(^{46}\) Indeed, with everyone trying to protect himself by such agreements, one may even encounter them in series, along which the liability travels until it settles upon the ultimate indemnitor. In *Hardman v. Ford Motor Co.*,\(^{47}\) a subcontractor's employee was in-


Note that, under well-established principles of indemnity, a general agreement to indemnify will not be construed to include indemnifying the indemnitee against the consequences of his own negligence; to achieve this result there must be a clear and explicit agreement. *Florida Power & Light Co. v. Elmore*, 189 So. 2d 522 (Fla. App. 1966). *See also* *Florida Power & Light Co. v. Hercules Concrete Pile Co.*, 275 F. Supp. 427 (S.D. Fla. 1967) (citing and following *Elmore*). In the former case an express contract of indemnification was relied upon by the third party in an attempt to recover over against the employer; this failed because it did not explicitly indemnify against the indemnitee's own negligence. In the latter case, the third party relied on an implied agreement to indemnify. The court pointed out, however, that for the third party to have become liable to the employee in the first place, he must have been guilty of *some* negligence, unlike the shipowner held to the absolute liability for unseaworthiness. Although the third party here contended his negligence was only passive, the court held that no implied indemnity could arise. If even under an express contract of indemnity the indemnitee's own negligence (in any degree) is not included, a fortiori an implied agreement of indemnity could rise no higher. On the general rule that indemnity does not cover the indemnitee's own negligence unless explicit, see *United States v. Seckinger*, 408 F.2d 146 (5th Cir. 1969), and cases there cited. For earlier cases see 175 A.L.R. § 17, at 29 (1948). For examples of express contracts that actually covered the indemnitee's own negligence, see *Cozzi v. Owens Corning Fiber Corp.*, 59 N.J. Super. 570, 158 A.2d 231, *aff'd*, 63 N.J. Super. 117, 164 A.2d 69 (1960); *Republic Steel Corp. v. Glaros*, 12 Ohio App. 2d 29, 230 N.E.2d 667 (1967).\(^{48}\)

\(^{43}\) *Clements v. Rockefeller*, 189 Misc. 889, 70 N.Y.S.2d 146 (1947). The landlord is, of course, liable to the employee even though, as between the landlord and tenant employer, the landlord has by express contract absolved himself of liability for the condition of the premises. *Kaylor v. Magill*, 181 F.2d 179 (6th Cir. 1950).\(^{44}\) *See, e.g.*, *Yearicks v. City of Wildwood*, 23 N.J. 379, 92 A.2d 873 (1952).\(^{45}\) *E.g.*, *Republic Steel Corp. v. Glaros*, 12 Ohio App. 2d 29, 230 N.E.2d 667 (1967).\(^{46}\) *E.g.*, *Western Contracting Corp. v. Power Eng'r Co.*, 369 F.2d 933 (4th Cir. 1966).\(^{47}\)

\(^{47}\) 70 N.J. Super. 275, 175 A.2d 455 (1961).
jured when the ladder on which he was standing slipped on a highly waxed floor. The contractor had furnished the ladder and was found to be negligent in not securing the ladder. The building owner was found to be negligent in not warning the employee of the highly polished surface. The subcontractor's employee successfully sued the contractor and the building owner. The owner cross-claimed against the general contractor on an indemnification agreement. The general contractor similarly filed a third-party complaint against the subcontractor for indemnification. The end result was that the injured employee's employer was held responsible for the judgment.

Separate Duty Based on Relationship

If the third party and employer stand in a special legal relationship that carries with it the obligation of the employer to indemnify the third party, this relational right of indemnity may be enforced without offending the exclusive-remedy clause.

Such a relationship is that of a bailee to his bailor. In a leading California case, *Baugh v. Rogers*, the employer, driving a car belonging to the third party, ran into his own employee. The employee sued the third party as owner of the car, under an owner's liability statute. The third party then claimed the right of reimbursement from the employer, whose negligence was the actual cause of the injury. It was held that the bailee of an automobile had a separate obligation to hold the bailor harmless from damage arising out of the bailment, and that this obligation extended to indemnification for imposition of third-party liability on the owner in the present circumstances.

This type of case usually presents, in addition to the special legal relations flowing from the concept of bailment, an extreme contrast between genuine negligence in one party and the most technical and constructive sort of imputed negligence in the other. This contrast, rather than the specific implications of bailment, was stressed in a somewhat similar Minnesota case, *Lunderberg v. Bierman*. Mrs. Bierman had taken her newly-purchased automobile back to

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48 24 Cal. 2d 200, 148 P.2d 633 (1944). See also *Bowman v. Atlanta Baggage & Cab Co.*, 176 F. Supp. 575 (N.D. Fla. 1959), holding a car rental agency entitled to indemnity from an employer-lessee. The court added that the compensation payments made by the employer should be deemed pro tanto satisfaction of the indemnity obligation.

49 241 Minn. 349, 63 N.W.2d 355 (1954).
the dealer for a 2,000 mile check-up provided for by the contract of purchase. As part of the check-up, Ilstrup and Elder Lunderberg, two employees of the dealer, took the car out for a road test, during which Elder Lunderberg was injured as a result of Ilstrup's operation of the car. Elder collected workmen's compensation, and then sued Ilstrup as the driver, and Mrs. Bierman as the owner with whose permission the car was being operated, under the Minnesota statute imposing such liability on motor vehicle owners. Mrs. Bierman was allowed to implead the dealer and was granted a summary judgment against him on the ground that he was liable to indemnify Mrs. Bierman for any recovery by Elder Lunderberg against her. The Supreme Court of Minnesota affirmed. The court relied not only on Baugh, but on several cases in which there was similarly a disparity between the relatively minor or technical fault of the third party and the active or primary negligence of the employer. The ground of the decision, then, is not the narrow one of the specific obligation of a bailee to hold a bailor harmless, but is the broader principle stated as follows by the court:

[The impleaded defendant is liable] . . . where, as here the parties are not in pari delicto, but, instead, the injury arises out of a violation of a duty which one owes to the other so that as between themselves the act or omission of one is the primary cause of the injury and liability exists as to the other only by virtue of a law imposing such liability.

New Jersey has reached a conclusion similar to that in the bailment cases when the special relation was that of principal to agent, entailing the implied obligation of the principal to indemnify the agent for losses or liabilities attending the carrying out of the agency. The deceased employee's widow had brought a wrongful death action alleging negligence against one of her husband's co-workers. The co-worker impleaded the employer as a third-party defendant on the ground that the employer would be liable to indemnify him for torts committed at the direction of the employer. The dismissal of the third-party suit was reversed. Although there could be no contribution between joint tortfeasors, indemnification

50 MINN. STAT. ANN. § 170.54 (1960).
51 American Dist. Tel. Co. v. Kittleson, 179 F.2d 946 (8th Cir. 1950); Burris v. American Chicle Co., 120 F.2d 218 (2d Cir. 1941); Westchester Lighting Co. v. Westchester County Small Estates Corp., 278 N.Y. 175, 15 N.E.2d 567 (1938).
52 241 Minn. at 363, 63 N.W.2d at 364 (citing Fidelity & Gas. Co. v. Northwestern Tel. Exch. Co., 140 Minn. 229, 167 N.W. 800 (1918).
would be allowed on the ground of an implied promise of indemnity by the principal for damages resulting to the agent from the execution of the agency. The court is careful to point out that if this were a simple case of negligence on the part of the agent, indemnity would not apply. But if the agent in good faith performs a tortious act at his principal's direction, or if he commits a tortious act relying on his principal's representations as to its legal propriety, he is entitled to indemnity from the principal.\textsuperscript{54} Although in this case the pleadings were based on alleged negligence, the court felt that, for purposes of a motion to dismiss, the state of the factual record was not such as to exclude the possibility of a right of indemnity based on the separate duty of the principal to indemnify his agent for losses incurred in the execution of the agency.

\textit{Separate Implied Obligation to Use Care}

When the employer's relation to the third party is that of a contractor doing work for the third party, there may be an implied obligation to perform the work with due care. If, by failing to use such care, the employer causes an accident injuring his own employee, it may be said that the employer has simultaneously breached two duties of care. One is toward the employee, and it is for this breach that compensation bars any common law remedy. The other is toward the third party contractee, and among the damages flowing from the breach of this separate duty are any damages the third party may be forced to pay the employee because of their relation. In the leading New York case, \textit{Westchester Lighting Co. v. Westchester County Small Estates Corp.},\textsuperscript{66} the third party, as owner of the premises on which the injury occurred, became liable to an employee of the light company for his asphyxiation resulting from a gas leak. The third party, as occupier of the land, had failed in his duty to discover the dangerous condition and warn the employee who was working upon the premises. The employee's own employer, however, had by his active negligence caused the break in the gas line and had thus failed in his duty toward the third party to perform the work with due care. It was accordingly held that the third party was entitled to indemnity from the employer, and that this liability was independent of the liabilities barred by the exclusive-remedy clause.

\textsuperscript{54} See 2 \textit{Restatement (Second) of Agency} § 439, at 329 (1958).
\textsuperscript{66} 278 N.Y. 175, 15 N.E.2d 567 (1938) (Crane, C.J., dissenting).
Since 1955, this doctrine has been associated with and strongly influenced by the decision of the United States Supreme Court in Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp. The Ryan case holds that when the contract merely called for the performance of specified stevedoring operations, this, by analogy to the manufacturer's implied warranty of soundness of a manufactured product, implied an obligation in fact, as a part of the contract, to perform the service in a workmanlike manner. From this the court goes on to the next step and finds a further implied agreement to indemnify the shipowner for damages sustained as a result of the nonperformance of the implied duty to perform the work safely.

If this sequence of implied agreement superimposed upon implied agreement is accepted, the legal justification of the right of action over against the employer is clear enough. The exclusive-remedy clause is circumvented because the liability of the employer is not "on account of" the injury to the workman as required by the typical exclusive-remedy clause, but rather "on account of" the employer's contract with the third party, as elaborated by the implied obligation to use care and to indemnify.

The Ryan case set off a Niagara of litigation, mostly but not entirely involving longshoremen. The discussion of it here will be in two parts. The first will be concerned with the body of law directly controlled by Ryan and related cases, as being within the federal orbit. The second will consider Ryan as it fits in with or affects the law under nonfederal acts, where although it has no binding force, it nevertheless looms very large in any discussion, both because of the prestige of the Supreme Court and because of the sheer mass of the decisional jurisprudence it has fathered.

Federal Law Under the Ryan Doctrine

The first major point established by Ryan is the decisive difference between recovery over between parties whose relation rests ultimately on contract and recovery over between parties whose basic relation is noncontractual in origin. This distinction was felt to be indispensable both to avoid the exclusive-remedy provision of the Longshoremen's Act and, in the process, to distinguish Halcyon,
which had ruled out contribution in noncollision cases. The distinction has been repeatedly reaffirmed by the Supreme Court and followed by federal courts, and, although it has not escaped criticism, appears to be about as firmly entrenched as any rule of law can be.

It must be stressed again that the contract-tort distinction in this connection goes to the root of the parties’ relation to each other, and not to the theory of the remedy sought. We have already dealt with the category in which the origin of the relation is noncontractual (e.g., a collision) and the form of the remedy is noncontractual (contribution between joint tortfeasors). Later in this article, we will examine the category in which the origin of the relation is noncontractual but the remedy is described in contractual terms (e.g., indemnity). Ryan clearly cannot be extended to this category. So far as the Ryan line of decisions is concerned, there is no such creature as “noncontractual indemnity.”

The Ryan category is contractual at both levels: there is some kind of contract in the background from which the rights and duties of the parties are ultimately derived and the remedy is cast in contract-type terms, typically indemnity.

Without, then, going into the pros and cons of Ryan, one may

57 See text accompanying notes 5 et seq. supra.
60 Proudfoot, “The Tar Baby”: Maritime Personal-Injury Actions, 20 STAN. L. REV. 423 (1968), believes most of the complications and inequities following in the train of Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956), could be avoided by handling the whole category of liability under tort principles. The dissent in Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956), contains a cogent presentation of the arguments against the holding. One of them lost its force not long after the decision. The Longshoremen’s Act at the time required the employee to elect between compensation and a third-party suit. The dissent argued that the employee could afford to bring a third-party suit only if the employer advanced money to him and helped him in expectation of being reimbursed. After Ryan, the argument ran, no employer in his right mind would
observe that, both conceptually and legally, the majority’s opinion is defensible. If one begins with the proposition, which no one appears to question, that a recovery over against an employer, based on an express written contract specifically agreeing to indemnify the third person is not a recovery “on account of the injury,” all that remains is to say that an implied agreement of indemnity is equivalent to an express one, and that in the circumstances such an agreement should be implied.

As for the propriety of making everything depend on whether the relation between the parties stems from a contract, there is a factor here that, in the welter of controversy about Ryan, has been largely overlooked. Early in its opinion, the Court drops this interesting footnote:

In the instant case, the stevedoring contractor, however, has received a contractual quid pro quo from the shipowner for assuming responsibility for the proper performance of all of the latter’s stevedoring requirements, including the discharge of foreseeable damages resulting from the contractor’s improper performance of those requirements.62

Another largely forgotten fact was mentioned in passing in the dissent: the shipowner had agreed in writing to pay “in some circumstances, cost of the stevedore’s insurance.”63

The significance of these passages is that they remind us that, in a contract situation, the parties are in a position to adjust in advance the distribution of losses between them. Specifically, one may assume that, with the Ryan doctrine firmly established, its impact has been reflected in increased liability insurance premiums of stevedoring companies. These increases, in turn, presumably go into the cost accounts of the stevedore firms and become part of the price of the service charged to the shipowners. Since all stevedores are under the same rule of law, there is no reason why competition should prevent the working-out of the passage of this cost back to the shipowner. By contrast, two strangers who meet for the first time in a random collision have no such opportunity to work things out in advance by agreement between the two of them.

help finance a suit destined to backfire as Ryan did. The amendment of the Longshoremen’s Act abolishing election and permitting the employee to claim compensation and also to sue the third party rendered this argument obsolete, as events have shown. The flood of longshoremen’s third-party suits is a far cry from Justice Black’s dictum that the Ryan decision “makes the right of employees to recover damages from a third party a barren promise.” Id. at 144.

62 Id. at 129 n.3.
63 Id. at 136.
When it is said that the *Ryan* rule only applies to contract-based cases, this does not mean that there necessarily has to be privity of contract. In *Weyerhaeuser I* the Supreme Court said:

The Court's decision in *Ryan* was based upon the existence of a contractual relation between the shipowner and the employer. In a series of subsequent cases, the same result was reached, although the contractual relationship was considerably more attenuated. *Weyerhaeuser S.S. Co. v. Nacirema Co.*, 355 U.S. 563; *Crumady v. The J. H. Fisser*, 358 U.S. 423; *Waterman Co. v. Dugan & McNamara, Inc.*, 364 U.S. 421.\(^{64}\)

The attenuation in *Crumady* was the result of the fact that the stevedore's contract was actually with a charterer, not with the vessel owner. The Court indicated alternative grounds for applying *Ryan* and not insisting on direct privity of contract between the stevedore and shipowner. One theory was that the ship, so to speak, was the third party beneficiary of the contract, since the contract to perform a workmanlike job was for the benefit of the vessel. The plaintiff longshoreman's action, it should be mentioned, was *in rem* against the ship. The other theory harked back to the analogy in the *Ryan* opinion between a contract to perform workmanlike service and a manufacturer's warranty of soundness of goods.

Under the analysis here suggested, a third practical argument is available. Whether the relation between the parties is a direct contract or a chain of contracts, they still have it within their power to adjust their loss-sharing relations in advance in order to accommodate them to applicable rules of law—a decisive difference from a tort encounter.

In *Waterman* the stevedore's contract was with a consignee of cargo, and the plaintiff's action was *in personam* against the shipowner. The Court merely referred back to its double-barreled rationale in *Crumady* in holding that lack of privity was no obstacle to application of *Ryan*. It is obvious, however, that the third party beneficiary theory is less satisfactory as to a consignee,\(^ {65}\) and that

\(^{64}\) 372 U.S. at 602-03. See also *Florida Power & Light Co. v. Hercules Concrete Pile Co.*, 275 F. Supp. 427 (S.D. Fla. 1967). Applying Florida law, the court accepted the Supreme Court rule that privity was not essential for liability as in *Ryan Stevedoring Co. v. Pan. Atlantic S.S. Corp.*, 350 U.S. 124 (1956). The court held, however, that *Ryan* should be limited to indemnitees who had been liable without fault, which was not true here, and granted summary dismissal of the action over by Florida Power & Light Company against Hercules.

\(^{65}\) 358 U.S. 423 (1959). Indeed, one federal court of appeals decision would limit the third-party beneficiary argument in *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423 (1959), to the situations arising under the peculiar admiralty
the other two arguments are more versatile in covering this type of situation.

rule of a vessel's liability in rem. In Halliburton Co. v. Norton Drilling Co., 302 F.2d 431 (5th Cir. 1962), an employee of Norton Drilling Company was injured through the negligence of Halliburton, an oil well servicing concern. Both had contracts with the oil well owner, of course, but from the pleadings it was not clear that they had a contract with each other. (Judge Rives, dissenting, thought that there was room within the pleadings for such a contract to be shown in the allegation that Halliburton had furnished certain equipment to Norton.) The employee sued Halliburton, who in turn, relying on Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956), brought a third-party complaint against Norton. The case arose under maritime law, since the operation was in navigable waters. Dismissal of the third-party claim was affirmed, one of the reasons being that the lack of privity in this instance could not be surmounted by the Crumady rationale. Judge Tuttle said:

Unless we are to say that a drilling contractor's promise to perform in a careful and workmanlike manner inures to the benefit of the "well" itself and thence to the suppliers of equipment to the well, it is apparent that the appellants' third-party beneficiary claim must fail. . . . It stretches credulity to imagine that Norton's promise to the owner of the well was intended to benefit each and every supplier of equipment to the well. While there is some logic in holding that a stevedore's warranty is meant to benefit the owner of the vessel, it would take the most artificial and tortuous reasoning to permit application of the third-party beneficiary theory to the facts of the instant case. 302 F.2d at 435. It is curious and unfortunate that both the majority and dissent seemed to assume that the only ground for Crumady and Waterman S.S. Corp. v. Dugan & McNamara, Inc., 364 U.S. 421 (1960), was the third-party beneficiary theory. Although the dissent cites Waterman, it fails to bring out the fact that because of its facts, although not in its language, Waterman in effect downgraded the third-party beneficiary theory and shifted major reliance to the analogy of manufacturers' liability. The court in Waterman merely quoted the entire passage on privity from Crumady, including the passage on warranty of the soundness of a manufactured product. Moreover, it did assert that the difference between an in rem and in personam action was not significant in this context. But suppose Waterman had confronted the court before Crumady. Would the court have resorted to the third-party beneficiary idea? It seems most unlikely. In Crumady the charterer of the ship had definite legal obligations related to the ship and running to the shipowner as well as to the vessel as the result of the charter-party agreement. But as to a mere consignee of cargo, can it be said that he too has such an obligation and that a part of this obligation is the enforcement for the benefit of the vessel and vessel owner of the stevedore's duty of workmanlike performance? This seems far-fetched indeed. Or, to look at the matter from the point of view of the stevedoring company, it is possible to say that since the action in Crumady was in rem, there was something like a privity of estate between the stevedore and the vessel. But what privity of estate is there between the consignee of cargo and the vessel's owner in relation to the stevedore's promise?

The second string to the court's bow in Crumady, however, the analogy of manufacturer's liability, is adequate to support the result in Waterman and would have been adequate to support a different result in Halliburton. The manufacturer's warranty of a product is not dependent on privity, but reaches to any foreseeable consumer. The services performed in Waterman and Halliburton if performed in unworkmanlike fashion in breach of the stevedore's warranty to the consignee or of the oil driller's warranty to the well owner would have consequences foreseeably
For present purposes it is important to keep constantly in mind that there are two questions in most of these cases: first, has the third party any duty at all toward the employer, and second, is a claim based on breach of that duty a claim "on account of" the compensation recipient's injury? Much of the controversy just discussed relates to the first question, which in a strict sense is not a problem of workmen's compensation law at all. It becomes entangled with compensation law because the exclusive-remedy principle so often drives the third party toward casting his claim in indemnity terms. Once the indemnity rule has been laid down in a compensation-related case, however, it is just as applicable to a case with no compensation background at all. As a result, the exigencies of compensation law have quite possibly prodded indemnity law to a degree of expansion it might never have attained if left to itself. Justice Black had this in mind when in his dissent in *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, in which the majority had damaging to the shipowner or oil well servicing company.

The *Halliburton* case was relied on by Wisdom, J., in a dictum in General Elec. Co. v. Cuban Am. Nickel Co., 396 F.2d 89 (5th Cir. 1968), a case arising in the same circuit, but under Louisiana law rather than maritime law. General Electric sold certain equipment with service warranties to Braun, who installed the equipment at the Nickel Company. The warranties provided that if Braun "or its customer" discovered defects, General Electric would repair or replace the equipment without cost to Braun or the customer. While servicing the equipment under this warranty, an employee of General Electric was injured by the alleged negligence of the Nickel Company, which he sued. The Nickel Company sought recovery over from General Electric for its negligence. The court barred the recovery over on the principal ground that there was no implied agreement to anyone to perform the work in a careful and workmanlike manner. But even if there were, the court says in a footnote that "we would decline to extend it beyond the immediate contracting parties, as has been done under admiralty law." *Id.* at 96. The court cites its own decision in *Halliburton* as its rejection of extension of the third-party beneficiary concept of *Crumady* to cover this kind of case.

Leaving aside the many other issues in the case and concentrating only on the issue whether lack of privity in itself should be a bar in this case if all the other elements of a *Ryan*-type recovery were present and if the *Ryan* rule itself were accepted, one is struck by the fact that this case presents a perfect testing ground for the second of the Supreme Court's reasons for overriding the privity objection. Here we have the very situation the Supreme Court drew upon as an analogy—the manufacturer's warranty of the soundness of goods. As far as it goes, it is not implied but express, and it runs to the customer of the buyer as well as to the buyer. Now, pursuant to that obligation, the manufacturer is performing services. If there was an obligation to perform those services in a workmanlike way, which is the assumption made in Judge Wisdom's dictum, and if performance of services should be analogized to sale of goods as the Supreme Court says, and if the privity gap is overleaped in warranty of soundness of goods, should it not equally be overleaped in warranty of workmanlike performance of services?

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held that Ryan applied even when the stevedore's supplying of defective equipment was nonnegligent, he said: "Moreover, the Court here expands the general law of warranty in a way which I fear will cause us regret in future cases in other areas of law as well as in admiralty."^{67}

There is no way of disentangling the indemnity problem from the compensation problem of exclusive liability. If, for example, compensation law had no exclusive-liability rule, it is possible that much of the law that has proliferated around indemnity would rather have been channeled into contribution. The relative rights of an employer and third party whose defaults had contributed to the employee's injury would have been adjusted according to tort principles of contributory and comparative negligence, and a more sensible, equitable, and simple loss-adjustment system might have resulted. Thanks to the exclusive-remedy rule, however, the third party's recovery-over rights have to be crammed into the mold of contract-based warranty and indemnity if they are to exist at all; it is no wonder that the mold at times appears to be bursting at the seams.

Within the federal system, at any rate, any earlier cases authorizing a tort-based distribution must now be either abandoned or rejustified in contract-based terms. To take the example with which this article opened, the Kittleson case, the central rationale of that decision, which was that a primary tortfeasor had an implied obligation to indemnify a secondary tortfeasor, is discredited by Ryan and Weyerhaeuser Steamship Co. v. Nacirema Operating Co.^{68} This does not mean, however, that the decision was wrong, or that it could not be supported by a rationale consistent with the Ryan line of cases. After all, there was a contract in Kittleson between the third party and the employer under which the telephone company was doing work on the employer packing company's roof. It would only be necessary to add that in this contract the packing company impliedly warranted to the telephone company's employees that it would provide a safe place in which to work, and the case is comfortably within the modern trend. Indeed, even before Ryan, the Second Circuit had said that this was the true ground on which Kittleson should be explained,^{69} although in the Kittleson opinion this was definitely not the court's central reliance.

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^{67} Id. at 326.

^{68} 355 U.S. 563 (1958) (Weyerhaeuser II).

^{69} Slattery v. Marra Bros., 186 F.2d 134 (2d Cir. 1951).
Outside the federal orbit, however, the question of whether there can be noncontractual indemnity based on the implied obligation of a primary wrongdoer to a secondary is not closed. The controversy operates at both levels: whether there is such an obligation as a matter of indemnity law, and whether given such an obligation, a claim based on it is barred by the exclusive-remedy rule as a matter of workmen's compensation law. This subject will be examined later.

The discussion up to this point has mainly centered on the rather negative point that a Ryan-type liability is not possible in the absence of a contractual base. The fact that the relation between the third party and the employer is contractual, however, does not in itself mean that every activity carried on in relation to the contract necessarily carries with it an implied obligation that will support an indemnity action. This point is well illustrated by the contrast between General Electric Co. v. Moretz and Halstead v. Norfolk & Western Railway. In Moretz, the employee Moretz was a truck driver for Mason & Dixon Lines. His truck overturned while transporting certain heavy equipment belonging to General Electric. He sued General Electric on the ground that the accident was due to its negligence in loading and insufficiently bracing the cargo. General Electric filed a third-party complaint against Mason & Dixon, contending that the accident was the fault of the carrier and demanding indemnity. The carrier was subject to the regulations of the Interstate Commerce Commission, one of which stated that "no motor vehicle shall be driven unless the driver thereof shall have satisfied himself that . . . all means of fastening the load are securely in place." Moretz reported to his employer that the load was not properly fastened, but the employer did nothing about it. The court read the ICC regulation into the contract between the carrier and General Electric and held that under it the carrier assumed a direct and specific obligation to General Electric to secure the cargo properly. This obligation was found to have been breached, and an obligation to indemnify General Electric arose.

In Halstead, the relation between employer and third party was, in a sense, the reverse of that in Moretz. The employer in Halstead was engaged in unloading its own property from the railway when

70 270 F.2d 780 (4th Cir. 1959).
72 49 C.F.R. § 193.9(b) (1969).
its employee was injured. The railway, having been sued by the employee, filed a third-party complaint against the employer, relying heavily on *Moretz*. It cited an ICC regulation placing the responsibility for unloading on the shipper. From this the railway tried to extract an implied duty on the part of the shipper to perform the work in such a way as not to impose liability on the railway. The court distinguished *Moretz* in several ways, but principally on the ground that in *Moretz* the trucker was performing a service for the third party, along with which the duty of care ran. Here the employer was performing no service for the third party, but only for himself. "The 'service aspect,'" said the court, "is what the Ryan doctrine is founded on, and it was so emphasized in Crumady v. The Joachim Hendrick Fisser, 358 U.S. 423, 79 S. Ct. 445, 3 L.Ed.2d 413."

The *Halstead* interpretation of *Ryan*, as well as that in *Hill Lines, Inc. v. Pittsburgh Plate Glass Co.* means that even if there is a contract between employer and third party, and even if this contract contains an implied obligation to perform certain functions with care because of incorporation by reference of ICC regulations or otherwise, this still does not generate a *Ryan*-type independent duty unless the functions being performed were a service to the third person under the contract. The analogy to a duty running with a manufacturer's sale of goods, invoked in the *Ryan* opinion itself, and again in *Crumady* is clear, with services being substituted for goods. If no services are passing from the employer to the third person under the contract, the analogy breaks down.

We now come to the question: what conduct by the employer and by the third party leads to *Ryan*-type liability? It must first be emphasized that the test is a relative one, not an absolute one; that is, it must involve an examination of the conduct of both

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73 E.g., there was in General Elec. Co. v. Moretz, 270 F.2d 780 (4th Cir. 1959), not only an express jury finding that the employer's negligence was the proximate cause of the accident, but also an express contractual obligation of the employer to secure the cargo. Neither of these facts had a counterpart in *Halstead v. Norfolk & W. Ry.*, 236 F. Supp. 182 (S.D. W. Va. 1964), aff'd, 350 F.2d 917 (4th Cir. 1965).

74 236 F. Supp. at 187 The court also relied on the case of *Hill Lines, Inc. v. Pittsburgh Plate Glass Co.*, 222 F.2d 854 (10th Cir. 1955), under the New Mexico Compensation Act, in which the facts were substantially identical except that a truck line instead of a railway played the role of third party. The trucker asserted that the shipper employer had a duty to unload the truck in a careful and prudent manner and that this was an independent duty running to the trucker. The Tenth Circuit flatly rejected this theory.

75 222 F.2d 854 (10th Cir. 1955).
parties and the relation between the two. To put the matter another way, one cannot look at the conduct of the employer alone, ignoring the third party, and reach a reliable conclusion on whether he is liable to the third party. This might seem self-evident, but the stress here is necessary because of dicta by the United States Supreme Court, especially in the Italia case, that might seem inconsistent with this statement. The Court in that case said:

Recovery in contribution is imposed by law and is measured by the relative fault of the joint tortfeasors or shared equally between them (citing cases); while recovery in indemnity for breach of the stevedore's warranty is based upon an agreement between the shipowner and stevedore and is not necessarily affected or defeated by the shipowner's negligence, whether active or passive, primary or secondary.\(^7^6\)

For this last proposition the Court cites Weyerhaeuser II. If the Court had ended this sentence at the word "negligence," the statement would have been sound; but neither the cited case nor any other holding of the Supreme Court or any court of appeals has ever actually held that a shipowner whose negligence was active and primary could recover indemnity from a stevedore whose breach of warranty of care would be equivalent of passive or secondary negligence. Indeed, as we shall see, there is ample authority to the contrary.

What the Supreme Court forgot in this momentary lapse is that Ryan liability involves two implied agreements: an implied agreement of workmanlike performance and an implied agreement to indemnify the shipowner in case of breach of the first agreement. As to the first, it is of course true that the third person's conduct is immaterial, in the sense that the stevedore can breach his implied contract of workmanlike performance even if the shipowner is actively negligent. As to the second agreement, however, it does not necessarily follow that for every breach of the implied agreement of workmanlike performance, the second agreement—that of implied indemnity—comes into play. Whether this happens does indeed depend on the shipowner's conduct. Even an express agreement to indemnify the third party would not indemnify him against the consequences of his own negligence unless explicitly stated.\(^7^7\) How then could a mere implied agreement give rise to a higher degree of liability?

Since the presence of some degree of negligence in the shipowner can therefore obviously not be ignored, the least controversial


\(^7^7\) See notes 41-47 supra and accompanying text.
category of cases is that in which the shipowner is in the usual sense free of negligence, and in which the stevedoring company is guilty of some breach, however minor or technical, of its warranty of workmanlike performance. This is the pattern when the shipowner has been held liable to the employee purely on the basis of the virtually absolute liability for damage caused by the unseaworthiness of the vessel. The *Italia* case supplies the most vivid illustration of this category. The accident here had occurred because of a latent defect, not discoverable by ordinary care, in a rope brought onto the ship by the stevedore employer in connection with its duties. The rope snapped and injured the employee, who then recovered damages from the shipowner. The ground of the recovery was that the ship was rendered unseaworthy by the defective rope. Note that fault on the part of the shipowner, in any sense, was absolutely zero; there was not even anything as mild as failure to discover a defect created by another. As to the stevedoring company, its fault was of low degree, but still not quite zero. It had, after all, brought on board the defective rope. Even if ordinary care would not have revealed the defect, the court points out that "latent defects may be attributable to improper manufacture or fatigue due to long use and may be discoverable by subjecting the equipment to appropriate tests." The Court in fact applies a relative test to the situation of the employer and the third party, although the quality being compared is not negligence. The comparison is between the ability of the two parties to prevent the injury: "[L]iability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury." This, it may be noted, is a statement that cannot possibly be reconciled with the dictum from the same opinion, criticized above, in which the Court said that even the shipowner's active or primary negligence would not necessarily defeat his right of indemnity. For how could it be said that the stevedore was better situated to reduce the likelihood of injury if the shipowner was engaged in active and primary negligence? Surely the best way to reduce the likelihood of injury would have been to refrain from the active negligence that led to that injury. The court continues:

Where, as here, injury-producing and defective equipment is under the supervision and control of the stevedore, the shipowner is powerless to minimize the risk; the stevedore is not.

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78 376 U.S. at 323.
79 *Id.* at 324.
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Where the shipowner is liable to the employees of the stevedore company as well as its employees for failing to supply a vessel and equipment free of defects, regardless of negligence, we do not think it unfair or unwise to require the stevedore to indemnify the shipowner for damages sustained as a result of injury-producing defective equipment supplied by a stevedore in furtherance of its contractual obligations.\(^{(80)}\)

Thus, the Court's test is unmistakably comparative. The imposition of liability on the employer on the strength of a degree of fault that is somewhat below conventional negligence is justified, since the alternative is to let full liability rest upon a shipowner whose true fault is not merely small, but nonexistent.

Up to this point, since the shipowner is wholly free of fault, the problem of indemnifying a person for the results of his own fault does not arise. The real complications set in when the third party has been guilty of some degree of negligence. In sorting out the state of the law developed in this class of cases, which are by far the most numerous, we may first take note of one or two attempts to place arbitrary limits on the *Ryan* doctrine itself.

Perhaps the narrowest compass suggested for the doctrine is the precise fact situation under which *Ryan* arose—that is, the triangular relation under admiralty law of the stevedore, the longshoreman and the shipowner. This is the position that has been adopted by the Fifth Circuit. As Chief Judge John R. Brown expressed it:

But the Government, as do all other parties today, when everything else fails, falls back on the Tinker-to-Evers-to-Chance multiple impleaders in the *Sieracki-Ryan-Yaka* situations of indemnity based upon breach of the WWLP—the breach of the warranty of workmanlike performance. So far this Court has kept this newly formed concept strictly confined to salt water or at least amphibious applications.\(^{(81)}\)

\(^{(80)}\) *Id.*

\(^{(81)}\) United States v. Seckinger, 408 F.2d 146, 153 (5th Cir. 1969). This particular case involved an accident on dry land at a marine depot. The employee of a contractor had obtained a judgment against the United States for injuries incurred when he came in contact with a high voltage wire which, due to the Government's negligence, had not been deenergized. The Government then sued the contractor under an express contract of indemnification. The main point of the case was the familiar one that an express contract of indemnification will not be construed to cover the indemnitee's own negligence unless this provision is specifically stated in the contract. But, as Judge Brown indicated, as a last resort the Government had fallen back on the implied indemnity theory of *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). The court not only refused to extend *Ryan* to nonmaritime cases, but added that "the express indemnity agreement may have waived any possible implied one." *Royal Netherlands S.S. Co. v. Strachan*
The Fifth Circuit's rule limiting Ryan essentially to its own fact situation dates from *Halliburton Co. v. Norton Drilling Co.*, which refused to apply Ryan even in a case controlled by federal maritime law, but not presenting the stevedore-longshoreman-shipowner pattern. The locus of the injury was a drilling barge in navigable waters, but the cast of characters consisted of an oil company, a drilling company, and an oil well servicing concern. In the earlier reference to this case, it was noted that the court declined to follow the extension of Ryan to nonprivary cases. But it went further and concluded that to the extent that the Ryan line of cases permitted indemnification even when the indemnitee was to some degree negligent, this rule should be limited to stevedore-shipowner situations. It accounted for the exceptional rule in stevedoring cases by the fact that when a ship enters port, the stevedore must know that it may have been battered by its sea trip and, therefore, be full of hazards.

If the Fifth Circuit is, in these cases, trying to say that the central principle of the Ryan case itself cannot be extrapolated beyond stevedoring situations, the attempted limitation cannot be accepted. But if what is meant is that some of the applications of Ryan to particular combinations of relative fault between stevedore and shipowner have no counterpart in cases not involving shipowners, the position may be more defensible.

The central principle of Ryan, that there may be an implied obligation to use care in a service contract accompanied by an implied agreement of indemnity for breach of that obligation, was not

Shipping Co., 301 F.2d 741 (5th Cir. 1962). See also United States v. Seckinger, supra, at 153 n.18.

* See also 302 F.2d 431 (5th Cir.), cert. denied, 374 U.S. 829 (1962). See also Delta Eng'r Corp. v. Scott, 322 F.2d 11 (5th Cir. 1963), cert. denied, 377 U.S. 905 (1964). In Central Stikstof Verkoopkanter v. Walsh Stevedoring Co., 380 F.2d 523 (5th Cir. 1967), the Fifth Circuit reaffirmed its position, saying:

"The implied warranty established in Ryan is a product of the admiralty courts and a creature of admiralty law. . . . Those cases in which the doctrine has been applied have been admiralty cases which presented substantially similar circumstances to those existing in Ryan." * Id. at 529. In the same year, the same court refused to apply Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956), and cases following it in a maritime situation involving repair work on a fixed, unmanned platform in the Gulf of Mexico. Ocean Drilling & Exploration Co. v. Berry Bros. Oilfield Serv., Inc., 377 F.2d 511 (5th Cir.), cert. denied, 389 U.S. 849 (1967).

The court cites a long vivid passage on the perils of the sea and the consequent expectable ragged condition of a newly-arrived ship from the opinion of Judge Mathes in Hugg v. Dampsksaktieselskabet Int'l, 170 F. Supp. 601 (S.D. Cal. 1959), aff'd, 274 F.2d 875 (9th Cir. 1960).
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originated by Ryan and has by no means been confined to maritime or shipowner cases. The principle itself is traceable to the Westchester case, and has been applied in both state and federal courts in a variety of situations.

The court in the Ocean Drilling case quotes the Supreme Court's language in Italia to support its isolation of Ryan:

But we deal here with a suit for indemnification based upon a maritime contract, governed by federal law, in an area where rather special rules governing the obligations and liability of shipowners prevail, rules that are designed to minimize the hazards encountered by seamen, to compensate seamen for the accidents that inevitably occur, and to minimize the likelihood of such accidents.

Note, however, that these “rather special” rules are concerned not with stevedoring companies but with seamen and, of course, with longshoremen under the rule in Seas Shipping Co. v. Sieracki, which holds that the liability of a shipowner for unseaworthiness extends to longshoremen. The only special feature, then, of Ryan-type fact situations is that the shipowner may become liable to the longshoreman without fault under the seaworthiness doctrine. Fact situations may therefore arise in which, as in Italia, the employer can become liable with very little fault because the shipowner has become liable with no fault. But fact situations may also arise—and these are much more common—in which the shipowner was guilty of some degree of negligence and would have been liable to the plaintiff longshoreman even if the special seaworthiness liability did not exist. The Ryan rule clearly applies to such cases and, this being so, there is no reason why the Ryan rule should not be carried over to nonshipowner situations when the actual relation between the fault of the employer and third party is the same in principle.

From the above, it can be seen that the significance of a case in the Ryan line must be appraised, not by the minimum degree of fault for which the shipowner could have been held liable to the longshoreman, nor even by the theory on which the longshoreman in fact recovered from the shipowner, but by the actual degree of fault of the shipowner in relation to the fault of the stevedoring com-

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85 Westchester Lighting Co. v. Westchester County Small Estates Corp., 278 N.Y. 175, 15 N.E.2d 567 (1938).
86 See, e.g., General Elec. Co. v. Moretz, 270 F.2d 780 (4th Cir. 1959), discussed at note 70 supra and the cases cited in notes 152 et seq. infra.
87 Ocean Drilling & Exploration Co. v. Berry Bros. Oilfield Serv., Inc., 377 F.2d 511, 513 (1967) (quoting 376 U.S. at 324) (emphasis added by the court of appeals.)
pany. The issue is between employer and third party and must be decided on principles of indemnity which, in turn, are governed by their actual conduct as it bears upon their express or implied agreements.

For this reason, it is also a mistake to confine Ryan, as was essayed in the Florida Power and Light Co. case, to cases in which the indemnitee has been held liable without fault. The court there, relying on the passage from Italia quoted earlier, and stressing the words "regardless of negligence," concluded:

It therefore appears that if the Ryan doctrine is extended, it would be extended only in favor of an indemnitee who has been held liable without fault, based on some concept of strict liability such as unseaworthiness.

What the court overlooks is that the "regardless of negligence" phrase in Italia was necessary only because of the facts of that particular case. The employer's fault was minimal, and the Supreme Court was saying no more than that in such a case the employer could still be held liable to a shipowner whose fault had been even less and who had been, in fact, held liable without fault.

The quickest way to expose the fallacy of limiting Ryan to cases in which the indemnitee has been held liable without fault is to adduce Weyerhaeuser II, in which the shipowner was indeed found by the jury to have been negligent, and in which his liability to the longshoreman had in fact been based on negligence and not on unseaworthiness—and in which the shipowner nevertheless recovered indemnity under Ryan. In fact, the jury actually found that the ship was not unseaworthy as a result of the shipowner's negligence. The case is thus clear authority for the proposition that there may be indemnity on the part of the employer stevedore for an injury resulting from the concurring negligence of employer and shipowner.

Having set to one side, then, two unsound efforts to encapsulate Ryan—one on the basis of a factual limitation to salt water, shipowners and stevedores, and the other on the basis of a conceptual limitation to strict liability in the indemnitee—we are ready to analyze the actual amount of relative fault in the employer and third

90 See text accompanying note 80 supra.
91 275 F. Supp. at 430.
party that will sustain indemnity liability in the employer. The Supreme Court has cautioned in *Weyerhaeuser II* against importing tort terminology into the essentially contractual problem of indemnity under *Ryan*. Specifically, the Court ruled out the concepts of active versus passive negligence and primary versus secondary negligence. These terms are unavoidably vague and notoriously awkward to apply in practice. Therefore, the classification here adopted will employ the familiar distinction between creating a dangerous condition and failing to discover it. This distinction coincides in many typical cases with the distinction between active-primary and passive-secondary negligence. In addition, it has the dual advantage of avoiding any reference to negligence or fault, and of turning on a fairly specific description of conduct rather than broad adjectives. Moreover, it covers a surprisingly high proportion of the facts of decided cases and, with a little adjustment by way of analogy, can give guidance for the rest.

There are four principal patterns that can be identified. The first is that in which the employer creates a dangerous condition and the third party fails to discover it. In this situation, the employer is liable for indemnity.

This is the fact situation in the *Ryan* case itself. At least it is the fact situation on which the majority opinion is built—which is what counts for purposes of identifying the *ratio decidendi* of the case. In simplest terms, leaving aside complications in the facts to be found in the dissent and in the courts below, the facts were that the stevedoring company negligently stowed cargo in a South Carolina port. Officers of the shipowner observed and supervised the loading of the entire ship and had authority to reject unsafe stowage. The same stevedoring firm unloaded the ship a few days later in Brooklyn, at which time a heavy roll of paper broke loose and injured the longshoreman. The longshoreman recovered damages from the shipowner on alternative grounds of negligence or unseaworthiness. The district court dismissed the shipowner’s complaint over against the employer, but the court of appeals reversed and the Supreme Court affirmed the reversal.

The *Kittleson* case provides another perfect illustration of this combination of facts, although the court in that opinion resorted

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94 350 U.S. 124 (1956), aff’g 211 F.2d 277 (2d Cir. 1954).
95 See text accompanying note 1 supra. Other cases in this category would include Curtis v. A. Garcia y CIA., Ltd., 272 F.2d 235 (3d Cir. 1959); Parenzan v.
to the concepts of primary and secondary negligence. The court said that the creation of a dangerous condition was primary negligence and that the mere failure to discover it was only secondary negligence.

The *Ryan* case has thus reached the same result on substantially similar facts, while avoiding the use of the words "primary" and "secondary" negligence. The *Ryan* opinion merely says: "[T]he contractor, as the warrantor of its own services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense."

The *Italia* case also properly falls in this category. One can epitomize the facts in that case by saying that the employer created a dangerous condition by bringing on board a defective rope, and that the shipowner failed to discover the defect. Of course, it may be doubted whether the shipowner was under any duty at all to discover the defect—but even if he was, his failure would not, under this analysis, offset the employer's active conduct in creating the danger. It must be stressed again that the qualifying word "negligently" does not appear in any of these formulations. If the stevedore in fact furnished the rope and its defective condition in fact created the danger, and if the shipowner in fact contributed no more to the accident than, at most, failing to discover the danger, the case for indemnity is complete.

Iino Kaiun Kaisya, 251 F.2d 928 (2d Cir.), *cert. denied*, 356 U.S. 939 (1958). Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563 (1958) (*Weyerhaeuser II*), is difficult to classify, but probably belongs here, because the court identifies this type of shipowner default as the one which clearly would have permitted a recovery like that in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). See the last sentence of the quotation in the text accompanying note 115 infra. The facts of the case were that the stevedoring firm had worked on the shipowner's vessel in New York, and apparently had built a winch shelter out of scrap lumber for protection from the weather. This was quite customary, but on this occasion the ramshackle winch shelter was left on the ship while the ship proceeded to Boston. In Boston, the same stevedoring company again went to work on the ship. Five days after the ship arrived in Boston, one of its employees was injured when a piece of wood fell from the winch shelter and struck him. The court reversed a directed verdict for the stevedoring company in the suit by the shipowner for recovery over of damages paid by the shipowner to the injured longshoreman. It directed the trial court to try the various issues between the shipowner and the stevedoring company bearing on the alleged failure of the stevedoring company to live up to the implied duty of care referred to in the *Ryan* case.

96 350 U.S. at 134-35.
Workmen's Compensation: Third Party Actions

The second category is that in which the position of the parties is reversed: the third party creates a dangerous condition, and the employer fails to discover it. The holding here is that the employer is not liable to the third party for indemnity.

The leading example in this category is the pre-Ryan case of *American Mutual Liability Insurance Co. v. Matthews.* In this case, the Second Circuit considered a claim for contribution brought by a third party against an employer, which grew out of a compensable accident resulting from the failure of a defective rope. The third party's negligence consisted in furnishing the defective rope, while the employer's consisted in failing to discover the defect. The court denied both contribution and indemnity, distinguishing both the *Westchester* case and *Rich v. United States* on the ground that the present case involved no duty running from the employer to the third party. The duty to inspect the rope was a duty only toward his own employee, not toward the third party who furnished the rope. To say that the employer had a duty toward the supplier would be to say that the employer agreed to indemnify the supplier for the results of the supplier's own negligence in furnishing defective rope. The court observed that it would be "utterly unreasonable" to imply promises by the stevedoring company that "he will not use equipment furnished him by the shipowner to be used for the very purpose to which it was put," or "that he will use care to detect any defect in the equipment which patently existed when the equipment was delivered for use by the employer." There is also a post-Ryan case which is the mirror image of *Italia: Ignatyuk v. Tramp Chartering Corp.,* in which the court said that the stevedoring company's implied warranty of workmanlike performance does not require it "to discover defects in the apparatus or equipment furnished by the vessel being loaded or unloaded which are not obvious upon a cursory inspection." In that case, the stevedoring company was

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98 182 F.2d 322 (2d Cir. 1950). See also Humble Oil & Ref. Co. v. Naquin, 414 F.2d 912 (5th Cir. 1969) (holding that indemnity is not available to an actively negligent third party).
100 250 F.2d 198 (1957).
101 *Id.* at 201. The court cites the following cases in support of this statement: Seas Shipping Co. v. Sieracki, 328 U.S. 85, 95 (1946); Shannon v. United States, 235 F.2d 457 (2d Cir. 1956); Gucciardi v. Chisholm, 145 F.2d 514 (2d Cir. 1944); Liverani v. John T. Clark & Son, 231 N.Y. 178, 131 N.E. 881 (1921). See also Pena v. A/S Dovrefjell, 176 F. Supp. 677 (S.D.N.Y. 1959) (making a similar holding as to failure to discover a weakness in a place of dunnage which broke under the longshoreman's weight).
held not liable to discover a latent defect in a cleat and in a rope.

The third category begins like the second, but takes a different turn that makes the issue much closer: the third party creates a dangerous condition; the employer discovers it but continues work. The majority of cases hold that to continue under these circumstances is in itself a breach of the implied warranty of workmanlike service.\textsuperscript{102} The Court of Appeals for the Third Circuit, however, reached a contrary conclusion in \textit{Hagans v. Farrell Lines, Inc.}\textsuperscript{103} in which both the shipowner and the stevedoring company knew that a winch was defective. Nevertheless, the winch was used thereafter for some time. The court held that while the stevedoring company's use of the defective winch might prevent it from recovering indemnity from the shipowner for compensation benefits, "it does not necessarily follow that the burden to indemnify is thereby created." \textit{Smith v. Pan Atlantic Steamship Corp.}\textsuperscript{104} reached a similar result on the authority of the \textit{Hagans} case. The court added: "Is it part of the stevedoring contract that the stevedore will walk off the job if he finds the ship's equipment unsuitable?" The court added: "It may be negligent for him not to do so but it is in furtherance of his contract rather than a breach of it, and the shipowner could hardly hold him liable for trying to complete the work."

Here we see the divorce from negligence carried to its logical conclusion. The issue is not negligence at all; it is whether the conduct, in all the circumstances, is in line with what the parties may


\textsuperscript{103} 237 F.2d 477 (3d Cir. 1956).

\textsuperscript{104} 161 F. Supp. 422 (E.D. Pa. 1957), aff'd per curiam, 254 F.2d 600 (3d Cir. 1958).
be deemed to have agreed upon under their contract. Furthermore, as this court held, there is no inherent reason why it may not be reasonable to conclude that the shipowner really intended, and impliedly agreed, that the stevedore should proceed under circumstances that amounted to legal negligence, when the alternative was that the work might not have been done at all.

The fact that the stevedore continues work in spite of discovery of a dangerous condition created by the employer is, *a fortiori*, no ground for imposing indemnity liability on the stevedore if the continuance of the work was at the orders of the shipowner. In a fifth circuit case, the longshoremen had called the attention of the ship’s mate to an unsafe condition in the form of loose dunnage covered by paper. They were told to go ahead anyway, build cargo to the height of the dunnage and work over it. A longshoreman was injured when his leg broke through a hole in the paper. The court concluded that the shipowner’s conduct was sufficient “to preclude recovery of indemnity” under what has come to be called the “Weyerhaeuser dictum.”

The fourth combination has a still different twist: the third party creates a dangerous condition which is latent; the employer does more than merely fail to discover it or continue in the face of it; he activates it by his own affirmative conduct. In the *Crumady* case, the shipowner had created an unseaworthy condition by setting a safety cutoff device of a winch at six tons despite the fact that three tons was the maximum safe working load of the equipment. What really precipitated the accident, however, was the stevedore’s conduct in moving the head of the boom in such a way as to place an abnormal strain on the equipment creating a strain far in excess of three tons. The Supreme Court held that the principle of the *Ryan* case applied, “since the negligence of the stevedores, which brought the unseaworthiness of the vessel into play, amounted to a breach of the warranty of workmanlike service . . . .”

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107 See discussion in text accompanying note 115 *et seq.* infra.


109 *Id.* at 429.
But even if the stevedoring company was negligent, and even if its negligence "brought into play" the dangerous condition created by the shipowner, the stevedore will not be liable in indemnity if in all the circumstances his conduct, in its interplay with the conduct of the shipowner, was not a breach of his implied warranty of workmanlike performance.

It may be wondered how this fourth combination could come about. The most direct way is for a jury to find, in answer to specific interrogatories, that this is what happened, as in *Waterman Steamship Corp. v. David*. The accident occurred when a hatch cover, being pulled back by the stevedore's employees, jumped the track because of its worn condition and fell on the plaintiff longshoreman. In answer to specific interrogatories, the jury found (1) that the proximate cause of the accident was the unseaworthiness of the roller assembly, (2) that the stevedoring company was negligent, and (3) that its negligence "caused or brought into play" the vessel's seaworthiness. Up to this point, the shipowner's case for indemnity would have been perfect within the *Crumady* case. But the jury did not stop there. In the next interrogatory it found that the negligence did not constitute a breach of the stevedore's warranty to perform its job in a reasonably safe and workmanlike manner. Finally the jury specifically found that the shipowner's breach of his seaworthiness duty was "so great as to preclude" the shipowner's recovery from the stevedore for breach of warranty. The three last interrogatories were obviously carefully tailored by counsel to match the doctrines of the three leading cases involved: *Crumady*, *Ryan*, and *Weyerhaeuser II*. The shipowner was ahead under the *Crumady* formula, but lost on both the central *Ryan* principle and the "*Weyerhaeuser dictum".

The shipowner contended that the answers were inconsistent with each other, and the court at once addressed itself to this issue. It began with the canon that it is the "duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them," and "to reconcile the jury's findings, by exegesis if necessary . . . before we are free to disregard the jury's verdict and remand the case for a new trial." The court achieved this reconciliation by harking back to the dominant theme of *Ryan*: the indemnity obligation rests on contract, not tort. Therefore the law of contract,

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110 353 F. 2d 660 (5th Cir. 1965).
not of negligence, determines what conduct under the *Weyerhaeuser* dictum would be "sufficient to preclude recovery." The court recalled that the *Weyerhaeuser II* opinion had adduced the sections of the Restatement of Contracts dealing with the promisee's hindrance of the promisor's performance of the latter's duty. Thus, Section 295 provides:

If a promisor prevents or hinders . . . the performance of a return promise, and the . . . return promise (would have) been rendered except for such prevention or hindrance . . . the actual or threatened nonperformance of the return duty does not discharge the promisor's duty . . . .

Then comes the nub of the decision:

These contract principles are implicit in the *Weyerhaeuser* dictum. If a vessel's unseaworthiness prevents the stevedore's workmanlike performance, that is "conduct" on the part of the shipowner "sufficient to preclude recovery," and to excuse even a negligent breach by the stevedore. The court concludes by saying that this was a question for the jury.

In support of this conclusion, the court quotes *Weyerhaeuser II*:

The evidence bearing on these issues—petitioner's [owner's] action in making the shelter or its ship available to respondent's employees in Boston although it was apparently unsafe, as well as respondent's [stevedore's] continued use of the shelter for five days without inspection—was for jury consideration under appropriate instructions.

It is in the last three words, "under appropriate instructions," that the real difficulty lies buried. What would appropriate instructions be? Neither the Supreme Court nor any court of appeals at this writing has faced up to the task of providing an overall affirmative working rule on what it would take to constitute "conduct on . . . [the] part . . . [of the shipowner] sufficient to preclude recovery." In the *Weyerhaeuser II* case itself, the Supreme Court was under no such necessity, since it was dealing with a directed verdict for the stevedore. Hence it merely had to conclude that there might have been some kind of negligence that would not necessarily prevent recovery by the shipowner. The Court said:

While the jury found petitioner "guilty of some act of negli-

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112 Restatement of Contracts (First) §§ 295 & 315 (1932). See also A. Corbin, Corbin on Contracts §§ 571, 947, & 1264 (1952).
113 353 F.2d at 665. The court then goes on to cite Reddick v. McAllister Lighterage Line, Inc., 258 F.2d 297 (2d Cir.), cert. denied, 358 U.S. 908 (1958), for the proposition that a finding of fault in the stevedore does not necessarily require a judgment of indemnity in the shipowner's favor.
114 355 U.S. at 567.
gence," that ultimate finding might have been predicated, *inter alia*, on a failure of petitioner to remove the shelter when the ship left New York, or a failure to correct or warn respondent of a latent dangerous condition known to petitioner when the respondent began the Boston unloading. Likewise, the finding might have been predicated on a failure of petitioner during the five days in Boston to inspect the shelter, detect and correct the unsafe condition. Although any of these possibilities could provide Connolly [the claimant] a basis of recovery, at least the latter would not, under Ryan, prevent recovery by petitioner in the third-party action.115

It will be observed that the Court is willing to state unqualifiedly that the shipowner's failure to inspect the dangerous condition after the ship was turned over to the stevedoring company in Boston was not sufficient to prevent recovery over by the shipowner. Nevertheless, the Court is in sufficient doubt about the boundaries of the shipowner's liability to stop short of making a similar declaration as to failure of the shipowner to correct the dangerous condition earlier — particularly in the light of the apparent custom of removing these temporary shelters when the ship put to sea.

In attempting to supply the need for "appropriate instructions," it should first always be remembered that the beginning point here is the contract between the stevedoring company and the shipowner. Since everything about the liabilities back and forth between the two parties must be derived from contract, a court must look to it to discover what kind of misconduct by the shipowner will preclude him from recovering over against the employer. As a next step, we may identify two kinds of conduct that are not sufficient to preclude recovery over. One, on the strength of the *Weyerhaeuser* passage just quoted, is failure to discover a dangerous condition created by the stevedore.

It appears equally clear that the required level of shipowner misconduct would not be satisfied by the technical violation of the shipowner's duty to provide a seaworthy vessel. Liability for unseaworthiness runs to the shipper of cargo, to seamen and to longshoremen, but it does not extend to the stevedoring contractor.116

115 Id. at 568. See also Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, *rehearing denied*, 369 U.S. 882 (1962), which does not add substantially to existing law, since the jury's verdict, finding the stevedoring company not liable, was not impossible as a matter of law on at least one theory which the jury might have favored.

116 This point is discussed in Hugev v. Dampskisaktieselskabet Int'l, 170 F. Supp.
There is a practical reason for this, which is effectively presented by the district court’s opinion in *Hugev v. Dampskisaktieselskabet International*.117 The court provides a vivid description of how the hazards of the sea, even under modern conditions, can still shake up and batter a ship, so that by the time it arrives in port to be worked on by longshoremen, it would be quite unreasonable to postulate that the stevedoring company expects the ship to be in seaworthy condition or even in a reasonably safe condition.

The most thorough attempt to formulate a positive set of tests is that contained in the *Hugev* opinion. Unfortunately the court of appeals, in affirming the decision, merely adopted the facts and conclusions. For that reason, this particular language is not part of the *ratio decidendi* of the case beyond the district court level. The tests adopted by the district court were as follows:

The surrounding circumstances of fact, and that of law just recited, prompt the holding that, absent express provision to the contrary, the shipowner owes to the stevedoring contractor under the stevedoring contract the implied-in-fact obligations: (1) To exercise ordinary care under the circumstances to place the ship on which the stevedoring work is to be done, and the equipment and appliances aboard ship, in such condition that an expert and experienced stevedoring contractor, mindful of the dangers he should reasonably expect to encounter, arising from the hazards of the ship’s service or otherwise, will be able by the exercise of ordinary care under the circumstances to load or discharge the cargo, as the case may be, in a workmanlike manner and with reasonable safety to persons and property; and (2) to give the stevedoring contractor reasonable warning of the existence of any latent or hidden danger which has not been remedied and is not encountered or reasonably to be expected by an expert and experienced stevedoring company in the performance of the stevedoring work aboard the ship, if the shipowner actually knows, or, in the exercise of ordinary care in the circumstances, should know of the existence of such danger, and the danger is one which the shipowner should reasonably expect a stevedoring contractor to encounter in the performance of the stevedoring contract.118

This passage was quoted by the United States Supreme Court in a different context—that of the stevedore’s attempt in *Burnside*119 to


117 *Id.*

118 170 F. Supp. at 610.

assert a right of action over against the shipowner, independent of the stevedore's subrogation rights in the employee's cause of action. However, since it would be rather awkward, to say the least, to have one standard of shipowner fault for purposes of supporting shipowner liability to the stevedore under *Burnside*, and a different standard for barring shipowner recovery from the stevedore under *Ryan*, the quotation of this set of tests by the Supreme Court may provide a start toward filling the void of "appropriate instructions" left by *Weyerhaeuser II*. Of course, the Supreme Court's mere reproduction of this passage in a footnote is not tantamount to adopting it; all the Court in *Burnside* was trying to do at that point was to show that there was some recognized duty running from shipowner to stevedore. Nevertheless, while the Court did not expressly approve the tests in *Hugev*, it did not disapprove them either—and their weight has certainly been enhanced by this high-level recognition.

It may be suggested, then, that a court or counsel confronting the task of preparing instructions to the jury in this class of cases has a fair amount of guidance, when all the sources are pieced together.\(^{120}\) Although the point seems not to have been raised in the *Waterman* case,\(^{121}\) it seems wrong to submit to the jury the question of whether the shipowner's breach of seaworthiness "was so great as to preclude it" from recovering indemnity, without any instructions on what degree of breach would satisfy the test. The Court in *Waterman* quotes *Weyerhaeuser II* in support of the holding that it is the jury's

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\(^{120}\) Of course, the instructions appropriate to the case will be tailored to the facts of the particular litigation. In most situations, the set of four categories identified in the text above, constructed around the concepts of creating or failing to discover a dangerous condition, would meet the need and have the advantage of concreteness. However, there could usually be substituted other degrees of actual negligence, such as knowing of a dangerous condition that is not reasonably discoverable by others and failing to reveal it, without disturbing the pattern. Any such instruction, however, would have to be accompanied by a warning that this element cannot be supplied by the technical liability of the shipowner for unseaworthiness of the vessel; it is the character of the shipowner's conduct leading to unseaworthiness that is relevant. At this point the general tests laid down in *Hugev v. Dampskisaktieselskabet Intl*, 170 F. Supp. 601 (1959), *aff'd sub nom.*, Metropolitan Stevedore Co. v. Dampskisaktieselskabet Intl, 274 F.2d 875 (9th Cir.), *cert. denied*, 363 U.S. 803 (1960), may be found to be useful. For completeness, there should be added an instruction drawn from the law of contracts as reflected in the passages from the *Restatement of Contracts (First)* §§ 295 & 315 (1932). The jury should be told that the shipowner has, under a normal contract, a duty to refrain from hindering the stevedore in an unreasonable manner from the performance of its work and the discharge of its duty to perform the work in a workmanlike manner.

\(^{121}\) Waterman S.S. Corp. v. David, 353 F.2d 660 (5th Cir. 1965).
task to answer this question, but is blind to the last three words, "under appropriate instructions." If there were any instructions to the jury, the opinion does not reveal it. *Weyerhaeuser II* surely never meant to say that the whole complex snarl of issues in this area—which have been keeping federal courts busy for years—should be ducked by tossing the problem to an uninstructed jury. The result is bound to be the kind of puzzle confronting the court in *Waterman,* where it bravely and ingeniously struggled to find a thread of legal consistency in the findings, which it then imputed to a jury that could not have possibly devised or even understood such a sophisticated legal rationale.

**Stevedore Employer's Action Over Against Longshoreman Employee**

Since the stevedore employer, in the first wave of *Ryan*-based cases, was usually the party that wound up with the ultimate burden of liability, it is not surprising that he began to cast about for ways of passing it on to someone else. The resulting proliferation of claims and cross claims in this area has inspired some more-than-usually picturesque judicial prose. Judge John R. Brown has contributed his share. Concurring in *McLendon v. Charente Steamship Co.*, he said: "The plight of stevedore-employer caught in the *Sieracki-Ryan-Yaka* maelstrom is indeed an unhappy one undoubtedly deserving of congressional solicitude." In *United States Lines Co. v. Williams,* he varies and mixes the metaphor somewhat, referring to "the hundreds of amphibious Tinkers-to-Evers-to-Chance judicial round robins churned by the swells of *Sieracki-Ryan-Yaka-Italia.*" A few pages later in the same volume, in *D/S Ove Skou v. Hebert,* he outdoes his previous effort both in the pungency and the mix of his triple metaphor:

> This is another of the growing number of multiparty Don-nybrook Fairs in which like Kilkenny cats . . . all lash out against each other in the hope that somehow from someone, somehow all or part of the *Sieracki-Ryan-Yaka-Italia* fallout can be visited on another.

The two principal attempts by the stevedore to pass the burden to someone else have been a counterclaim against the negligent long-

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122 348 F.2d 298, 303 (5th Cir. 1965).
123 365 F.2d 332, 333 (5th Cir. 1966).
124 365 F.2d 341, 344 (5th Cir. 1966). For another opinion by Judge John R. Brown on a tangle of cross-claims, see *Grigsby v. Costal Marine Serv. of Tex., Inc.*, 412 F.2d 1011 (5th Cir. 1969).
125 365 F.2d at 344.
shoreman-employee himself and, more recently, an independent suit for indemnity against the shipowner, as in Burnside.\textsuperscript{128} At this point, we may examine the comparatively recent burst of cases in which the employer has attempted to shift the ultimate burden of damage liability all the way back to the longshoreman-plaintiff himself. These cases arise when the longshoreman who was injured happens to be the same longshoreman whose negligence contributed to the unseaworthiness which caused his injury.

To a lawyer trained in conventional concepts of master-servant law, it might come as a surprise that there could be any doubt about the liability of the tortfeasor employee to pay for his own wrong, if he can. Although Lord Holt, the father of \textit{respondeat superior}, at first held that a servant was not himself answerable in tort for negligence,\textsuperscript{127} it soon became established in both England and the United States that a servant is not only liable for his negligence to a third person, but also liable to his master, if the master has had to pay damages resulting solely from the servant's fault.\textsuperscript{128}

The existence of this rule of law was all but forgotten inasmuch as normally the servant would not be able to pay a judgment; but this did not destroy the rule itself. When for some special reason, such as the coverage of the employee by automobile liability insurance, the employee is indeed able to respond in damages, the principle has been remembered and revived. Thus, although the legal basis is somewhat different, recoveries have been had by employers against their own employees as third parties when the tortfeasor employee injured the compensation-claimant employee.\textsuperscript{129}

In the \textit{Ryan}-type case, the ability of the employee to pay a judgment is ensured by the fact that the whole cycle begins with his obtaining a judgment from the third-party shipowner.\textsuperscript{130} There is thus no financial obstacle to reposing terminal liability on the true tortfeasor. The issue, therefore, becomes one of reexamining the conventional rule in the light of modern conditions and concepts—

\textsuperscript{128} See note 65 \textit{supra}.
\textsuperscript{127} Lane v. Cotton, 12 Mod. 472, 488 (T. 13 W III) (1701).
\textsuperscript{128} Grand Trunk Ry. v. Latham, 63 Me. 177 (1874).
\textsuperscript{129} See 2 A. Larson, \textit{The Law of Workmen's Compensation} § 72.10 (Supp. 1969) at note 15 \textit{et seq. supra}.
\textsuperscript{130} In this respect the present issue is readily distinguishable from the question whether the employer should be allowed to implead the acting employee when there is no visible financial reason. See Goodhart v. United States Lines Co., 26 F.R.D. 163 (S.D.N.Y. 1960). \textit{See also} cases cited in \textit{id.}, at 164, in the footnote marked with an asterisk.
including the intervention of nonfault workmen’s compensation liability, nonfault unseaworthiness liability, and the total set of relationships created by Congress and the courts surrounding maritime and longshore injuries. At this writing, no record of a successful suit by an employer against his longshoreman-employee has appeared in the reports; all but one of the reported cases have ruled out this type of suit. The remaining case did not affirmatively pass on the merits of such a suit but merely declined to dismiss it, stressing the rule that all possible parties to a controversy should be joined in the interest of judicial efficiency. The law up to this point has been made mostly in federal district courts and must, therefore, be viewed as being still in a formative stage.

The case that started the discussion on its present course was Cavelleri v. Isthmian Lines, Inc. The heart of that opinion lies in the concept that since the longshoreman’s recovery from the shipowner is reduced in proportion to the percentage of the longshoreman’s contributory negligence, that negligence is “excised” from the litigation and can no longer be attributed to the longshoreman for purposes of the stevedore’s counterclaim. Suppose, to take the actual facts in the later case of Cusumano v. Wilhelmsen.


132 Malfitano v. King Line, Ltd., 198 F. Supp. 399 (S.D.N.Y. 1961). See also the footnoted observation of Judge Friendly, dissenting in Shenker v. United States, 322 F.2d 622, 630 n.1 (2d Cir. 1963), cert. denied, 376 U.S. 907 (1964): “Perhaps the circle will be completed by the stevedoring company’s recovering from Shenker for breach of his undertaking to keep his eyes open implicit in his contract of employment.” Of course, no judicial expression can be technically much weaker than a dictum within a dissent, and the second circuit later, in Nicoli v. Den Norske Afrika-og Australasien Wilhelmsens Dampskibsaktieselskab, 332 F.2d 651 (2d Cir. 1964), made short work of the issue, acknowledging Judge Friendly’s “hyperbolic footnote” merely as the evident inspiration for the stevedore’s attempt.

133 Historically, the first case involving an effort to transfer liability to the longshoreman appears to have been Cook v. The MV Wasaborg, 189 F. Supp. 464 (D. Ore. 1960), but the theory relied on by the stevedore was somewhat out of the mainstream that developed in subsequent cases. The stevedore contended that the employee was in effect a vice-principal and as such should bear the full judgment. The court found that the precedents relied on involved persons who were the alter ego of the corporation, which was not the case with this employee.

134 189 F. Supp. 525 (S.D.N.Y. 1960). For complete names and citations of cases in the ensuing discussion, see notes 131 and 132 supra.

the total assessed damages were $119,000 and the plaintiff's negligence 60 percent. The plaintiff's recovery would be reduced to $47,600, as was actually done in that case. If the shipowner then recovers the $47,600 from the stevedore, the basis must be something other than the longshoreman's negligence, so this theory runs. Therefore, the $47,600 that the stevedore tries to recoup from his longshoreman-employee cannot be viewed as related to the stevedore's negligence.

This theory, while not free from serious weaknesses as a matter of law, can at least be conceptually defended when the accident was not caused by the sole negligence of the longshoreman. For example, if the negligence of the stevedore through other employees was a factor, it can be argued that the $47,600 represented this residuum of negligence remaining after plaintiff's negligence had been excised.

The really awkward problem arises when the longshoreman's negligence is the sole cause of the unseaworthiness that resulted in his injury. In Cusumano the longshoreman moved to dismiss the stevedore's counterclaim against him; the stevedore's allegation that the longshoreman's negligence was the sole cause of its being held liable to the shipowner presumably must be taken to be true. When the court discusses the issue on this assumption, however, the "excision" theory backfires. If the longshoreman's negligence had been excised, how could it have still served as the sole basis for the stevedore's liability to the shipowner? To put the matter another way, the shipowner has benefited once by the longshoreman's negligence, by having the damages against himself reduced by 60 percent. He then benefits again by using the same negligence to achieve a recovery over against the stevedore.

The court's answer is that this argument would more properly have been directed to the contest between the stevedore and the shipowner than to that between the stevedore and the longshoreman. But the difficulty in reducing or blocking the shipowner's recovery against the stevedore, says the court, lies in the fact that this recovery is based on indemnity and is, therefore, not necessarily defeated by

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136 Proudfoot, supra note 60, at 441 says:

This is simply semantic nonsense. The same act, negligent or otherwise, can constitute a violation of independent duties owed to different parties. Thus the fact that the negligence of the plaintiff breaches a duty to the shipowner and results in a reduction in his award is no reason that the same negligence cannot constitute a breach of duty to the stevedore based upon an implied warranty of workmanlike performance running from the longshoreman to the stevedore.
the shipowner's negligence.137

The real trouble here is that one is trying to make legal sense out of a mixture of jury findings and pleadings that cannot be reconciled. In Cusumano, our given quantities are: the shipowner was not negligent; the ship was unseaworthy; the longshoreman's negligence in creating the unseaworthiness was 60 percent; the stevedore was not negligent except through this same longshoreman. Where then is the other 40 percent of negligence? Obviously rational legal rules cannot be based upon irrational fact combinations like this.

The next case after Cavelleri to undertake an analysis in depth of this problem was Johnson v. Partrederiet Brovigtank.138 One or two added factors received attention in this opinion. The stevedore in Johnson argued that just as there was an implied warranty of workmanlike performance running from the stevedore to the shipowner, so too there was an implied warranty running from the longshoreman hatch boss to the stevedore that the former would work in such a way as not to saddle his employer with liability. The court rejected this argument out of hand—in spite of its appeal to consistency and logic—on the ground that the Ryan implied warranty was purely an attempt to reach an appropriate adjustment of loss between the stevedore and the shipowner as to their mutual relation to the longshoreman. In fact, in the last analysis the decisions in this category will be found to be largely policy-based,139 with traditional

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137 The court cites Holley v. The Manfred Stansfield, 186 F. Supp. 212 (E.D. Va. 1960), a case in which it was apparently held that a longshoreman can recover against a shipowner even when his own negligence was the sole cause of the unseaworthiness, as support for this proposition. The court also suggests that apportionment between the shipowner and the stevedore of the residual damages after reduction by the plaintiff's negligence might be possible, although in this case it was not because the stevedore had withdrawn its counterclaim against the shipowner—a possibility also suggested in D/S Ove Skou v. Hebert, 365 F.2d 341 (5th Cir. 1966). One can now add that, under Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404 (1969), the stevedore might have still another route by which to seek an adjustment of the loss.


139 The court relies heavily, to support its general policy, on the holding of United States v. Gilman, 347 U.S. 507 (1954), which held that the United States is not entitled to recover indemnity from one of its employees for whose negligence it had been held liable under the Federal Tort Claims Act. As a legal precedent, the case is rather far afield since it turns entirely on the construction of a particular statute that created the tort liability in the first place and that omitted the feature of recovery over against the employee. Even as to policy, the situation is quite different. The Court in Gilman paints a Dickensian picture of a harassed employee being hounded and put to great expense for legal fees by the big, wicked government. In the present situation, however, one finds a longshoreman al-
legal concepts and logic giving way where necessary. The Johnson opinion sets the stage for this approach by a quotation from Sieracki: "And beyond this he [the shipowner] is in a position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost."\(^{140}\)

This language may seem to have a familiar ring. It is the original formula used to justify the policy desirability, and constitutional validity, of legislative action creating nonfault workmen's compensation liability for limited benefits. Here the same language is used to justify the judicial provision of nonfault shipowner liability for unlimited damages to the longshoreman. It is then requoted to justify letting the longshoreman keep the recovery despite his own negligence—and this at the expense of an employer who has already discharged his full social responsibility by paying the longshoreman nonfault compensation benefits based on precisely the same social theory.

The court then introduces the argument that to allow recovery against the longshoreman would, in effect, restore the full defense of contributory negligence and deprive him of the benefit of the comparative negligence rule. If his negligence was only a partial cause of the accident, and if the stevedore was allowed full recovery over against him, this would be true. To revert to the figures in Cusumano, if out of total damages of $119,000, plaintiff received $47,600 because he was 60 percent negligent, and if the stevedore finally recouped $47,600 from him, he would indeed be paying as if his negligence had been 100 percent responsible. It has been suggested that, in these circumstances, the stevedore should recover from the longshoreman only 40 percent of $47,600.\(^{141}\) This would make sense if the remaining 40 percent of fault is presumed to be in the shipowner. If it were in the stevedore, however, no recovery at all would be justifiable. Once more it is clear that the place to adjust this remaining portion of the loss is between the stevedore and shipowner; if this is not done, it will be difficult to achieve equity by tinkering with the rights between stevedore and longshoreman.\(^{142}\)

\(^{140}\) 202 F. Supp. at 861, quoting from Seas Shipping Co. v. Sieracki, 328 U.S. 85, 94-95 (1946).

\(^{141}\) Proudfoot, supra note 60, at 439-42.

\(^{142}\) Another argument relied on in Johnson v. Partrederiet Brovigtank, 202 F. Supp. 859 (S.D.N.Y. 1962), deserves little weight. This is the contention that since
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If this field of law is to develop soundly, more attention will have to be given to some important variables that are now often slighted—particularly those touching the character and quantity of the longshoreman's negligence.

Suppose the holding in this type of case is paraphrased as follows: plaintiff by his own negligence creates an unseaworthy condition; as a result of this condition he is injured; both the shipowner and the stevedore are innocent of negligence; the longshoreman recovers $60,000 from the shipowner—this amount representing his injuries reduced by this contributory negligence; the shipowner gets $60,000 indemnity from the stevedore by attributing the longshoreman's negligence to him; but the stevedore must not be allowed to recover the $60,000 back from the tortfeasor longshoreman. In short, the guilty party ends with $60,000 and the innocent employer, already having paid workmen's compensation and supposedly protected by its exclusive liability clause, is left "holding the bag." Put in this way, the result would strike most lawyers as indefensible.

The trouble with this picture is that in most cases the longshoreman's negligence is not the sole cause of his injury. Moreover, his negligence is seldom of the direct and culpable variety that this paraphrase suggests. In almost every case the injured man is a supervisory employee, such as a hatch boss. His negligence is not in some physical movement of his own, but in the fact that something has been done the longshoreman's right to sue his employer is barred by the compensation act, it is anomalous to permit the employer to sue the longshoreman. The fallacy is that the employee has not lost his right to sue his employer; he has recovered once from him directly in workmen's compensation, and a second time, indirectly, by a recovery against a third party which in fact has been paid by the employer. The recovery over against the employee, far from flouting the exclusive-remedy concept of workmen's compensation, is designed to restore it by cancelling out the second of these recoveries.

143 The fact that the quality of plaintiff's fault is definitely relevant is demonstrated when one examines the result in cases involving actual assaults by employees. The unseaworthiness doctrine has been expanded to permit recovery by a seaman for injuries caused by the assault of a fellow seaman. Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336 (1955). Several decisions have allowed the shipowner defendant to implead the assaulting seaman on the ground that he is the primary tortfeasor and the shipowner only the secondary tortfeasor. States S.S. Co. v. Howard, 180 F. Supp. 461 (D. Ore. 1960); Codrington v. United States Lines Co., 168 F. Supp. 261 (S.D.N.Y. 1958); Thompson v. American Export Lines, Inc., 15 F.R.D. 125 (S.D.N.Y. 1953). The court in Johnson v. Partrederiet Brovigtank, 202 F. Supp. 859, 865 n.6 (S.D.N.Y. 1962), distinguished these cases, saying:

To permit impleader of the assaulter, and thereby bring into the action a third person who acted intentionally, is different in principle from allowing a defendant to assert a claim that would if successful, defeat the recovery of a plaintiff who was at most negligent.
under his supervision that he should have discovered and corrected. Or, as in *Nicroli*, it may merely have been failure to look where he was going when he slipped on a deck made dangerous by sugar spilled by others. The jury reduced his damages by 50 percent on account of this contributory negligence. Now, suppose the stevedore had recovered over against the plaintiff. The end result would have been that the plaintiff would have recovered nothing, while those who were responsible for the creation of the dangerous condition in the first place would have had their liability lightened at plaintiff's expense. It is small wonder that the Second Circuit consumed only one short paragraph in rejecting the stevedore's counterclaim.

The optimum disposition of these cases would be this: first, if the plaintiff's negligence was really the sole cause of the vessel's unseaworthiness that led to his injury, although he theoretically still has a cause of action against the shipowner, his recovery should be reduced by 100 percent. No other result is legally rational. Second, if plaintiff's negligence was only partly responsible, say 60 percent, his damages should be reduced accordingly and he should have no further liability. Third, the remaining adjustment of rights between shipowner and stevedore should be concerned exclusively with the 40 percent actually paid. If, for example, in *Nicroli* the slippery condition of the deck was due to the stevedore's failure to perform his duty through other employees, the shipowner should have his indemnity. Conversely, if it was the shipowner's duty to clear up the slippery condition, he should absorb the 40 percent himself. If both were in default on their obligations—the stevedore to perform in a workmanlike way, the shipowner to provide a safe place to work—they should share the burden.

*Direct Liability of Shipowner-employer to Longshoreman*

Perhaps the most remarkable of the many extensions of the *Sieracki-Ryan* doctrine is the Supreme Court's unqualified holding that when a shipowner employs longshoremen directly, the exclusive-remedy clause does not bar a direct action by the longshoreman against the shipowner for injuries due to unseaworthiness. When this rule was first applied in *Reed v. The Yaka*, it seemed quite plausible to assume that the direct hiring of longshoremen was a deliberate device, employed by the very shipowner in-

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144 332 F.2d 651 (2d Cir. 1964).
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volved in Ryan, to circumvent the Ryan result. After all, if the stevedore's increased costs are passed along to the shipowner in the price of the stevedore's services, it is to the ultimate advantage of the shipowner to block Sieracki-Ryan recoveries right from the start.

In any event, if there was ever any doubt that the Yaka rule was one of general applicability, it was removed by Jackson v. Zykes Steamship Co.\(^\text{146}\) The Court justified the result purely on the ground that it was unfair to deny an unseaworthiness recovery to a longshoreman hired directly by a shipowner, while permitting the same kind of recovery to a longshoreman doing exactly the same kind of work when employed by an independent stevedore. The Court said:

We cannot accept such a construction of the Act—an Act designed to provide equal justice to every longshoreman similarly situated. We cannot hold that Congress intended any such incongruous, absurd, and unjust result in passing this Act.\(^\text{147}\)

Of course, in passing this Act (the Longshoremen's Act) with its exclusive-liability feature, Congress did not have the Ryan case before it and could scarcely have formed any intentions about absurd results that might follow from it. In fairness to Justice Black, one may assume that this statement was merely a shorthand version of what he had said in his Yaka opinion—that Congress had left Sieracki and Ryan unchanged. This seems to suggest that every time a legislature leaves a court decision unchanged, all the implications of that decision are retroactively imputed to the legislature as part of legislative intent at the time of original enactment. This would be a rather unrealistic rule of statutory construction—attributing to legislatures a degree of vigilance in scrutiny of judicial decisions, and alacrity in passing legislation, that corresponds to nothing in the observed real world.

Be that as it may, Yaka is firmly lodged in the series, and the inevitable process of further extrapolation is well under way. In American Mail Line, Ltd. v. Weaver,\(^\text{148}\) a direct suit by a longshoreman against a shipowner under Yaka, the issue was whether the jury should be instructed to disregard medical expenses and wage loss as elements of damage, inasmuch as these had already been paid by the

\(^{146}\) 386 U.S. 731 (1967) (Harlan & Stewart, JJ., dissenting). It is interesting to note that the opinions in both Reed v. The Yaka, 373 U.S. 410 (1963), and Jackson were written by Justice Black, who also wrote the vigorous dissent in Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956).

\(^{147}\) 386 U.S. at 735.

\(^{148}\) 408 F.2d 674 (9th Cir. 1969).
defendant under the Longshoremen's Act. It was held that instructions as to the full damages should be given to the jury. Two reasons were presented: (1) to do otherwise would only confuse the jury, and (2) under the three-way type of litigation involving an independent stevedore, full damages would be recoverable from the shipowner; since the object of Yaka was to achieve parity of treatment, the instructions were required. The court admits that this way of handling the matter presents the plaintiff's case "in a warmer light to the jury." There would be no double recovery, of course, since the employer would be reimbursed for his compensation expenditures. The holding does, however, highlight how far this line of cases has strayed from the exclusiveness of liability principle, when the employer is not only sued by his employee, but denied an offset for the compensation he has in fact paid.

The net result is that the Supreme Court has now created, in effect, a new kind of workmen's compensation act for longshoremen—with strict liability drawn from the unseaworthiness doctrine, but with unlimited benefits. It has achieved this by a series of gradual extensions, each time looking back and saying it would be quite unfair to discriminate between the recipients of the last extension and the proposed beneficiaries of the next extension. The widening range of items embraced by the concept of an unseaworthy ship—to assaults,149 for example, and to conditions on dry land150 is an illustration of the same process. The Court has thus achieved for longshoremen a compensation system roughly resembling in result the one it achieved for railroad workers by a series of judicial decisions,151 both classes of workers in a large proportion of cases have the best of both worlds: strict liability and unlimited damages.

If the court believes that it is bound to do this by reasons of humanitarian policy, that is understandable. But it really should not announce that it is bound to do it in order to carry out the intention of Congress. Congress expressed its intention as to the kind of compensation act longshoremen should have when it passed the Longshoremen's and Harbor Workers' Compensation Act; Congress

149 See note 143 supra.


151 See 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 91.77 (Supp. 1969). The result in the case of railroad workers came about from the opposite direction; that is, the court began with an employer's liability act based on fault but with unlimited damage and gradually turned it into essentially a nonfault system by insisting that practically every case go to the jury.
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decreed that this liability should be exclusive. As for discrimination between workers injured by perils associated with the sea, the answer is that Congress intended to discriminate when it established one kind of remedy for seamen in the Jones Act and a quite different kind of remedy for longshoremen in the Longshoremen's and Harbor Workers' Compensation Act.

Third Party's Indemnity Action Under State Law

When we turn to cases arising under state law, we find a sharp divergence of opinion. Some jurisdictions hold that when the relation between the parties is based on contract, an obligation of care with an accompanying indemnity obligation can be implied and that these obligations survive the exclusiveness defense; others reject the

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152 California: San Francisco Unified School Dist. v. California Bldg. Maintenance, 162 Cal. App. 2d 434, 328 P.2d 785 (1958). Plaintiff had contracted with defendant to wash the windows of plaintiff's school buildings. The contract required defendants to furnish equipment and, for certain windows, stepladders were to be used. A washer employed by defendant, operating in violation of this provision, was injured. He sued and recovered from plaintiffs on the theory of failure to provide a safe working place. Plaintiffs brought action against defendant employer to recover the amount of that judgment and expenses incurred in the suit. Plaintiff recovered on the ground that the contract held defendant responsible for payment of any and all damages resulting from its operation. The court said that if such a provision was not an express indemnity, it was an implied one. Accord, Vegetable Oil Prods. Co. v. Superior Court, 213 Cal. App. 2d 252, 28 Cal. Rptr. 555 (1963). Cross complaint against employer was permitted on an implied agreement to indemnify the third party, although the statute of limitations for an independent action had expired. Iowa: Blackford v. Sioux City Dressed Pork, Inc., 254 Iowa 856, 118 N.W.2d 559 (1962). An employee of a commercial cleaning company was injured while cleaning a machine in the pork company plant. He sued the pork company as a third party tortfeasor. The pork company cross-petitioned his employer, the cleaning company, for indemnity if held liable to the employee. The court followed the reasoning of Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124 (1956), that the employer could be held liable to the third party tortfeasor on an implied promise to indemnify for breach of contract. The Iowa court dealt with the exclusive-remedy defense on the theory that the employer would not be liable to the third party for the employee's injuries, but for the employer's breach of contract with the third party. See also American Dist. Tel. Co. v. Kittleson, 179 F.2d 946 (8th Cir. 1950), decided under the Iowa Act, and discussed in the Blackford opinion. Kentucky: Whittenberg Eng'r & Constr. Co. v. Liberty Mut. Ins. Co., 390 S.W.2d 877 (Ky. App. 1965), discussed in text accompanying note 161 infra. Missouri: McDonnell Aircraft Corp. v. Hartman-Hanks-Walsh Painting Co., 323 S.W.2d 788 (Mo. 1959). The employee of a contractor hired to paint the third party's plant was injured by high tension wires and sued to recover from the third party. The third party brought in the contractor on the ground that the contractor had breached its duty of performance since it had been warned of the open wires. The court concluded that
implied indemnity doctrine.  

The greater part of the controversy between these cases has been supplied not by the issue whether an independent duty to indemnify based on contract is free of the compensation exclusiveness principle, but rather by the issue whether under the law of the jurisdiction there is an implied obligation of care and indemnity in the circumstances. Because Ryan and related maritime cases have


Maryland: American Radiator & Standard Sanitary Corp. v. Mark Eng'r Co., 230 Md. 584, 187 A.2d 864 (1963). New Jersey: Bertone v. Turco Prods., Inc., 252 F.2d 726 (3d Cir. 1958) (applying New Jersey law and finding no possibility of an implied agreement to indemnify arising out of the sale of a solvent). New Mexico: Royal Indem. Co. v. Southern Cal. Petroleum Corp., 67 N.M. 137, 353 P.2d 358 (1960). The petroleum company hired Clower to drill a well and employed the B.J. Service Company to cement the casing. Two Service employees were killed in a fire, and their dependents brought a third-party action against Petroleum and Clower. Service's compensation carrier intervened for its subrogation rights for benefits paid. Petroleum impleaded Service, the employer, alleging that the fire was caused by the negligence of Service, that the negligence was a breach of the contract between Petroleum and Service, and that Service was liable under an implied agreement to indemnify Petroleum. Petroleum received a release from the dependents. The trial court dismissed Petroleum's claim against Service, the employer, but granted Service's compensation carrier a summary judgment against Petroleum. Tennessee: Trammell v. Appalachian Elec. Coop., 135 F. Supp. 512 (E.D. Tenn. 1955) (holding that under Tennessee law no indemnity was permitted). But see General Elec. Co. v. Moretz, 270 F.2d 780 (4th Cir. 1959) (decided under the Tennessee act and allowing indemnity on the strength of I.C.C. regulations incorporated into the contract). See note 70 supra.

This controversy ranges far beyond the class of cases originating in the necessity of getting around the exclusiveness rule in workmen's compensation. See, e.g., Penn Tanker Co. v. United States, 409 F.2d 514 (5th Cir. 1969). Penn had
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bulked so large in this area, courts have all too often approached the issue as if it were a matter of taking sides for or against Ryan; some will then emphasize the peculiarities of the stevedore-shipowner situation and conclude that apart from such peculiarities Ryan should not be emulated.

As we have seen, however, the doctrine here involved had its genesis not in Ryan, but in the New York case of Westchester, and has substantial support in nonstevedore, nonmaritime, and nonfederal-law cases. The limiting factor is not the maritime quality, but rather the underlying contractual quality of the relation. The key to the Westchester type of case is that some kind of service was performed for the indemnitee under contract, along with which an implied obligation could run to the indemnitee to perform with due care and to indemnify for damages flowing from breach of this obligation.

Probably the most troublesome point of difference is between those cases that permit indemnity when the indemnitee's fault is relatively minor and those that flatly rule out indemnity if the indemnitee is guilty of any fault at all. The issue is well illustrated by the Florida opinion in the Florida Power and Light Co. case. The court quotes the following statement from the Supreme Court's Italia opinion:

Where the shipowner is liable to the employees of the stevedore company . . . for failing to supply a vessel and equipment free of defects, regardless of negligence, we do not think it unfair or unwise to require the stevedore to indemnify the shipowner for damages sustained as a result of injury-producing equipment supplied by the stevedore in furtherance of its contractual obligations. The district court says that this is the "underlying basis for the Ryan doctrine."

If by this the court means, as its italics indicate, that the essence of the Ryan doctrine is that the indemnitee in a Ryan recovery must be free from negligence, the statement is demonstrably wrong. Weyerhaeuser II had already established beyond all doubt that a ship-

paid Jones Act damages to a seaman for an eye injury. A United States hospital aggravated the injury by treatment. The court held that Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956), could not be stretched to imply a duty of workmanlike performance running from the hospital to Penn on the strength of which a claim for indemnity would lie.


156 376 U.S. 315, 324 (1964) (as quoted in 275 F. Supp. at 430).
owner could be guilty of some negligence and still recover under Ryan; the question from that point on became, as we have seen: how much negligence? Nevertheless, the court goes on:

It therefore appears that if the Ryan doctrine is extended, it would be extended only in favor of an indemnitee who has been held liable without fault, based on some concept of strict liability such as unseaworthiness. However, here as in the Ocean Drilling case, the plaintiff's liability to Rita Ahearn could not have been based on liability without fault. On the contrary, as plaintiff points out, its liability was based on its own negligence, even though it chooses to characterize that negligence as "passive." 157

What is really at stake here is a distinction between two indemnitees who have become liable—one without fault in any real sense; the other, liable on the basis of a degree of fault that is relatively markedly less than that of the indemnor. Practically all authorities, including texts and Restatements, would agree that if the indemnitee has become liable on purely technical or vicarious grounds, his constructive "fault" should not bar his right of indemnity against one who has saddled him with liability through genuinely tortious conduct. 158 This would include an indemnitee made liable, for example, solely by an automobile owner's liability statute, 159 or by a nondelegable duty with respect to the condition of premises. 160

Difficulty arises when the fault of the indemnitee moves from "constructive" or "technical" to "passive" or "secondary." It is submitted that much of the difficulty can be avoided by eschewing the use of vague adjectival descriptions like "passive," and sticking to the familiar factual interplay between creation of a danger and failure to discover it. It is difficult to see why there should be any conceptual obstacle to saying that when the employer negligently creates a dangerous condition in performing a service for the third party, he should indemnify the latter even if the third party was negligent to the extent of failing to discover the danger. It must always be borne in mind that we are here talking about a contractual relation. This helps to expose that sharp difference between the two forms of default. It is relatively easy to say that one contracting to perform services agrees not to create dangerous conditions. It is much harder to say that one accepting and paying for such services

157 275 F. Supp. at 430.
158 See W. Prosser, Law of Torts § 46 (3d ed. 1964); Restatement of Restitution §§ 76 & 95 (1937).
159 See text accompanying note 48 et seq. supra.
160 Restatement of Restitution § 95, comment a at 289 (1937).
agrees that he will discover any dangerous conditions created by the contractor.

An interesting variant on the *Westchester-Ryan* theme occurs when the role of employer claiming immunity is played by a general contractor, while the role customarily thought of as played by a third party is occupied by the workman's immediate employer, a subcontractor. This variant is well illustrated by *Whittenberg Engineering & Construction Co. v. Liberty Mutual Insurance Co.*\(^{161}\) Defendant Whittenberg, the general contractor, provided a defective hoist. An employee of Knight, the subcontractor, was injured as a result. Plaintiff, Liberty Mutual, insured the subcontractor's compensation liability. Having paid this compensation, plaintiff sought indemnity from the general contractor in the amount of the compensation paid. It was held that defendant Whittenberg, the general contractor, was liable to plaintiff for indemnity.

The decision is based squarely on a controlling precedent which the court declined to overrule: *Ruby Lumber Co. v. K. V. Johnson Co.*,\(^{162}\) as well as on *Johnson v. Ruby Lumber Co.*\(^{163}\) The rationale is as follows: an implied contract of indemnity arises in favor of a person who, without any fault on his part, is compelled to pay damages on account of the negligence or tortious act of another; although the general contractor as statutory employer is not a "third party" subject to suit by virtue of the third-party action provisions of the compensation act, this is immaterial; the present suit is bottomed not on the third-party section of the act but on the common-law right of indemnity.\(^{164}\)

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\(^{161}\) 390 S.W.2d 877 (Ky. App. 1965).

\(^{162}\) 299 Ky. 811, 187 S.W.2d 449 (1945).

\(^{163}\) 278 S.W.2d 71 (Ky. App. 1954).

\(^{164}\) The court analyzes the two foreign cases holding to the contrary. The first, Fidelity & Cas. Ins. Co. v. Sears, Roebuck & Co., 124 Conn. 227, 199 A. 93 (1938), is criticized by the court for failure to distinguish adequately the principles of contribution and indemnity. The A.L.R. commentator makes the same criticism in the annotation at 117 A.L.R. 565 (1938). The second, New Amsterdam Cas. Co. v. Boaz-Kiel Constr. Co., 115 F.2d 950 (8th Cir. 1940), is rejected on the ground that it considered common law rights "swept away" by the compensation acts—a view which, in too general a form, the court points out has been criticized by the author. See 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 72.64 (Supp. 1969). The Kentucky cases on this point appear to stand alone, except perhaps for the Illinois cases of Baker & Conrad v. Chicago Hts. Constr. Co., 364 Ill. 386, 4 N.E.2d 953 (1936), and Thornton v. Herman, 380 Ill. 341, 43 N.E.2d 934 (1942), which are not entirely comparable since they arose under the peculiar former provisions of the Illinois statute abrogating the common law right of the employee against a third-party tortfeasor, but continuing it in the hands of the employer.
This distinction is dramatically illustrated by this case. Earlier an attempt had been made by the employee to sue the general contractor as third-party tortfeasor and the present plaintiff insurer had joined in that action as subrogee; that action was dismissed. The court here, therefore, had the additional question of res adjudicata. It disposed of it principally by observing that the statute-based right of subrogation and the common-law-based right of indemnity were different causes of action. Likewise collateral estoppel did not apply, since the substantive issue of negligence was never actually litigated and determined.

The practical effect of the Kentucky rule is not quite so startling as might first appear; the liability being thrown upon the general contractor is not a large common-law damage liability. It is limited to the workmen's compensation liability of the subcontractor or his insurer. The net result is that when the general contractor's negligence is solely responsible for the injury, he becomes ultimately liable for workmen's compensation, whether or not the subcontractor is insured. If the subcontractor is not insured, this would happen by the operation of the statutory-employer provision; if the subcontractor is insured, it would happen by the route of the present type of indemnity suit by the subcontractor's insurer.

Noncontractual Indemnity

Up to this point, the genesis of the relation between employer and third party has been either a contract or a special relationship, such as that of bailee to bailor, that carries with it an established set of legal rights and duties. The final combination to be examined is that in which there is no such contractual or special relation—the simplest illustration being that of a collision between strangers. If the form of the recovery over by the third party against the employer sounds in tort, as in a claim for contribution, the near-universal rule, as noted earlier, bars the action under the exclusive-remedy principle. There remains the question of whether by clothing his claim in the form of indemnity, the third party can surmount the exclusiveness barrier.

The third-party plaintiff here has not one hurdle to leap, but two. He must first establish that the law implies an agreement by the primary tortfeasor to indemnify the secondary. Even if he can do this, however, the harder task remains: he must also show that this

165 See text accompanying note 5 et seq. supra.
liability, even if contractual in form, is not on account of the injury. The final result of this dual obstacle is clear: the great majority of cases hold that when the relation between the parties does not spring from a contract or special position such as bailee or lessee, the third party cannot recover indemnity from the employer. This results because an active or primary wrongdoer does not have an implied obligation, capable of penetrating the exclusiveness rule of workmen's compensation law, to indemnify a passive or secondary wrongdoer. In the leading case establishing this rule, Judge Learned Hand gave the following reason for the holding:

[W]e shall assume that, when the indemnitor and indemnitee are both liable to the injured person, it is the law of New Jersey that,

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166 Federal: United Air Lines, Inc. v. Wiener, 335 F.2d 379 (9th Cir.), petition for cert. dismissed, 379 U.S. 951 (1964), held that as to government employees killed in a collision between a United Air Lines plane and a military plane, United was barred by the exclusive-remedy provisions of the Federal Employees' Compensation Act (which are indistinguishable from those of the Longshoremen's Act) from recovery over against the United States in the absence of an express or implied duty of indemnity based on a contractual relation or a joint liability to the injured party. The former condition was unsatisfied since there was no contract between the parties, and the court refused to find an implied indemnity growing out of a concept of active and passive or primary and secondary negligence. The latter condition was also unsatisfied because there was nothing here resembling the special admiralty duty of sharing damages invoked in Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597 (1963) (Weyerhaeuser I) rev'g United States v. Weyerhaeuser S.S. Co., 294 F.2d 179 (9th Cir. 1961). This aspect of the case is discussed in the text accompanying note 15 supra. Halliburton Co. v. Norton Drilling Co., 302 F.2d 431 (5th Cir. 1962), discussed in note 65 supra:

Furthermore, even if we were to agree with Halliburton that its fault was only passive or secondary, there is a serious doubt that this alone would be a sufficient ground for imposing an obligation to indemnify upon Norton, in view of the fact that the applicable workmen's compensation statutes have completely abolished an employer's tort liability for injuries to his employees. Id. at 434. See also Brown v. American-Hawaiian S.S. Co., 211 F.2d 16 (3d Cir. 1954); Crawford v. Pope & Talbot, Inc., 206 F.2d 784 (3d Cir. 1953); Lo Bue v. United States, 188 F.2d 800 (2d Cir. 1951); American Mut. Liab. Ins. Co. v. Matthews, 182 F.2d 322 (2d Cir. 1950), discussed in note 98 supra; Standard Wholesale Phosphate & Acid Works, Inc. v. Rukert Terminals Corp., 65 A.2d 304 (Md. 1949) (applying Longshoremen's and Harbor Workers' Compensation Act). See also Murray v. United States, 405 F.2d 1361, 1367 (D.C. Cir. 1968), for an inconclusive discussion of noncontract indemnity. Georgia: Central of Ga. Ry. v. Lester, 118 Ga. App. 794, 165 S.E.2d 587 (1968). The court quotes most of the opinion from O'Steen. See O'Steen v. Lockheed Aircraft Corp., 294 F. Supp. 409 (N.D. Ga. 1968) (applying Georgia law). Louisiana: General Elec. Co. v. Cuban Am. Nickel Co., 396 F.2d 89 (5th Cir 1968) (applying Louisiana law). See treatment of this case in note 65 supra. See also Halliburton v. Norton Drilling Co., supra, in this note under Federal, in which the court says that although maritime law controlled, it would reach the same result applying Louisiana law; Ocean Drilling & Exploration Co. v. Berry Bros. Oilfield Serv,
regardless of any other relation between them, the difference in

377 F.2d 511 (5th Cir.), cert. denied, 389 U.S. 849 (1967), applying Louisiana law and holding that there can be no noncontractual indemnity even when the third party's negligence was "passive." Michigan: Husted v. Consumers Power Co., 376 Mich. 41, 135 N.W.2d 370 (1965). Plaintiff employee sued third-party Power Company for alleged negligence as to its power line. Power Company sought reimbursement from plaintiff's employer, alleging negligence in bringing a crane in contact with the power line—the episode that injured plaintiff. The court held that the action by the Power Company over against the employer would not lie. The right to implied indemnity was not established. The court flatly rejected the active-passive negligence theory. Instead, it follows the Slattery case, supra this note under Federal, and the often-cited common law rule that the right of indemnity arises against a wrongdoer whose wrong has saddled the plaintiff with a liability only when the plaintiff's own wrong does not bar him. The court also emphatically rules out contribution as a ground for recovery over. New Jersey: Bertone v. Turco Prod., Inc., 252 F.2d 726 (3d Cir. 1958) (applying New Jersey law); Slattery v. Marry Bros., 186 F.2d 134, 139 (2d Cir. 1951) (applying New Jersey law); North Carolina: Hunsucker v. High Point Bending & Chair Co., 237 N.C. 559, 75 S.E.2d 768 (1953); North Dakota: White v. McKenzie Elec. Coop., 225 F. Supp. 940 (D.N.D. 1964); Texas: Abilene v. Jones, 355 S.W.2d 597 (Tex. Civ. App. 1962). The third-party tortfeasor, held liable to the employee for damages as the result of a collision, could not recover contribution or indemnity from the injured worker's employer on pleading that the contractor employer had furnished the worker a defective tractor and that the employer had been negligent in entrusting the use of the tractor to an unsafe and incompetent operator, the injured worker. The employer secured summary judgment. Cf. Westfall v. Lorenzo Gin Co., 287 S.W.2d 551 (Tex. Civ. App. 1956), which implies that an indemnity action might lie if the third party pleaded facts showing that the employer was guilty of gross negligence. No case is cited in which such a recovery over has in fact been allowed. Wisconsin: Kennedy-Ingalls Corp. v. Meissner, 16 Wis. 2d 145, 113 N.W.2d 562 (1962). Meissner and Associated Sales & Bag Company (manufacturer) sold certain industrial aprons to Kennedy-Ingalls Corporation (supplier) who in turn sold the aprons to A.O. Smith Corporation (employer), one of whose employees was severely burned when the apron caught fire. The result of a number of claims and actions stood as follows: The employee received $17,000 in compensation benefits from the employer. The employee also received an additional $17,000 in damages from the supplier. The supplier was in turn reimbursed in an action on warranty of goods by the manufacturer. The employer sought to be reimbursed directly from the manufacturer for the $17,000 compensation paid to the employee. The manufacturer counterclaimed to recover the amount paid to the supplier on the grounds that the employer had been negligent in allowing the employee to use the apron. The court held that the employer could not be liable in tort to the manufacturer for any damages the manufacturer had had to pay the supplier since the employer's exclusive liability for the employee's injuries lay under the compensation act and therefore the employer could not be liable in tort for the same loss as a joint tortfeasor or as one contributorily negligent. The counterclaim was dismissed. Contra: Kentucky: Kentucky Util. Co. v. Jackson County Rural Elec. Coop., 438 S.W.2d 788 (Ky. App. 1968). Plaintiff settled a wrongful death claim in which it had been alleged that plaintiff was negligent in failing to discover and correct a dangerous condition which had been created by defendant, the decedent's employer. After settling the death claim, plaintiff sought recovery against the employer for indemnification. The workmen's compensation act was held not to bar recovery in this case, if the
gravity of their faults may be great enough to throw the whole
loss upon one. We cannot, however, agree that that result is ra-
tionally possible except upon the assumption that both parties
are liable to the same person for the joint wrong. If so, when
one of the two is not so liable, the right of the other to indemnity
must be found in rights and liabilities arising out of some other
legal transaction between the two. 167

Note that as to the two hurdles, Judge Hand does not concern himself
with the first. He assumes for the sake of argument that the third-
party plaintiff could overcome it in New Jersey, since in any case
the second hurdle, the exclusiveness bar, is insurmountable. In some
of the cases, the first issue—whether there is any implied obligation
of indemnity at all—is treated at more length. The results vary, but
the final outcome is usually the same: the action fails. For this
reason, there is little occasion for an extended discussion of the ex-
tent to which different states accept the fiction of an implied agree-
ment by one wrongdoer to reimburse a lesser wrongdoer when the
latter is forced to pay the damages. 168

In General Electric Co. v. Cuban American Nickel Co., 169 for
example, Judge Wisdom examines with great thoroughness the state
of the Louisiana law on this point and concludes that in that juris-
diction the distinction is between, not active and passive negligence,
but actual and constructive fault. In either case, however, the ac-
tion would be barred, since its origin lies in the breach of a duty owed
by the employer to the employee. In other words, the same kind of
"common liability," which is a condition precedent to recovery of
contribution by one tortfeasor against another, is also a condition
precedent to recovery of indemnity by a secondary from a primary
wrongdoer. 170 In these cases there can be no such common lia-

167 Slattery v. Marra Bros., 186 F.2d 134, 139 (2d Cir. 1951).
168 For a discussion of this fiction, see F. Woodward, THE LAW OF QUASI
CONTRACTS § 259 (1913). The Supreme Court of the United States has held that
when one person's guilt consists in creating a dangerous condition and the other's
consists only in failing to discover it, the former's negligence is primary and sub-
jects him to this indemnity obligation. Union Stock Yards Co. v. Chicago, B. & Q.
169 396 F.2d 89 (5th Cir. 1968).
170 Indeed, this class of cases is not so much different from the ordinary con-
bility, because the employer's liability to the employee, which is a special and exclusive liability under the compensation act, cannot be a liability in common with the third party's liability.

The attempt to assert noncontractual indemnity often occurs in cases in which the relation between the employer and the third party is indeed contractual at base. Here its role is that of a "second string to the bow" of the third-party plaintiff. In such cases, however, it has never added anything to the third party's case. If he has failed to establish a Ryan-type indemnity running with the contract, it is not surprising that he has fared no better in trying to extract a noncontractual indemnity from the same facts. On the other hand, in one or two cases courts have begun by finding that the facts in the case would support a common-law right of indemnity on the active-passive negligence theory, but then, finding that route blocked by the exclusive-remedy clause, have gone on to say that the same facts would also support an implied contractual warranty of the Ryan-Westchester type not barred by the act. If the Kittleson case were to be decided today, it would probably follow this pattern since, as pointed out by Judge Learned Hand in Slattery v. Marra Brothers, it could be explained on the basis of the employer's undertaking to the contractor to furnish the contractor's men with a safe place to work.

In some cases, however, there is no contract whatever between the parties. Thus, in United Air Lines there was simply an air collision; in Abilene v. Jones, an automobile-tractor collision; in Husted v. Consumers Power Co., a contact between the employee's crane and the third party electric company's power line. In other

tributution cases as might at first appear. The fiction of implied promise can be applied just as readily to ordinary contribution between tortfeasors as to indemnity between primary and secondary tortfeasors and has indeed been used in some jurisdictions as the theoretical justification for contribution. While this theory is unnecessary to account for contribution, Camp v. Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669 (1870), it would, in jurisdictions where it is accepted, support an argument that contribution can be demanded of the employer by the third party with just as much reason as indemnity if both are based on the fiction of a separate obligation running from the employer to the third party.

171 American President Lines, Ltd. v. Marine Terminals Corp., 234 F.2d 753 (9th Cir. 1956); McDonnell Aircraft Corp. v. Hartman-Hanks-Walsh Painting Co., 323 S.W.2d 788 (Mo. 1959).
172 179 F.2d 946 (8th Cir. 1950), rev'd 81 F. Supp. 25 (N.D. Iowa 1948).
173 186 F.2d 134, 139 (2d Cir. 1951).
174 335 F.2d 379 (9th Cir. 1964).
cases there may be a contractual relation of sorts, but not one along which an implied obligation can travel, or at least not travel in the necessary direction. In *Bertone v. Turco Products, Inc.*, the third party was the manufacturer and the employer was the purchaser of a dangerous solvent. If the positions had been reversed, a separate implied duty running with the goods might have been found, although in the *Cuban American Nickel* case even this was not enough. When a purchaser buys a product, however, does he make an implied contract with the manufacturer to use the goods in such a way as not to bring liability upon the manufacturer? This would be stretching the concept of contract out of all relation to reality. The court's approach to the matter assumed that the employer's duty to the manufacturer, if any, would have to be one based on its relative negligence, and on that basis could not survive the exclusive-liability clause. A similar attempt to make a manufacturer's warranty relationship operate in reverse was thwarted in *Kennedy-Ingalls Corp. v. Meissner*. Here the manufacturer of an apron, bought by the employer from a supplier, was ultimately held liable for injuries to the employee when the apron caught fire. The manufacturer attempted to recover over against the employer on the ground that the employer was negligent in letting the employee use the apron. The action was held barred, since the employer could not be found jointly liable with the manufacturer in tort.

In summary, when the relation between the parties involves no contract or special relation capable of carrying with it an implied obligation to indemnify, the basic exclusiveness rule generally cannot be defeated by dressing the remedy itself in contractual clothes, such as indemnity. What governs in these cases is not the delictual or contractual form of the remedy but the question: is the claim "on account of" the injury, or on account of a separate obligation running from the employer to the third party?

**CONCLUSION**

The phrase most frequently heard in arguments against recovery over by the third party against the employer is this: the allowance of such recovery over accomplishes indirectly what cannot be done directly and, therefore, evades the spirit of the legislation. This is not entirely accurate, for it does not tell the whole story. True, the

177 252 F.2d 726 (3d Cir. 1958).
178 See notes 65 & 169 *supra*.
179 16 Wis. 2d 145, 113 N.W.2d 562 (1962).
end result is that a common-law size recovery proceeds from the employer to the employee. In the process, however, two things are accomplished, one of which is relevant to the purposes of the compensation provision and the other of which is independent of it. The relevant accomplishment is that of preserving the employee’s common-law rights against negligent outsiders. This having been done, there still remains the job of adjusting rights fairly between the outsider and the negligent employer. The question here becomes very precise: did 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 whereas the injured employee got *quid pro quo* in receiving assured compensation payments as a substitute for tort recoveries, 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.

A situation like this ought to be dealt with legislatively. It is rather inconsiderate to force courts to speculate about legislative intention on the strength of statutory language, in the framing of which the draftsmen had not the remotest trace of the present question in their minds. The legislature should face squarely the question whether the third party who happens to be so unfortunate as to get tangled up with a compensable injury should, so to speak, individually subsidize the compensation system by bearing alone a burden which normally he could shift to the employer.