Negligence Standards under the 1972 Amendments to the Longshoremen's and Harbor Worker's Compensation Act: Examining the Viewpoints

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COMMENT

NEGLIGENCE STANDARDS UNDER THE 1972 AMENDMENTS TO THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT: EXAMINING THE VIEWPOINTS

I. INTRODUCTION

In 1972, the Longshoremen's and Harbor Workers' Compensation Act of 1927 was amended by Congress. Although the 1972 Amendments substantially changed the 1927 Act, the most significant and controversial modification was effectuated by section 905(b) which eliminated the injured harbor worker's "seaworthiness" cause of action against the vessel. Nevertheless, continuing the policy of the superseded section, section 905(b) did allow a third party action against the vessel if the claim was grounded in negligence.

In amending section 905(b), Congress apparently granted wide discretion to the courts in fashioning the parameters of the duty owed by the vessel to the longshoreman. Specifically, in construing the section, there are two central questions to which Congress provided no specific answers. First, by eliminating the longshoreman's seaworthiness remedy, did Congress intend that the remainder of the post-seaworthiness case law should remain intact? If not, what is the applicable standard to judge the extent of the shipowner's duty to the longshoreman? Second, if common law negligence concepts form the applicable initial frame of reference, how are they to be


5. For a definition of seaworthiness and an outline of the evolution of this doctrine in the case law, see notes 24-27 & 59 and accompanying text infra.

6. See text accompanying note 77 infra.

7. See text accompanying notes 122 & 123 infra.

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modified because of either the special problems of maritime occupations or the humanitarian notions of admiralty law? The answers to these questions are unclear. Most of the courts have concluded that Congress created an entirely new remedy for the longshoreman, one that was to be referenced to, if not congruent to, the duties of a contractee-landowner to an employee of an independent contractor working on the premises.\(^8\) In essence, this means that the common law duty of the landowner to his business invitee circumscribes the scope of the vessel's duty to the longshoreman. These decisions are indicative of judicial attitudes which differ significantly from those which underlay the conclusions of the seaworthiness cases.\(^9\) However, in reaching this result, the courts may have imposed on the longshoreman a standard which overlooks the pragmatic needs of maritime occupations and, more importantly, contemporaneous congressional policy perceptions which may have been more clearly expressed in the enactment of the Occupational Safety and Health Act in 1970.\(^10\)

The purpose of this Comment is to review the conclusions of the early cases and to match them against other possible sources of law which could form the appropriate frame of reference for the interpretation of section 905(b). Our beginning lies in an extremely complex statutory and case law history.

II. Course Changes in the Maritime Law of Personal Injuries: The Background of Section 905(b)

A. The Early Days

Originally, the work of longshoremen in loading and unloading vessels was treated as a non-maritime activity.\(^11\) It was not until 1882 that a harbor worker was able to resort to the admiralty court for a personal injury claim.\(^12\) In such cases, common law tort principles were applied to grant or deny claims.\(^13\) Following the turn of the century, the enactment of workmen's compensation statutes in most states prompted Congress to place the harbor worker under the coverage of the state systems; but, premised on the need for federal uniformity, the United States Supreme Court rejected Congress' efforts in two controversial and divided decisions.\(^14\) As a result of these decisions, harbor workers were the only group of shore-side workers who were unable to avail themselves of workmen's compensa-

\(^8\) See notes 78-93 and accompanying text infra.

\(^9\) Compare text accompanying notes 65-67 infra, with notes 17, 124 & 128-35 and accompanying text infra.


\(^12\) Leathers v. Blessing, 105 U.S. 626 (1881) (business invitee on board injured because of negligently stowed cargo).

\(^13\) See generally Annot., 44 A.L.R. 932 (1926) (liability of contractees for injuries sustained by contractor's employees in the course of contracted work).

tion remedies. The Court's sensitivity to this situation, coupled with Congress' failure to implement the Court's suggestion that a federal compensation system be created for the harbor worker and longshoreman, precipitated the Court's 1926 decision that the harbor worker was a seaman for purposes of the Jones Act.15 Congressional reaction was swift; less than a year later it enacted the Harbor Workers' and Longshoremen's Compensation Act of 1927. Under the 1927 Act, the Longshoreman's right of recovery against his stevedore-employer was exclusively limited to compensation payments,16 although a cause of action was preserved against the shipowner and other third parties who may have caused the injury.17 Once the plaintiff's status had been ascertained,18 the actions during this period were invariably grounded in familiar negligence concepts.19 Since 15. International Stevedoring Co. v. Haverty, 272 U.S. 50 (1926). Justice Holmes acknowledged that the Supreme Court was reaching for an equitable decision in Haverty. He stated: "as the word is commonly used, stevedores are not 'seamen.' But words are flexible. The work upon which the plaintiff was engaged was a maritime service formerly rendered by the ship's crew." Id. at 52 (Holmes, J., dissenting) (citations omitted). The Jones Act, 46 U.S.C. § 688 (1970), is the seaman's remedy for personal injuries caused through a negligent act or omission for which the vessel is responsible.


17. This is the standard practice. See 2 A. Larson, The Law of Workmen's Compensation ch. XIV passim (1974 ed.) [hereinafter cited as Larson]. The theoretical basis is that the third party is not privy to the "bargain" struck between employer and employee. In such a "bargain," the employee gives up the right to potentially unlimited damages in return for the sure remedy of compensation, while the converse reflects the employer's half of the compromise. See generally W. Prosser, Handbook of the Law of Torts § 80 (4th ed. 1971) [hereinafter cited as W. Prosser].

Ramirez v. Toko Kaiun K.K., 385 F. Supp. 644 (N.D. Cal. 1974), an early case construing and interpreting section 905(b) to establish the standard of care owed by the shipowner to the longshoreman, offered a similar explanation of the trade-off that was represented by elimination of the longshoreman's seaworthiness remedy: Congress concluded that the judicially created protection in the Sieracki/Ryan [Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); Ryan Stevedoring Co. v. Pan-Atlantic S.S Corp., 350 U.S. 124 (1956) ] line of cases was not viable and fashioned an alternative in the 1972 Amendments. A tradeoff was made by Congress in an attempt to balance the interests of all parties involved. Under the plan as formulated by Congress, the longshoreman lost his claim against the vessel under the warranty of seaworthiness allowed by Sieracki, and in return was granted much higher compensation benefits. The stevedoring company that employs the longshoreman was forced to pay the higher workmen's compensation benefits, but was relieved of liability from Ryan-type indemnity suits brought by the vessel. The vessel lost its indemnity rights against the stevedoring company, but had its liability to longshoremen limited to cases where its negligence can be proved.

Id. at 650 (citations omitted). The notions expressed by the Ramirez court form an important underpinning for current case law constructions of sections 905(b). See notes 91, 124 & 141 and accompanying text infra. See also Comment, Risk Distribution and Seaworthiness, 75 Yale L.J. 1174, 1183-85 (1966) (discussing this theory in connection with the case law prior to the 1972 Amendments).

18. It was during this period that the court wrestled with the "maritime but local" and "twilight zone" doctrines in maritime personal injury and compensation cases. The most useful discussion of these cases may be found in G. Gilmore & C. Black, The Law of Admiralty §§ 6-48 to -52 (1st ed. 1957).

the actions were relatively few,20 fundamental differences as to the scope of the duties which the longshoreman, stevedore, and shipowner owed inter se were not of particular importance or, at least, were not litigated.

B. Seamen's Remedies: The Judicial Doctrine of “Seaworthiness”

For the seaman, however, there were important developments in maritime negligence concepts throughout this period. Negligence standards developed under the Jones Act began to suggest judicial viewpoints that were considerably more liberal than their counterparts as evolved under common law negligence.21 The unspoken social perceptions of these cases laid the philosophical foundation for the next development in the law of maritime personal injuries, the judicial doctrine of “seaworthiness.”

In 1944, with the advent of the Court’s “humanitarian majority,”22 the storm of third party suits first began to break in Mahnic v. Southern Steamship Co.23 In this case, the Court’s discovery of the maritime doctrine of near absolute liability — “seaworthiness”24 — greatly expanded the rights of the seaman. Two years later, in Seas Shipping Co. v. Sieracki,25 the longshoreman too was afforded a seaworthiness cause of action “because he was doing a seaman’s work and incurring a seaman’s hazards.”26

The availability of seaworthiness as a cause of action to both longshoremen and seamen substantially impeded the clear development of maritime

20. Gilmore & Black, supra note 3, § 6-4, at 278.
21. See, e.g., Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424 (1939). In Socony, the Court held that assumption of risk was not available as a defense in seamen’s personal injury cases even though the case presented a situation where the injured plaintiff had a choice between a safe way to accomplish the job and a dangerous way. A fuller discussion of this development may be found in Gilmore & Black, supra note 3, §§ 6-26 to 6-37, at 351-83.
22. See, e.g., Gilmore & Black, supra note 3, § 6-1(a), at 274-75; Tetreault, supra note 11, at 400, 418.
24. The Court has defined seaworthiness as essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. It is a form of absolute duty owing to all within the range of its humanitarian policy. Seas Shipping Co. v. Sieracki, 328 U.S. 85, 94-95 (1946) (citations omitted). In outlining the possible parameters of this doctrine, the Court has stated:
[A] vessel’s condition of unseaworthiness might arise from any number of circumstances. Her gear might be defective, her appurtenances in disrepair, her crew unfit. The number of men assigned to perform a shipboard task might be insufficient. The method of loading her cargo, or the manner of its stowage, might be improper. For any of these reasons, or others, a vessel might not be reasonably fit for her intended service.
Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 499 (1971). For an exhaustive listing of conditions which may result in the vessel being found unseaworthy, see 2 Norris, supra note 3, § 323.
26. 328 U.S. at 99.
negligence concepts since, in most cases, where there was negligence, there was also unseaworthiness. However, in a limited number of Jones Act cases where the plaintiff's cause of action was based on negligence alone, the Court continued to liberalize negligence concepts in maritime personal injury cases. This expansion was justified on the grounds that the maritime worker was unable to protect himself from extraordinary dangers entailed in his work and that he was not financially capable of bearing the resulting injuries. This liberalization of the theories of maritime negligence resulted in significant expansion of the scope of a shipowner's duty as well as the practical elimination of the requirement of a causal relationship between the breach of duty and the injury. For example, in Hopson v. Texaco, Inc., a vessel's officer hired an independent taxi driver to transport injured seamen to a local hospital. While on route to the hospital, an accident occurred which was caused solely by the fault of the driver. By holding the shipowner liable for the negligence of the taxi driver, the Court, in effect, abrogated the distinction between an agent and an independent contractor for the purposes of maritime negligence. Similarly, the shipowner was found liable in Kernan v. American Dredging Co., a case in which a seaman was fatally burned when an oil spill was ignited by a navigation lamp. The lamp was hung in a manner which violated Coast Guard navigation rules since it was only 3 feet above the water. This regulation was not designed to prevent the type of accident which occurred. The Court, however, found that violation of the rule was negligence, thus rejecting the common law rule that breach of a statutory

27. See text accompanying notes 86 & 119 infra.
28. These cases are of considerable importance in that they allow isolation of the negligence theory since seaworthiness was not advanced as an alternative theory of recovery. E.g., Kernan v. American Dredging Co., 355 U.S. 426 (1958); see text accompanying note 86 infra. The longshoreman had no occasion to seek to develop liberal standards of maritime negligence principles when he was injured since negligence and seaworthiness were largely coterminous. See GILMORE & BLACK, supra note 3, § 6-57, at 449-55. But see Usner v. Luckenbach Overseas Corp., 400 U.S. 494 (1971); text accompanying notes 60 & 61 infra. If the longshoreman was not aboard the vessel when injured, he could only pursue those remedies available under state law. See, e.g., Nacirema Operating Co. v. Johnson, 396 U.S. 212, 223-24 (1969). However, the law was complex and unsettled in this area. See GILMORE & BLACK, supra note 3, § 6-49, at 418-23. In the 1972 Amendments, Congress improved this situation by moving the coverage of the Act ashore. 33 U.S.C. § 903(a) (Supp. IV, 1974). Problems remain, however, concerning the scope of coverage and remedies available to a longshoreman who is injured ashore. See GILMORE & BLACK, supra note 3, § 6-50, at 423-26.
32. Id. at 263.
33. Id.
34. Id. at 264.
36. Id. at 427-28.
37. Id. at 439.
duty was negligence only if the resulting injury was of the type which the statute sought to prevent.\footnote{See \textit{W. Prosser}, \textit{supra} note 17, at 200-04.}

In addition to these developments, the Supreme Court significantly reduced the quantum of evidence which was necessary to take the plaintiff's case to the jury. In\textit{ Sentilles v. Inter-Caribbean Shipping Corp.,}\footnote{361 U.S. 107 (1959).} the plaintiff sued to recover damages for a serious tubercular illness alleged to have been caused when he was washed overboard while at sea.\footnote{\textit{Id.} at 107-08.} Although no medical witness could testify that the accident in fact caused the illness,\footnote{\textit{Id.} at 109.} the Court, in reversing the trial court, held the evidence sufficient to support the jury's conclusion that the illness was caused by the accident.\footnote{\textit{Id.} at 110. In a similar common law action, it is unlikely that the court would have allowed recovery. \textit{See, e.g.,} \textit{Kramer Serv., Inc. v. Wilkins}, 184 Miss. 483, 186 So. 625 (1939); \textit{W. Prosser}, \textit{supra} note 17, at 241.} In\textit{ Ferguson v. Moore-McCormack Lines, Inc.,}\footnote{352 U.S. 521 (1957).} the plaintiff was injured while using a knife to remove frozen ice cream from a container.\footnote{\textit{Id.} at 522.} The Court rejected the defendant's argument that it was not reasonably foreseeable that the plaintiff would use the knife to remove the ice cream although the defendant acknowledged that it had failed to furnish a tool adequate for the job.\footnote{\textit{Id.} at 523.} Reinstating the jury verdict for the plaintiff, the Court held:

\begin{quote}
[T]he jury \ldots plays a preeminent role in \ldots Jones Act cases. \ldots It was not necessary that [the defendant] be in a position to foresee the exact chain of circumstances which actually led to the accident. \ldots [T]he standard of liability under the Jones Act is that established by Congress under the Federal Employers' Liability Act. \ldots "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."\footnote{\textit{Id.}, quoting \textit{Rogers v. Missouri Pac. R.R.}, 352 U.S. 500, 506 (1957) (citations omitted). One authority has added this amplification: \textit{[C]ommon law standards of negligence, even as those standards are applied in railroad cases decided under the Federal Employees' Liability Act do not necessarily apply to the conditions of maritime employment: the shipowner's duty may be higher than that of the shore employer and the quantum of negligence needed to establish his liability less.} \textit{GILMORE & BLACK}, \textit{supra} note 3, \S 6-35, at 376.}
\end{quote}

It appears then that the thrust of these opinions was to mandate that the shipowner, as employer, was required to furnish to his seamen, as employees, a place of employment free from recognizable hazards, even though this was not required under common law negligence concepts or the resultant injury was not foreseeable in the common law sense.
C. Longshoremen's Recoveries Under the 1927 Act: Circular Liability

Although criticized heavily, Sieracki was enlarged and extended. The difficulty was that most injuries were not caused by the condition of the vessel; rather, they were caused by an act or omission of the stevedore or his employee—who in some cases was the litigant himself. Under the doctrine of seaworthiness, these acts or omissions were chargeable against the vessel owner. This state of affairs was highly unsatisfactory to the shipowner, and therefore, he began to cast about for a way out of the problem. But Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp. presented a most formidable barrier to resolution of the plight of the unhappy shipowner. In Halcyon, the Court held that there could be no contribution among joint tortfeasors in maritime personal injury cases not involving collision.

Initially, all of this was probably of limited concern to the stevedore. He was liable for compensation in any event, and, if the employee were successful in a third party action, the stevedore had a right of subrogation as the compensation payor. However, the favored position of the stevedore was soon to undergo a radical change. Despite Halcyon and the exclusive remedy provision of the 1927 Act regarding the extent of the stevedore’s liability, the Court, in Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., allowed the vessel to recover the damages for which it was liable to the injured longshoreman from the stevedore in an indemnification action for the breach of an express or implied warranty of workmanlike performance. The shipowner's success in Ryan thus possibly became the most important catalyst in generating the brooding set of forces which eventually led to the 1972 Amendments.

Despite strong dissatisfaction with, and sharp criticism of, the Sieracki-Ryan doctrine, political vectors prevented congressional consensus and

47. E.g., Seas Shipping Co. v. Sieracki, 328 U.S. 85, 103-08 (1946) (Stone, J., dissenting); Tetreault, supra note 11, at 416. But see Hearings on H.R. 207 Before the Subcom. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries, 87th Cong., 2d Sess. 149-56 (1962) [hereinafter cited as 1962 Hearings]; Comment, supra note 17, at 1179-80.
48. Much, if not most, of the case law has revolved about this very point. See, e.g., cases cited in note 59 infra.
49. Admiralty's rule of comparative negligence would only serve to mitigate damages, not to bar recovery. See, e.g., Curry v. Fred Olsen Line, 367 F.2d 921 (9th Cir. 1966).
50. See George, Ship's Liability to Longshoremen Based on Unseaworthiness — Sieracki through Usner, 3 J. MARITIME L. & COM. 45 (1971).
51. See Gilmore & Black, supra note 3, § 6-55, at 442.
52. 342 U.S. 282 (1952).
53. Id. at 285-86.
56. Id. at 128-34.
the likelihood of amelioratory action. \[58\] During this hiatus, the Court continued to elaborate upon the circular liability problem. As the majority viewpoint on the Court shifted back and forth, the case law permutations and combinations of this doctrine became confused if not contradictory. \[59\]

Nevertheless, there was some recognition that the Court may have gone too far in this area of judicial legislation. Shortly before the enactment of the 1972 Amendments a "new" majority in the Court arose and the tide began to turn. In *Usner v. Luckenback Overseas Corp.*, \[60\] the Court found that a single act of negligence of a fellow longshoreman did not render the vessel unseaworthy. In addition, the Court held that operating negligence was distinct from unseaworthiness. \[61\] In *Victory Carriers, Inc. v. Law*, \[62\] the same majority diluted the implications which had been raised in a number of earlier cases and which had seemed to suggest that the vessel's liability for seaworthiness might be extended to the stevedore's operations on the pier. \[63\] The *Victory* Court explicitly held that there was

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The Committee also has taken note of the inescapable fact that the controversy over third party claims by longshoremen has had political ramifications which have resulted in forestalling any improvements in the present Act for over twelve years. *SENATE REPORT*, supra note 3, at 9.

59. For instance, in Reed v. The Yaka, 373 U.S. 410 (1963), the vessel had been demised to the stevedore under a bareboat charter for the period of the loading operations. The Court treated the stevedore as an owner *pro hac vice* and allowed an in rem recovery against the vessel in spite of the exclusive liability provision of the 1927 Act and the fact that it was the stevedore's equipment which had created the unseaworthy condition. In Weyerheuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563 (1958), the Court allowed indemnification against the stevedore where there was no seaworthiness condition and the vessel and the stevedore were concurrently negligent. Furthermore, in *Crumady* v. The Joachim Hendrik Fisser, 358 U.S. 423 (1959), the Court permitted indemnification against the stevedore where his employee "brought into play" the unseaworthy condition of the vessel. The Court, in Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963), extended seaworthiness to the pier, when it permitted a longshoreman to recover for injuries received when he had slipped on beans which had been spilled from a defective bag in the course of the unloading operation. In Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315 (1964), the longshoreman-plaintiff recovered on a seaworthiness action against the vessel where the defective equipment was supplied by the stevedore even though the defect was latent and no negligence of the stevedore was involved. Nonetheless, the Court allowed indemnification against the stevedore, holding that negligence of the stevedore was not necessary when the defective equipment had been supplied by him. Many more cases, too numerous to recount here, proceeded upon similar judicial voyages. See, e.g., Proudfoot, *"The Tar Baby": Maritime Personal Injury Indemnity Actions*, 20 Stan. L. Rev. 423 (1968), wherein the inconsistencies of the cases which followed in the wake of *Sieracki* and *Ryan* are discussed.

60. 400 U.S. 494 (1971).

61. Id. at 500. See also Earles v. Union Barge Line Corp., 486 F.2d 1097 (3d Cir. 1973).


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no admiralty jurisdiction over an action by a longshoreman injured on the
dock in the course of a loading operation while operating a forklift owned
by the stevedore. 64 Usner and Victory are not without meaning although
the 1972 Amendments are in effect and cases interpreting them are just
beginning to filter up through the appellate process. There remains a
question which was raised by Usner and Victory and is as yet unanswered:
What was the unspoken perception of the majority in those opinions?
They may stand only for the proposition that the Court had finally over-
stepped itself in Sieracki's progeny; but, more significantly, they could
indicate that the Court has reevaluated its doctrinal stance and begun to
turn away from the special status which the maritime worker has been
afforded in admiralty for over half a century. Much of the future case
law will turn on the answer to this question and the circuit courts' evalu-
ations of what were the true motivations of the Usner and Victory ma-
jorities. However, an objective evaluation of the meaning that these cases
hold for section 905(b) plaintiffs is impossible at this time.

D. Historical Impacts on Interpretation of Section 905(b)

It is likely that the Sieracki-Ryan line of cases were the result of
three rarely expressed, but fundamental notions: first, a general dissatisfac-
tion with the low levels of compensation available under the 1927 Act
and a realistic assessment that Congress would act only infrequently to
amend the available levels of payments; 65 second, a humanitarian appraisal
of the difficult societal position of the seriously injured worker and family
suddenly cut off from wages and only receiving niggardly compensation
payments; 66 and third, a recognition that most injuries to longshoremen
were attributable to the failure of the stevedore to correct unsafe conditions
or to supply adequate equipment for loading and unloading operations. 67
When these notions coalesced with the probable perception that strict
adherence to the exclusive liability provision of the 1927 Act and its low
compensation awards would provide little incentive for necessary remedial
action, the Sieracki-Ryan doctrine became an almost inevitable response.

206 (1963). Both cases are briefly discussed in note 59 supra. The 1972 Amendments
moved the coverage of the Act ashore. See note 28 supra. However, in view of the
reluctance of the Victory majority to extend seaworthiness ashore despite the humani-
tarian and historical arguments offered by the dissent, it is likely that Victory will
have an impact on the interpretation of section 905(b).
64. 404 U.S. at 215.
65. Cf. note 58 supra.
66. Cf. Senate Report 92-1125, supra note 3, at 4-5. The Senate report stated:
[W]ith the vast improvement in compensation benefits which the bill would
provide, there is no compelling reason to continue to require vessels to assume
what amounts to absolute liability for injuries which occur to longshoremen or
other workers under the Act who are injured while working on those vessels.
Id. at 9. Compare authorities cited in note 17 supra. See generally Gilmore & Black,
supra note 3, ch. VI passim.
67. See Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.,
376 U.S. 315 (1964), where the Court stated, that "liability should fall upon the
As noted, the courts have concluded that section 905(b) created an entirely new remedy for the injured longshoreman, or, at least, a remedy that was no longer as strongly rooted in the traditions of maritime law. Yet, these initial decisions really do not write upon a clean slate. The concerns which prompted the Sieracki-Ryan doctrine are too firmly a part of admiralty's humanitarian spirit to be long forgotten.

"[T]he ancient characterization of seamen as wards of admiralty is even more accurate now than it was formerly." Out of this relation of dependence and submission there emerges for the stronger party a corresponding standard or obligation of fostering protection. Twice the longshoreman has been found by the Court to occupy substantially the same status as the seaman and thus enjoy the same protections. A more difficult and more important question involves an estimation of how far the doctrines developed in Jones Act negligence cases might apply in longshoremen's section 905(b) action. It should be noted, however, that it is likely that analogous, if not identical, judicial policy perceptions shaped both the Jones Act and the seaworthiness lines of cases. Concrete expressions of maritime negligence theories applicable to the conditions found in the longshoring industry are lacking only because the seaworthiness doctrine obviated the need to examine this problem in detail. Whatever the similarities or differences between conditions in the industry during the Sieracki-Ryan period and the present, it is unlikely that the law ultimately will be able to develop without regard to these earlier cases and the judicial perceptions which formed their foundation and generating force. Yet, it is the implications raised by these cases which hold meaning for interpreting section 905(b) and not their specific holdings.

Two courts have already rejected the hypothesis that Jones Act negligence standards form the applicable frame of reference for section 905(b) actions. This result seems sound because the same reasons justi-
fying congressional withdrawal of the seaworthiness remedy from longshoremen are likely to apply with equal force in denying longshoremen the special advantages of Jones Act negligence concepts — concepts which must relate to the hazards and discipline inherent in the performance of the duties of a seaman. The discipline to which seamen are subject, the unique danger of their occupation, and the absence of a compensation program for seamen comparable to that for longshoremen seem to generate quite different parameters in measuring a rule of tort law for each of the two different situations when logical social policy dictate they arrive at the same result. Yet at the same time, it is well to recall that the Jones Act cases are arguably the most reliable course markers as to how maritime negligence law in longshoremen's personal injury cases would have developed in the period stretching from 1944 until 1972 if Sieracki had not supervened.

III. AN OVERVIEW OF INITIAL DECISIONS CONSTRUING SECTION 905(b)

As enacted, section 905(b) creates a number of problems which eventually will have to be resolved by the courts. Most importantly for

74. Cf. Larson, supra note 17, § 72.50, at 14-95. The author stated:

If there is no strong reason of compensation policy for destroying . . . rights as to . . . third parties, then, every presumption should be on the side of preserving those rights, once basic compensation protection has been assured. . . . The injured plaintiff has a right to be made whole — not just partly whole — and the more inadequate compensation recoveries appear, the more cogent becomes this argument.

Id.

75. See note 28 and accompanying text supra.

76. A relevant secondary effect of section 905(b) was to again expose the shipowner to full liability for the longshoreman's injuries even though the stevedore was concurrently negligent. This problem is particularly significant where the fault of the shipowner is minor compared to that of the stevedore. Quick to apprehend the unfairness of such a result, shipping interests have urged a variety of ameliorative solutions to this problem. In the leading case of Lucas v. “Brinknes” Shiffahrts Ges., 379 F. Supp. 759 (E.D. Pa. 1974), the defendant-shipowner advanced what is probably the full scope of theories to limit the shipowner's liability to the stevedore: 1) that the vessel was liable only when it was solely negligent, id. at 766; 2) that the vessel could seek contribution from the stevedore, id. at 769; 3) that the vessel was entitled to a pro rata release of liability if the stevedore were jointly negligent, or that the vessel was only liable for its proportionate fault in causing the injury, id. at 766; 4) that the vessel's liability should be reduced pro tanto by the extent of payments made by the stevedore to the longshoremen, id. at 760. This assertion was based on the case of Murray v. United States, 405 F.2d 1361 (D.C. Cir. 1968). Murray was decided under the 1927 Act, the applicable compensation act for workers in Washington, D.C. The court allowed a pro rata credit on the liability obtained against the defendant where the government was jointly negligent and the plaintiff was a Government employee. The Lucas court distinguished Murray as not involving a maritime matter, 379 F. Supp. at 764.

The Lucas court first found that the recent case of Cooper Stevedoring Co. v. Kopke, 417 U.S. 106 (1974), had virtually eliminated the restrictions of Halcyon, leaving “admiralty courts . . . relatively free to fashion appropriate rules of con-
the purposes of this Comment, the 1972 Amendments do not indicate whether maritime or common law negligence theories form the intended standard against which the shipowner's duty of care to either the stevedore or the employee is to be measured. In pertinent part, section 905(b) provides:

In the event of injury to a person covered under the chapter cause by the negligence of a vessel, then such person . . . may bring an action against such vessel as a third party . . . and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel. . . .

What then is negligence?

tribution based on fairness to the parties.” 379 F. Supp. at 764. In Cooper, the Court had distinguished Halcyon and allowed a shipowner to recover contribution from a stevedore, other than the plaintiff's employer, whose negligence in another port created the unsafe condition causing the plaintiff's injuries. 417 U.S. at 113-15. Cooper commenced prior to the enactment of the 1972 Amendments. Despite this, the Lucas court disagreed with the shipowner's proposals, concluding:

Congress decided that the primary duty to provide a safe place to work is on the stevedore. The substantial increase in compensation benefits provided by the amendments was thought to be an incentive to the stevedore to provide a safe place to work. . . . At the same time, however, Congress was concerned that the vessel owner not become lax in doing what it should reasonably be required to do to prevent injuries to the longshoreman. The common law negligence remedy was thought sufficient to provide the vessel with the necessary incentive. The argument . . . that the shipowner can be liable only when it is solely negligent would negate Congress' intention to prevent shipowner negligence and is contrary to the terms of the Act. . . .

. . . Congress sought to eliminate all actions against the stevedore. . . . Allowance of any such actions, even a pro tanto recovery to the extent of payments made by the employer under the Act, would create the circuitous type action Congress considered was too costly and disruptive of the compensation scheme to be permitted.

379 F. Supp. at 768-69 (emphasis supplied by the court).

For a complete discussion of other problems raised by section 905(b), see GILMORE & BLACK, supra note 3, §§ 6-46 to -57. The question decided in Lucas has also been of importance in land-based third party compensation actions. There is a considerable amount of confusion in this area of the law. See LARSON, supra note 17, §§ 75.22-23. See also id. § 72.80.

77. 33 U.S.C. § 905(b) (Supp. IV, 1974). A vessel for the purposes of the statute is defined as

any vessel upon which or in connection with which any person entitled to benefits under this Chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter [sic] or bare boat charterer, master, officer, or crew member.

Id. § 902(21).
A. Illustrative Judicial Viewpoints

Hite v. Maritime Overseas Corp., 78 (Hite II) is probably the leading case to date. In Hite II, the plaintiff asserted that section 905(b) should be interpreted in light of maritime principles of negligence. The plaintiff contended that the shipowner's duty of care was "a non-delegable duty to provide a reasonably safe place to work for those business invitees that board the vessel to perform contract work for the vessel owner." 79 Although the Hite II court, in granting a directed verdict for the defendant, could have relied on the plaintiff's failure to show that the vessel or crew was in any way connected with the defective equipment causing the injury, 80 the court chose instead to hold that the applicable negligence standard under section 905(b) was analogous to the common law duty of care owed by landowner to a business invitee. Specifically, the shipowner was

to exercise reasonable care to have the premise in a reasonably safe condition for use by the independent contractor and to give said contractor warning of any concealed or latent defects that are known by the owner and not by the independent contractor. The owner of a premise is under no duty to warn the independent contractor or his employees of dangers or open and obvious defects which are known to the independent contractor or his employees or which could be readily observed by said employees in the exercise of due care. 81

78. 380 F. Supp. 222 (E.D. Tex. 1974). In Hite v. Maritime Overseas Corp., 375 F. Supp. 223 (E.D. Tex. 1974), (Hite I), the court held that the plaintiff was not entitled to assert a negligence claim against the vessel based upon a violation of safety regulations applicable only to the stevedore's operations. Id. at 237. Compare Hite I, with notes 149-56 and accompanying text infra.

79. 380 F. Supp. at 224.

80. Id at 223. The plaintiff's injuries were caused by a fall after he touched a defective electrical cord of which he was aware prior to the accident. Id. No facts were presented to show that the officers or crew maintained any degree of control or supervision over the work being performed. Id. at 224.


In dicta, the Hite II court opined that the following standards would also be applicable:

(1) The vessel owner is not liable to an independent contractor or his employees if the injury is caused by a condition that said contractor has been employed to correct.

(2) The vessel owner who retains no more right of control of the independent contractor's work than the necessity to secure satisfactory completion of the work owes no duty to protect the independent contractor and his employees from dangerous conditions arising during the performance of the work.

(3) The vessel owner owes no duty to warn the independent contractor or his employees of dangerous conditions created on the vessel by said employees during the performance of their work.

380 F. Supp. at 227 n.10 (citations omitted). These standards generally comport with the common law duties of a general contractor. See generally Annot., 31 A.L.R.2d 1379 (1953) (duty of owner of premises to furnish independent contractor or his employee with a safe place to work where the contract is for repairs); Annot., 20 A.L.R.2d 870 (1951) (general contractor's liability for injury to the employees of subcontractors); Annot., 8 A.L.R.2d 268 (1949) (employer's negligence in hiring a careless, reckless, or incompetent independent contractor).
Hite II was substantially followed in Fedison v. Vessel Wislica, and Ramirez v. Toko Kaun K.K. However, these cases added several important refinements. In Fedison, the plaintiff was injured because of an obviously dangerous condition which had developed in the stowed cargo. The court, noting that the crew was aware that such conditions were likely to develop in the cargo, held that this "sort of constructive knowledge imposed no duty upon the vessel to ... warn the longshoremen" of the condition. In Ramirez, the court rejected the plaintiff's argument for a maritime negligence standard similar to that which had been urged by the plaintiff in Hite II. The court stated that the so-called negligence principles found in post-Sierachki decisions had to be read with care because they often reflected "the rationale of the warranty of seaworthiness even when talking in terms of a negligence standard." The court went on to suggest that after a long voyage it would be unreasonable to assume that a ship would be a safe place in which to work. The court concluded, therefore, that the vessel owner's duty of care to the longshoreman would be satisfied by placing the vessel in a condition which an experienced stevedore would reasonably expect to encounter in the course of his work.

In Citizen v. M/V Triton the plaintiff contended that a negligence action should lie if the vessel arrived in port with an unseaworthy condition of which the master knew or, in the exercise of reasonable diligence, could have known. In rejecting this contention as "in effect allowing a cause of action based on unseaworthiness," the court reasoned that to hold the defendant liable for the condition of the stow would circumvent the purposes

83. 385 F. Supp. 644 (N.D. Cal. 1974)
84. 382 F. Supp. at 5.
85. Id. at 8. However, the court also specifically found that the vessel had received no notice of the dangerous condition until after the injury. Id. at 6. Proper dunnage would have corrected the condition. Dunnage was to be obtained from the vessel as needed; however, the plaintiff was unable to establish that a request had been made to the vessel's officers for proper dunnage. There is a suggestion in the opinion that had the plaintiff been able to show that dunnage was withheld after being requested, the vessel would have been negligent. Id. at 5-6.
87. 385 F. Supp. at 651. The Ramirez standard of care for the shipowner was essentially identical to that proposed in Hite II. Id. at 646. A fact of considerable importance for the Ramirez court was that while either plaintiff, in accordance with union policy, could have stopped the loading operation at any time had an unsafe condition developed, neither chose to do so. Id. at 648.
88. Id. at 651, citing Hugew v. Dampskisaktieselskabet Int'l, 170 F. Supp. 601 (S.D. Cal. 1959), aff'd sub nom. Metropolitan Stevedore Co. v. Dampskisaktieselskabet Int'l, 274 F.2d 875 (9th Cir. 1960). Hugew dealt with the duty of care which the vessel owed the stevedore and which would defeat the stevedore's indemnification recovery. However, the Ramirez court concluded that the situations were analogous and that the Hugew holding fairly indicated the standard of care demanded by section 905(b). 385 F. Supp. at 652. Hugew has been cited with apparent approval by the Supreme Court. See Federal Marine Terminals, Inc. v. Burnside Shipping Co., Ltd., 394 U.S. 404, 416 n.18 (1969). See also Proudfoot, supra note 59, at 443-45.
90. Id at 201.
of the 1972 Amendments. In dictum, however, the court added that the 1972 Amendments abolished the Sieracki-Ryan rationale for negligence as well as for unseaworthiness and non-delegable duty. The court finally concluded that “[t]he injured longshoreman is in the same position he would be in had he been injured in the non-maritime employment ashore and his burden of proving negligence is greater than that of a seaman under the Jones Act.”

In contrast to the element of fault required by the courts in these cases, the court in Streatch v. Associated Container Transportation, Ltd. allowed suit under a strict products liability theory. The plaintiff was injured aboard the vessel as a result of an alleged defect in vehicle furnished by the vessel owner for cargo operations. The court denied a motion to dismiss the plaintiff’s claim which was based on a strict liability theory akin to that of Section 402A, Restatement (Second) of Torts. To reach

91. Id. However, the following hypothetical, offered in the Senate report, appears to contradict the court’s conclusion:

Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel’s responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.

So, for example, where a longshoreman slips on an oil spill on a vessel’s deck and is injured, the proposed amendments to [section 905] would still permit an action against the vessel for negligence. To recover he must establish that: 1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully of [sic] negligently failed to remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances. The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore.

Senate Report, supra note 3, at 10–11.

In Citizen, the plaintiff’s employer was also the stevedore who had unsafely loaded the cargo in an earlier port of call. 384 F. Supp. at 199. Knowledge of an unseaworthy condition may well be the intended congressional standard. Cf. notes 119 & 120 and accompanying text infra.

92. 384 F. Supp. at 201. In effect, this indicates that all of Sieracki’s underlying humanitarian notions have been abrogated. Furthermore, as a guide to future case development, the court stated that “[i]n view of the 1972 Amendments, the court must look to the decisions prior to the time of Sieracki and Ryan to determine negligence on the part of the defendant vessel.” Id. But see Slaughter v. Steamship Ronde, 390 F. Supp. 637, 639–40 (S.D. Ga. 1974), aff’d, 509 F.2d 973 (5th Cir. 1975).

93. Id. at 202 (footnote omitted); see Birrer v. Flota Mercante Grancolombiana, 386 F. Supp. 1105 (D. Ore. 1974). The Birrer court held that stringent state safety standards and duty of care imposed on general contractors by state statute were inappropriate as a guide to the shipowner’s duty of care under the 1972 Amendments, even though the state’s high standard had been held by the Supreme Court, in Hess v. United States, 361 U.S. 314 (1960), to be applicable in a maritime wrongful death action.


95. Id. at 936.

96. Id. at 937.

97. Section 402A provides:

Special Liability of Seller of Product for Physical Harm to User or Consumer—

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical
this result, the court postulated that: 1) a products liability theory was not "contrary to federal legislation or admiralty law precedents" and widely followed in common law jurisdictions could be drawn into maritime law; and 2) under this theory an action would lie against the shipowner if he had acted in the legal status of a bailor and not as a vessel owner qua vessel owner. The court held that the plaintiff's allegation that the chattel, a vehicle, was provided for consideration was sufficient to prevent dismissal even though the vehicle was provided and used solely for unloading and loading operations aboard the vessel and was normally transported on the vessel.

The defendant in Streatch argued that strict liability claims against the vessel were precluded because Congress had "rejected the thesis that a vessel should be liable without regard to its fault for injuries." In answering this argument, the court expressed notions far different from those found in Hite II, Fedison, Ramirez, and Citizen:

[T]he Court believes that the above quoted sentence is merely an imprecise way of stating that the [Congress] was proposing to end unseaworthiness liability of a vessel to a longshoreman . . . . Strict liability in tort . . . is not such a broad and absolute liability . . . .

[I]t can be argued that strict liability in tort does not fall within the Congressional rejection of the liability of a vessel "without regard to its fault." But the more persuasive argument is . . . that the language used by the congressional committee was an imprecise synonym for unseaworthiness liability.

The early decisions discussed in this Comment are illustrative of the positions which courts may be expected to take in section 905(b) cases.
However, due to the narrow fact situations confronted by the courts in these cases, it would be a mistake to suggest that cases such as *Hite II* can be viewed as entirely predictive of negligence standards which the courts may be expected to develop in future cases. Rather, these decisions are better read as indicative of imperfectly expressed judicial attitudes differing significantly from those which underlay the conclusions of the *Sieracki-Ryan* line of cases. They diverge in their analyses because each court viewed congressional intent in enacting section 905(b) differently. In *Hite II, Fedison, Ramirez*, and *Citizen* the underlying judicial notions in effect seem to take the longshoreman’s section 905(b) action entirely outside of the maritime law. Is this result justifiable in the maritime background of longshoremen’s personal injury actions?

**B. Longshoreman’s Injuries: A Maritime Matter**

Even if one accepts the proposition that the shipowner’s duty to the longshoreman is to be measured by the content of the obligations of a contractee landowner, a necessary postulate, supported by the case law background of maritime personal injuries extending back to *Southern Pacific Co. v. Jensen*, is that the nature of the longshoreman’s action against the shipowner is essentially maritime. Thus, it can be expected that common law perceptions as expressed in common law tort rules will ineluctably be altered when transplanted into admiralty. Additionally, where the underlying theoretical basis for the common law rule is assumption of risk or contributory negligence, that rule should have limited application in maritime litigation.

103. Cases such as *Hite II* seemed to have reached broad conclusions of law not necessarily justified by the facts as reported. In the majority of cases applying common law negligence concepts, it is fairly evident that the cause of the injuries was the negligence of the stevedore to provide proper equipment or the longshoreman himself. *See, e.g.*, note 80 *supra.* In these circumstances, the plaintiffs’ ideas as to the vessel’s standard of care differed from seaworthiness only on a verbal level. *See, e.g.*, text accompanying notes 78 & 79 *supra.* *See also Proudfoot, supra* note 59, at 42-45. In a number of cases the courts noted that the plaintiffs had worked safely around the alleged unsafe condition for a matter of hours before the injuries occurred. *E.g.*, *Ramirez v. Toko Kaiun K.K.*, 385 F. Supp. 644, 647 (N.D. Cal. 1974). Apparently, where there has been some act or omission attributable to the vessel, the courts have not been quite so dogmatic in their holdings. *See note 126 infra.*

104. *244 U.S. 205 (1917).* In *Jensen,* the Supreme Court held a state workman’s compensation statute unconstitutional as applied to a longshoreman who had been injured under circumstances which constituted a maritime tort.

105. *Cf. The Arizona v. Anelich,* 298 U.S. 110 (1936). In that case, which involved an analogous situation construing the Jones Act, the Court stated:

>The Jones Act thus brings into the maritime law new rules of liability. The source from which these rules are drawn defines them but prescribes nothing as to their operation in the field to which they are transferred. “In that field their strength and operation come altogether from their inclusion in the maritime law” by virtue of the Jones Act. The election for which it provides “is between the alternatives accorded by the maritime law as modified and not between that law and some non-maritime system.”


106. For example, *Ramirez* specifically cites section 343A of the *Restatement (Second) of Torts* (duty of care that an owner of premises owes to a business in-
Most importantly, an automatic, and thus unanalyzed, application of common law negligence theories to actions that are essentially maritime in character ignores the implications raised by *Kermarec v. Compagnie Generale Transatlantique.* In *Kermarec*, the plaintiff, who was not a member of the ship's company, was injured while visiting a seaman on board. The Supreme Court held that since the plaintiff was injured aboard a ship upon navigable waters, the case was within the full range of admiralty jurisdiction, and thus, it was error for the district court to instruct the jury that the plaintiff was only to be accorded the status of a gratuitous licensee under state law. In so concluding, the Court added:

The distinctions which the common law draws between licensee and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism. In an effort to do justice in an industrialized urban society, with its complex economic and individual relationships, modern common-law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common-law categories, and to delineate fine graduation in the standards of care which the landowner owes to each. Yet even within a single jurisdiction, the classifications and subclassifications bred by the common law have produced confusion and conflict.
Admittedly, there is a considerable difference between disallowing distinctions to be made between licensees and invitees in admiralty and suggesting that the common law standard of the landowner's duty to an invitee is inappropriate as a measure in longshoremen's personal injury cases; however, the Court's language in Kermarec appears broad enough to cover the point — especially since in Kermarec the district court correctly eliminated the plaintiff's claim for unseaworthiness.110 "Kermarec was not a member of the ship's company, nor of that broadened class of workmen to whom the admiralty law has latterly extended the absolute right to a seaworthy ship."111 This analysis suggests that if the policy notions underlying Sieracki-Ryan and the Jones Act maritime negligence cases continue to possess any residual value, then the appropriate negligence standards for section 905(b) actions ought to be something quite different from those found in the common law.112 The next step is to determine if a theoretical foundation for the cases can be found in the legislative history of section 905(b).

IV. INDICATIONS IN THE LEGISLATIVE HISTORY CONCERNING THE SCOPE OF THE VESSEL'S DUTY OF CARE TO THE LONGSHOREMAN

A. A Legislative Standard?

Most of the congressional documents113 associated with the 1972 Amendments provide little aid in discerning the intent of Congress as to the applicable standard by which to measure the shipowner's duty of care formulation — but is due to the attempts to apply just rules in our modern society within the ancient terminology.

... [T]he immunities from liability predicated upon those classifications, and the exceptions to those immunities, often do not reflect the major factors which should determine whether immunity should be conferred upon the possessor of land. Some of those factors, including the closeness of the connection between the injury and the defendant's conduct, the moral blame attached to the defendant's conduct, the policy of preventing future harm, and the prevalence and availability of insurance, bear little, if any, relationship to the classifications . . . and the existing rules conferring immunity.

Id. at 117, 443 P.2d at 567, 70 Cal. Rptr. at 103.

110. 358 U.S. at 629.

111. Id.

112. E.g., notes 150-56 and accompanying text infra; cf. Gilmore & Black, supra note 3, § 6-53, at 436-38; id. 6-57, at 449-55.

113. See Hearings on S. 2318, S. 525, S. 1547 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess. (1972) [hereinafter cited as Senate Hearings]; Hearings on H.R. 247, H.R. 3505, H.R. 12006, H.R. 15023 Before the Subcomm. on Labor of the House Comm. on Education and Labor, 92d Cong., 2d Sess. (1972) [hereinafter cited as House Hearings]; Staff of Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History, Longshoremen's and Harbor Workers' Compensation Act Amendment — 1972 (Comm. Print 1972). The Senate Hearings and the House Hearings cover essentially the same ground, but the Senate Hearings are more comprehensive. The Legislative History is a compilation of all associated congressional materials other than the hearings; unfortunately, it furnishes little help in clarifying the applicable negligence standards under section 905(b).
to the longshoreman. On one hand, testimony contained in the Senate and House hearings is too partisan and too devoid of congressional inputs to be of much use;\textsuperscript{114} on the other hand, even the most useful documents, the Senate and House reports, are written in such a broad manner that any interpretation depends largely on the predilections of the interpreter. However, to arrive at their holdings, the courts have parsed the language of these documents and pieced together an analytical mosaic which, it is submitted, is more representative of a particular judicial point of view than of congressional intent.

The principal language supporting the proposition that Congress intended a land-based negligence standard to be the applicable basis for decisions under 905(b) is found in the committee reports. The Senate report stated:

\textit{[T]he Committee has concluded that, given the improvement in compensation benefits which this bill would provide, it would be fairer to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of the vessel as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness. This would place vessels in the same position, insofar as third party liability is concerned, as land-based third parties in non-maritime pursuits.}

The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as \textquoteleft{}unseaworthiness,\textquoteleft{} \textquoteleft{}non-delegable duty,\textquoteleft{} or the like.\textsuperscript{115}

\section*{Footnotes}

\textsuperscript{114} Compare \textit{Senate Hearings, supra note 113}, at 130-68, with id. at 258-93. Neither the \textit{Senate Hearings} nor the \textit{House Hearings} contain a definitive statement of the applicable standard. It was suggested to both committees that a specialized conception of maritime negligence was applied in maritime suits that was considerably different from common law negligence remedies. While such statements went so far as to suggest that seaworthiness was the functional equivalent of \textit{maritime negligence}, there was little discussion of this beyond the response that maritime negligence was but little different \textquoteleft{}from the theory of negligence which is now applied by the courts on a construction site where you have hazardous activities as well.\textquoteright\textsuperscript{115} \textit{Id.} at 274.

Exhaustive quotation from the hearings to support the central idea of this footnote would entail a footnote longer than the Comment and probably would suffer the additional drawback of distortion because of a lack of contextual inputs. Those interested in pursuing the question should begin with the following: \textit{id.} at 33-34, 38, 65, 71, 130-31, 139-61, 174, 191-94, 208-11, 241, 263, 270-74, 296, 301-02; \textit{House Hearings, supra note 113}, at 50, 58, 78, 120, 137-38, 146, 237, 242.

\textsuperscript{115} \textit{Senate Report, supra note 3}, at 10. Later, the Senate report added:

\textit{[T]he Committee intends that the admiralty concept of comparative negligence rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury. Also, the Committee intends that the admiralty rule which precludes the defense of \textquoteleft{}assumption of risk\textquoteright{} in an action by an injured employee shall also be applicable.}

\textit{Id.} at 12. Whether this language was also meant to indicate that common law standards were those applicable, again, depends largely on the reader's point of view. It can be argued that this is a gratuitous suggestion, since admiralty courts would
The implications of this passage depend largely on one's point of view. Commentators, who had examined the issue before any cases reached the courts, arrived at diametrically opposed conclusions. Edward D. Vickery, an attorney who represented shipowning interests and who testified before Congress concerning proposed amendments of the 1927 Act, argued for a stringent model based on limited notions of the landowner's duties to the business invitee. However, leading admiralty scholars, Professors Grant Gilmore and Charles L. Black, Jr., have suggested that the Jones Act, the seaman's statutory negligence remedy against the vessel, should be read into the 1972 Amendments. While these authors do not explicitly state so, their position suggests, additionally, that the especially liberal negligence standards and broad notions of the vessel's duty as outlined in Jones Act cases form the appropriate frame of reference for defining the vessel's duty to longshoremen for purposes of section 905(b). Other approaches could also be taken. For instance, by focusing on the narrow line of cases cited in the committee reports, it is possible to argue that Congress specifically eliminated "seaworthiness" as a longshoreman's remedy only where the vessel's liability was predicated on acts or omissions of the stevedore or his employees. In other words, a vessel's failure to

have determined in any event that comparative negligence applied and assumption of risk as a defense was precluded. Cf. notes 104-06 supra.


117. GILMORE & BLACK, supra note 3, § 6-57, at 453.

118. See notes 27-46 and accompanying text supra.

119. What does it mean to say that "the vessel" is liable for negligence but not for unseaworthiness? The two terms overlap over most of the range of their meanings. Only at the fringes can we identify such concepts as pure operating negligence aboard a seaworthy vessel or unseaworthiness which is not caused by someone's negligence. A formula which recurs in hundreds of cases is: the defendant's negligence made the ship unseaworthy. In the seaman's action which combines a Jones Act count with an unseaworthiness count, the two counts have become ... Siamese twins.

GILMORE & BLACK, supra note 3, § 6-57, at 452 (footnote omitted). Compare note 91 and accompanying text supra.

120. The Senate report provided:

Persons to whom compensation is payable under the Act retain the right to recover damages for negligence against the vessel, but under these amendments they cannot bring a damage action under the judicially-enacted doctrine of unseaworthiness. Thus a vessel shall not be liable in damages for acts or omissions of stevedores or employees of stevedores subject to this Act, Crumedy v. The J.H. Fisser, 358 U.S. 423, Albanese v. Matti, 382 U.S. 283, Skibinski v. Waterman S.S. Corp., 330 F.2d 539; for the manner or method in which stevedores or employees of stevedores subject to this Act perform their work. A.N.G. Stevedores v. Ellerman Lines, 369 U.S. 355, Blassingill v. Waterman S.S. Corp., 336 F.2d 367; for gear or equipment of stevedores or employees of stevedores subject to this Act whether used aboard ship or ashore, Alaska S.S. Co. v. Peterson, 347 U.S. 396, Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315, or for other categories of unseaworthiness which have been judicially established.
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furnish equipment “reasonably fit for its intended use” constitutes “fault,” in the parlance of maritime negligence actions, without regard to the open and obvious nature of the defective condition. The result in Streatch may be closely analogized to this position.121

Considering the strengths of the rival factions — labor, shipowner, and stevedore — and recognizing the courts’ substantial expertise in and intimacy with maritime matters,122 it is submitted that most probably Congress intended to simply leave the matter to the courts as had been done in the past with other legislation where sensitive political interests were involved.123 This position implicates a broad mandate to the courts to develop the law of longshoremen’s remedies in accordance with their own understanding of how the 1972 Amendments altered the considerations and perspectives which inspired the Sieracki-Ryan doctrine. The decisions in the initial cases tend to support the notion that federal judges have at least intuitively recognized a change in the relationship of the longshoreman, stevedore, and harbor worker.124 Since tort concepts are ultimately the children of judicial ideas on social policy,125 the conclusions of these cases may be quite correct. However, it would be better if those decisions relied more on explicit policy considerations since by and large the legislative history does not contain authoritative statements of principle.126 Seeking the most meaningful statement of congressional intent in the context of the 1972 Amendments seems too largely a matter of individual temperament, predilection, and judgment. Legal matrices, however formed from the diverse legislative history of the 1972 Amendments, seem to have inherent contradictions and thus, ultimately portend increased litigation. This effect is to undercut one of the clear purposes of

This listing of cases is not intended to reflect a judgment as to whether recovery on a particular actual setting could be predicated on the vessel’s negligence. Senate Report, supra note 3, at 10 (emphasis added); see the court’s indecisive analysis in Slaughter v. Steamship Ronde, 390 F. Supp. 637 (S.D. Ga. 1974), aff’d, 509 F.2d 973 (5th Cir. 1975); notes 122-25 and accompanying text infra.

121. See text accompanying notes 94-102 supra.

122. Traditionally the greater part of the maritime law has been fashioned by the courts. See Gilmore & Black, supra note 3, ch. I passim.


125. W. Prosser, supra note 17, § 3.

126. Cf. Lucas v. “Brinknes” Shiffahrts Ges., 379 F. Supp. 759 (E.D. Pa. 1974). In Lucas, the court relied explicitly on excerpts from the committee hearings. Id. at 767-68, 769-72. A number of other courts have cited Lucas in support of the proposition that the Congress intended that the negligence standard under section 905(b) be derived from common law negligence theories. E.g., Ramirez v. Toko Kaiun K.K., 385 F. Supp. 644, 653 (N.D. Cal. 1974). It is interesting to note, however, that the Lucas court specifically left the question open, stating:

Congress perceived that it was eliminating the large number of cases in which the vessel was held liable without fault pursuant to the doctrine of unseaworthiness. This perception was based on the assumption that the negligence

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the 1972 Amendments, reducing the caseload of the federal courts in maritime personal injury suits.\footnote{\textsuperscript{127}}

B. The Cases In Light of the Legislative History — Some Final Reflections

Under section 905(b), \textit{Streach} seems to be the least justifiable case. That court appears to have ignored the plain language of section 905(b), which limits the liability of the vessel to injuries caused by its negligence.\footnote{\textsuperscript{128}} Nor is it helpful that the court suggested that the no-fault concept of Section 402A is different from seaworthiness, because Section 402A applies only to “defects and render the product unreasonably dangerous;”\footnote{\textsuperscript{129}} this is likely to be a post facto conclusion inherently susceptible to judicial result selecting. Also, compensation paid by the stevedore largely eliminates one of the fundamental premises of section 402A — lifting the burden of the injury from the otherwise uncompensated plaintiff and placing it on the person most able to socialize the costs.\footnote{\textsuperscript{130}} Finally, to separate into different legal components the shipowner’s full legal status, which only grew out of the stevedoring contract, was to hark back to judicial logic which Congress clearly attempted to abrogate with the 1972 Amendments.\footnote{\textsuperscript{131}}

\textit{Hite II, Ramirez, Citizen,} and \textit{Fedison} came closer to achieving a useful expression of the congressional will, but these decisions also have their faults. Absent is any discussion of the fact that longshoring is an extremely dangerous occupation.\footnote{\textsuperscript{132}} To suggest that safety is principally the responsibility of the stevedore carries a hidden edge. If the increased benefits available as a result of the 1972 Amendments provide increased incentives for the stevedore to implement better safety programs and thus fulfill his responsibilities, then it seems to follow that after a period of time, any accident rate greatly in excess of the average for land-based occupations statistically represents hazards associated only with unsafe shipboard conditions caused by the rigors of long voyages.\footnote{\textsuperscript{133}} Because these

\footnote{\textsuperscript{127}} See also note 76 supra.
\footnote{\textsuperscript{128}} See text accompanying note 79 supra.
\footnote{\textsuperscript{129}} 388 F. Supp. at 940.
\footnote{\textsuperscript{131}} The analysis in \textit{Streach} seems analogous to that in Reed v. The Yaka, 373 U.S. 410 (1963), discussed in note 59 supra. Congress specifically aimed to vitiate \textit{Reed} with the 1972 Amendments. See Senate Report, supra note 3, at 11.
\footnote{\textsuperscript{132}} At the time the 1972 Amendments were enacted, the injury frequency rate for the longshoring industry was over four times the national average for manufacturing operations. Senate Report, supra note 3, at 2.
\footnote{\textsuperscript{133}} Cf. Gilmore & Black, supra note 3, § 6-57, at 455.
hazards must be different in kind and in degree\textsuperscript{134} from those \textit{unavoidable}, commonplace dangers which the land-based worker is exposed to in the course of a day’s work and which have shaped the landowner’s common law duties, common law negligence conceptions are likely to be largely unworkable in a maritime setting. This in turn suggests that a long-term reduction of the courts’ workload of shore-related maritime personal injury cases is largely illusory as long as the courts continue the trend of rigidly forcing common law negligence into maritime molds.\textsuperscript{135}

\textbf{V. SOME CONCLUSIONS AND A MODEST RECOMMENDATION}

Subtle historical and social notions undercut the results of the initial cases. Unburdened by the social currents which shaped the common law, maritime law historically developed with emphasis on certainty coupled with practicality.\textsuperscript{136} Should the facts of \textit{Hite II, Fedison, Citizen, Ramirez} and other cases be even slightly changed,\textsuperscript{137} analogizing the shipowner's position in maritime law to that of the landowner’s in tort raises serious questions.\textsuperscript{138} The maritime worker has long enjoyed a special status in the courts.\textsuperscript{139} For the longshoreman, \textit{Sieracki} represented the greatest manifestation of this concept. While \textit{Usner} and \textit{Victory} cast doubt upon the viability of the harbor worker's presence within the chosen circle,\textsuperscript{140} the committee reports suggest that Congress was aware of these protective notions. Thus, it is submitted that while Congress overruled \textit{Sieracki}'s specific holding, it nonetheless bowed, at least in part, to the judicial logic which formed the basis for that decision and which continued to find expression in the cases until \textit{Victory}.\textsuperscript{141} The following three considerations principally underlay Congress’ purpose in enacting the 1972 Amendments: first, a recognition that the benefits and coverage provided by the

\textsuperscript{134} This constituted one of labor's major arguments in its opposition to the elimination of seaworthiness for the longshoreman. \textit{E.g., Senate Hearings, supra} note 113, at 130-31.

\textsuperscript{135} \textit{Cf. note 106 supra.}


\textsuperscript{137} \textit{See}, note 103 \textit{supra.}

\textsuperscript{138} \textit{See} notes 104-09 and accompanying text \textit{supra}. \textit{Cf. Larson, supra} note 13, \textsection 91.77.

\textsuperscript{139} \textit{E.g., Harden v. Gordon, 11 F. Cas. 480 (No. 6047) (C.C.D. Me. 1823)} (Story, J.) (perhaps the best known and one of the earliest of the courts' expressions of the maritime workers' special status).

\textsuperscript{140} \textit{See} text accompanying notes 60-65 \textit{supra.}

\textsuperscript{141} The Senate report seemed to recognize that even under section 905(b), \textit{Sieracki} retained some residual value:

\textit{The Committee believes that especially with the vast improvement in compensation benefits which the bill would provide, there is no compelling reason to continue to require vessels to assume what amounts to absolute liability for injuries which occur to longshoremen or other workers covered under the Act who are injured while working on those vessels. In reaching this conclusion, the Committee has noted that the seaworthiness concept was developed by the courts to protect seamen from the extreme hazards incident to their employment which frequently requires long sea voyages and duties of obedience to
1927 Act had to be enlarged and extended; second, a realization that although the Sieracki-Ryan doctrine generated crowded courts and increased expenses — particularly lawyers' fees and insurance costs — it provided few additional monetary benefits for the injured employee or his family; and third, a concern that “every appropriate means be applied toward improving” the working conditions and the safety of the longshoring industry. Each of these considerations should be a vector in arriving at the most accurate judicial expression of the congressional will. However, the courts have tended to focus on one consideration or another — more often as a justification for the rule of law announced in the decision than as part of a logical legal equation. The basic problem is that facile analogies readily extend the “open and obvious defect” doctrine of the early cases to nearly all circumstances where the hazard causing the injury resulted from the vessel's act or omission. This seems inherently suspect when it is realized that most cargo is carried in vessels of foreign registry that as a matter of course are inherently less susceptible to American safety regulations and, therefore, are likely to have conditions aboard less safe than the conditions that the longshoreman has a right to expect under the law. The initial cases seem to go a long way towards diluting the protection afforded by this right. The doctrine of those cases excuses the vessel while placing the major loss on those least able to bear it — the longshoreman and his family. Additionally, a hidden notion of Ramirez seems to impose, however indirectly, the expertise of the stevedore on the longshoreman; this result is questionable as a matter of legal theory and reality.

In short, it is apparent that Sieracki continues to hold a meaning whose content has yet to be evaluated by the courts. Additionally, as the courts sort through the exceptions and contradictions of common law

orders not generally required of other workers. The rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board on [sic] vessel while it is in port.

SENATE REPORT, supra note 3, at 9-10 (emphasis added); cf. LARSON, supra note 17, at 14-81 to -82; notes 119-21 and accompanying text supra.

142. SENATE REPORT, supra note 3, at 4-5.


144. SENATE REPORT, supra note 3, at 2.


146. Ramirez proposed that the duty of care owed by the vessel to the stevedore and the longshoremen were substantially identical. See 385 F. Supp. at 651-52; note 88 and accompanying text supra. Whether this ought to be the case or not is open to argument as the first duty arises as a matter of contract between equal parties bargaining at arm's length while the second is a matter of tort conceptions formed to protect a class that appears largely helpless to control the situation, especially in light of current economic conditions. See note 156 infra.

147. For a similar proposition advanced from a slightly different point of view, see GILMORE & BLACK, supra note 3, § 6-46, at 411-12.
negligence concepts, the resulting litigation is likely to be more vexious than useful and probably quite as self-contradictory as anything under the Sieracki-Ryan principle. Common law concepts are ill-suited to the needs, conditions, and hazards associated with maritime employment and seem to be too drastic a break with the scope of protections traditionally extended to maritime employees.

On the other hand, full and uncritical extension of negligence concepts as developed in the Jones Act cases is unjustified especially in that the full scope of protections offered by these cases simply approaches "seaworthiness" by utilizing another name. Yet, the thrust of the Jones Act cases is that, as a maritime duty, the vessel owner, at the least, owes to workers aboard the vessel a duty to furnish a vessel free from recognizable hazards likely to cause harm. This notion is echoed in the "general duty" section of the Occupational Safety and Health Act of 1970 (OSHA). This section provides in pertinent part:

(a) Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees . . . .

In the committee reports on the 1972 Amendments, Congress emphasized that "nothing in [the Amendments] is intended to relieve any vessels . . . from their obligations and duties under the Occupational Safety

148. See text accompanying notes 28-47 supra.
150. Id. § 654(a). A question arises whether the term employer has the same meaning in both acts. The 1972 Amendments redefined the term:

The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).


The term "employer" means a person engaged in a business affecting commerce who has employees, but does not include the United States or any State or political subdivision of a State.

29 U.S.C. § 652(5) (1970). The safety standard provided for the "employer" in the 1927 Act is significantly narrower than is the OSHA general duty standard. Section 941 of the 1927 Act provides:

Every employer shall furnish and maintain employment and places of employment which shall be reasonably safe for his employees in all employments covered by this chapter and shall install, furnish, maintain, and use such devices and safeguards with particular reference to equipment used by and working conditions established by such employers as the Secretary may determine . . . to be reasonably necessary to protect the life, health, and safety of such employees, and to render safe such employment and places of employment and to prevent injury to his employees.

and Health Act of 1970. Thus, a feasible argument is that section 905(b) ought to be read in light of the parallel general duty standard outlined in the OSHA. The OSHA does not provide for a private right of action as an enforcement sanction. However, if OSHA's "general duty" section does apply to the vessel owner as the statutory authorities seem to indicate and if an argument can be made that OSHA's "penalty" section is unlikely to best effectuate the purposes of the act because of the foreign registry of most carriers, then strong reasons exist for the courts as a matter of "maritime common law" jurisdiction to create a private right of action against the vessel owner using the OSHA "general duty" section as the appropriate standard. While this standard transcends the policy notions expressed or implied in the early cases following Hite II, it has the likely virtue of being more expressive of congressional policy considerations which underlay both acts than does the mere implanting of common law concepts into section 905(b). Refinement and development of this suggested standard will be required, but it would seem that this could be done in ways that are at once more open, more expressive of maritime conditions, and less contradictory than those implicated by the courts' current trend.

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151. Senate Report, supra note 3, at 12. This section in the report relates specifically to section 905(b).

152. Cf. Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959), wherein the Supreme Court stated:

[T]he owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interest the duty of exercising reasonable care under the circumstances of each case.


154. See note 150 supra.


156. For discussions concerning refinements of OSHA's general duty standard, see Miller, supra note 152; Morey, The General Duty Clause of the Occupational Safety and Health Act of 1970, 86 Harv. L. Rev. 988 (1973). Admittedly the OSHA standard may create another kind of absolute liability; however, this can be avoided by interpreting the section to afford the vessel owner the benefit of various defenses. For instance, the vessel could avoid liability by showing that: 1) it was not economically feasible to remedy the defect, see id. at 993; cf. United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947) (Hand, J.), or 2) the owner's duty was discharged by the employment of a skillful and competent stevedore who could be expected to recognize and properly safeguard against the hazard in the course of his operations and that the costs to the stevedore of the delay or repairs were provided for in the vessel's contract with the stevedore, or were commonly accepted as an added cost in similar operations. Cf. Restatement (Second) of Torts § 411 (1965). See also Senate Hearings, supra note 113, at 151, 673. Apparently, a major complaint of labor representatives was that stevedores often cut safety standards in order to remain competitive in terms of turn-around time and costs.