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TUGS, STEVEDORES, AND THE WARRANTY OF WORKMANLIKE PERFORMANCE

DAVID G. DAVIES†

“And they had a knack of dying interesting deaths and uttering memorable last words.”¹

The law of admiralty has developed more than its share of memorable words. Part of this results from status as a restricted specialty; for with a specialized bar, a knowledgeable body of litigants, large amounts of money often at stake, concentration in a limited number of courts, and the special patronage of the United States Supreme Court, admiralty has proven to be a laboratory for judicial experimentation and innovation. Furthermore, admiralty cases present dramatic fact situations. It is a rare case that does not bring out just a little of the Joseph Conrad in the attorney writing the brief or the judge writing his opinion.

Occasionally, these words develop a momentum of their own that outstrips the ideas that underlie them. This paper will be a study of a particular subspecialty of admiralty law—the liability relationship between a tug and its tow—in which momentum of the words “*ex delicto*” and that of “warranty of workmanlike performance” have recently led in two opposite directions. In one case the progression has been toward what is for admiralty a very conventional three-possibility tort-collision division of damages, and in the other, toward a more radical and artificial two-possibility contractual standard of indemnification for damage.

Perhaps the root of the divergence lies in the fact that a tug-tow accident has elements of both contract and tort. The tug and tow owners begin with an implied or actual contractual relationship, while the tug

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1. P. BLOOMFIELD, UNCOMMON PEOPLE 31 (1955), concerning the descendants of one Sir Henry Sidney, “[m]any of [whom] lived cultivated and full lives, even when these were somewhat abruptly brought to an end,” but who, the writer admits, were to his knowledge otherwise unconnected with the towing business.

and the tow themselves are in a physical relationship that presents ample opportunity for the type of inadvertent physical damage that is the essence of tort. Any damage that results generally is, as with most maritime torts, the subject of insurance.²

For many years, words and ideas common to tort have dominated the liability of tug to tow, and the leading case has been *Stevens v. The White City*,³ decided in 1932 in which the Supreme Court, in exonerating the tug from liability for the tow's hull damage, held:

It has long been settled that suit by the owner of a tow against her tug to recover for an injury to the tow caused by negligence on the part of the tug is a suit *ex delicto* and not *ex contractu*.

. . . .

. . . [The tug owner] . . . owed to the [tow] owner such care and maritime skill as prudent navigators employ for the performance of similar service.

In recent years, however, it appears that the word "warranty" has gained currency in situations where the tow is seeking indemnity. The leading case for this approach has been the Second Circuit's 1957 decision

2. The tug's key insurance coverage is the Collision Clause with Tower's Liability of the hull insurance policy:

And it is further agreed that if the Vessel hereby insured shall come into collision with any other Vessel, craft or structure, floating or otherwise (including her tow); or shall strand her tow or shall cause her tow to come into collision with any other vessel, craft, or structure, floating or otherwise or shall cause any other loss or damage to her tow or to the freight thereof or to the property on board, and the Assured, as owner of the Vessel in consequence thereof, or the surety for said Assured in consequence of his undertaking, shall become liable to pay and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such casualty the value of the Vessel hereby insured, we, the Underwriters, will pay the Assured such proportion of such sum or sums so paid as our subscriptions hereto bear to the value of the Vessel hereby insured. . . .

Note that coverage of liability to the tow is broader than the pure "collision" coverage with respect to other vessels or structures, but that Tower's Liability coverage does not include injuries to persons on board the tow or the amount by which any claim exceeds the value of the tug. This coverage therefore interlocks with "Protection and Indemnity" (P & I) coverage and excess insurance. See Hecht, *The Hull Policy: Interrelationship of Hull & P & I*, 41 TUL. L. REV. 389 (1967). For a general discussion of maritime insurance, see G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 48-86 (1957) (hereinafter cited as GILMORE & BLACK).

3. 285 U.S. 195, 201 (1932). A corollary is that a lien for towing damage may take tort priority in the uncertain hierarchy of maritime liens, *The John G. Stevens*, 170 U.S. 113 (1898), heavily relied upon in *The White City* case; but see GILMORE & BLACK 598: "[N]egligent towing claims do not seem to be as firmly anchored on the tort side as ordinary collision and personal injury claims." A second corollary has been that the tug generally cannot contract away liability for negligence. *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955).

in *McWilliams Blue Line v. Esso Standard Oil Co.*,⁴ where the impleaded tug owner lost to the tow's charterer on facts that will be discussed in greater detail below,⁵ and the court said:

. . . The towing agreement between the respondent and respondent-impleaded necessarily implied an obligation on the part of the respondent-impleaded to tow libellant's barge properly and safely. Competency and safety were essential elements of the towing service undertaken by the respondent-impleaded. The very nature of this towing agreement implied a 'warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product.' *Ryan v. Pan-Atlantic Corp.*, 350 U.S. at pages 133-134.

The words "warranty of workmanlike service" have, since having been brought to admiralty in *Ryan* just sixteen months before *McWilliams Blue Line*, proven both memorable and potent. They refer to a body of law that has since undergone dramatic development. In turn, *McWilliams Blue Line* has been followed either explicitly or in principle in some five cases⁶ without having yet had so dramatic an effect. However, in many more tug-tow cases, the tort-collision doctrine of *Stevens* has remained the governing principle.⁷

Though on the surface not radically different, the pigeonholes labeled "tort" and "warranty" have the capacity for producing unpredictable and diametrically opposite results when a situation arises on a tow that has not yet occurred in a reported case: when the faults or unseaworthiness of *both* tug *and* tow have contributed to a casualty involving damage or injury to the tug, the tow, and a third party.

I. WHAT RYAN IMPLIES: A SUMMARY OF THE DEVELOPMENT OF THE WARRANTY PRINCIPLE IN HARBOR WORKER LITIGATION

To understand the implications of the citation of *Ryan* in *McWilliams*

4. 245 F.2d 84, 87, 1957 A.M.C. 1213, 1217 (2d Cir. 1957).

5. See text at notes 48 & 49 *infra*.

6. *United States v. Tug Manzanillo*, 310 F.2d 220, 1963 A.M.C. 365 (9th Cir. 1962); *Dunbar v. Henry DuBois' Sons Inc.*, 275 F.2d 304 (2d Cir.), *cert. denied*, 364 U.S. 815 (1960); *Singer v. Dorr*, 272 F. Supp. 931, 1968 A.M.C. 146 (E.D. La. 1967); *Tebbs v. Baker-Whitely Towing Co.*, 271 F. Supp. 529, 1968 A.M.C. 668 (D. Md. 1967); *Farrell v. S.S. Birkenstein*, 207 F. Supp. 500, 1963 A.M.C. 1846 (S.D.N.Y. 1962) (*semble*).

7. See, *e.g.*, *Chitty v. The Valley Voyager*, 284 F. Supp. 297 (E.D. La. 1968); *Tidewater Constr. Co. v. Southern Constr. Co.*, 269 F. Supp. 1000, 1004, 1967 A.M.C. 1908 (E.D. Va. 1967); *Offshore Co. v. G & H Offshore Towing Co.*, 262 F. Supp. 282, 286, 1966 A.M.C. 2172 (S.D. Tex. 1966); *Derby Co. v. A.L. Mechling Barge Lines, Inc.*, 258 F. Supp. 206, 211 (E.D. La. 1966); *South Inc. v. Moran Towing & Transp. Co.* 252 F. Supp. 500, 505, 1965 A.M.C. 2559 (S.D.N.Y. 1965), *aff'd* 360 F.2d 1002, 1966 A.M.C. 1987 (2d Cir. 1966); *Frederick Snare Corp. v. Moran Towing & Transp. Co.* 195 F. Supp. 639, 641, 1961 A.M.C. 2605 (S.D.N.Y. 1961).

Blue Line, one must review the development of law dealing with the third-party liability of the tug's maritime neighbor, the stevedore. Development of this principle, in turn, has been as a corollary to that of first-party liability based upon the shipowner's warranty of seaworthiness. Both developments are the subjects of a considerable literature.⁸ Very briefly, the law has developed as follows:

First-party liability to seaman. The absolute duty of the shipowner to furnish a seaworthy vessel to his own crew has been developing since 1944, when the Supreme Court decided *Mahnich v. Southern S.S. Co.*,⁹ and its momentum has carried the doctrine to what is probably its full vertical¹⁰ development. Liability is not dependent on traditional standards of negligence. To constitute unseaworthiness, a condition need not have existed for any substantial period of time,¹¹ nor, apparently, need it be discernible to ordinary inspection.¹² On the other hand, while negligence is not an element of unseaworthiness, it is now doubtful that negligence can exist independently of unseaworthiness; the safest course is for a trial judge to instruct in both.¹³

8. *E.g.*, *Ambler, Seamen Are "Wards of the Admiralty" But Longshoremen Are Now More Privileged*, 29 WASH. L. REV. 243 (1954); *Baer, Down to the Seas Again*, 40 N.C.L. REV. 377 (1962); *Benbow, Seaworthiness and Seamen*, 9 MIAMI L.Q. 418 (1955); *Tetreault, Seamen, Seaworthiness, and the Rights of Harbor Workers*, 39 CORNELL L. Q. 381 (1954) and *Wright, Justice at the Dock; The Maritime Worker and Mr. Justice Black*, 14 U.C.L.A.L. REV. 524 (1967). See generally, M. NORRIS, *LAW OF MARITIME PERSONAL INJURIES AFFECTING HARBOR WORKERS, PASSENGERS AND VISITORS* (2d ed., 1966). See also Weinstock, note 23 *infra*.

9. 321 U.S. 96 (1944).

10. "Vertical" is used here as in *Benbow*, *supra* note 8, at 424, to describe the growth of a doctrine within a particular class of workers, and "horizontal," its spread to similar occupations and industries.

11. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960). *Mitchell* also contains the language which gives solace to the otherwise frustrated defendant-shipowner (or the third-party defendant who may have to indemnify him) in the charge to the jury:

What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service.

362 U.S. at 550.

12. *Alaska S.S. Co. v. Petterson*, 347 U.S. 396 (1954), *reh. denied*, 347 U.S. 994 (1954).

13. *Waldron v. Moore-McCormack Lines, Inc.*, 386 U.S. 724 (1967). See also *Jackson, J.*, dissenting in *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406-20 (1953): "The court's instructions scrambled common-law negligence doctrines with admiralty principles of indemnity for unseaworthiness." "Operational negligence" was once thought to be something different from unseaworthiness, so that a harbor worker injured as the immediate result of his fellow employee's negligent operation of seaworthy equipment might fail against the shipowner as a matter of law. For discussions of the intricacies of this doctrine, see *Friendly, J.*, dissenting in *Skibinsky v. Waterman S.S. Corp.*, 360 F.2d 539, 1966 A.M.C. 873 (2d Cir. 1966); *Kaufman, J.*, dissenting in *Radovich v. Cunard S.S. Co.*, 364 F.2d 149 (2d Cir. 1966); and *Note*, 76 HARV. L. REV. 819, 827-28 (1963). The Court's decision in *Mascuilli v. United States*, 387 U.S. 237

The development of the doctrine of unseaworthiness is analogous to that of product liability "in tort":¹⁴ The doctrine has largely eclipsed what was once the seaman's primary recovery based on negligence under the Jones Act,¹⁵ just as product liability "in tort" apparently is eclipsing its forerunner doctrine of sales warranties, even though the latter has been expanded under Uniform Commercial Code.¹⁶ However, the trend in selection of words in maritime personal injuries has been from tort to contract, while that in product liability has been from contract to tort.

As in the case of product liability, the trend has been to widen the circle of those entitled to the shipowner's warranty. This horizontal¹⁷ development began soon after *Mahnich in Seas Shipping Co. v. Sieracki*,¹⁸ holding a longshoreman to be entitled to the same warranty as a seaman so long as he does the work of a seaman.¹⁹ From that point, the doctrine has spread horizontally to benefit employees of other specialized maritime industries who are said to have supplanted the seaman in his work.²⁰ This spread provided the first element of the situation that was to lead to the development of the *Ryan* indemnity doctrine cited in *McWilliams Blue Line*.

On the other hand, the analogy to product liability is not entirely accurate, for while the typical product liability case generally arises from the malfunctioning of a defective object in the hands of the accident

(1967), *rev'g* 358 F.2d 133 (3d Cir. 1966), at least severely damaged this doctrine, *but see* Bryan, J., dissenting in *Venable v. A.S. Det Fornede Dampskibsselskab*, 387 F.2d 639, 1968 A.M.C. 1437 (4th Cir. 1968).

14. RESTATEMENT (SECOND) OF TORTS, § 402(A) (Tent. Draft No. 10, 1965).

15. 46 U.S.C. § 688 (1964). "The true measure of the success of the Jones Act is that it has become obsolete." GILMORE & BLACK 315.

16. See Shanker, *Strict Tort Failure Product Liability and The Uniform Commercial Code*, 17 W. RES. L. REV. 5 (1965).

17. See Benbow, *supra* note 8, at 424.

18. 328 U.S. 85 (1946).

19. Technical innovation seems to be the secret for shipowner's non-liability. A shoreside electrician, since he does not do the work of a seaman, is not entitled to the warranty. *Halecki v. United New York and New Jersey Sandy Hook Pilots Ass'n*, 358 U.S. 613 (1959). This does not mean that he cannot recover on some other theory. *Id.* 302 F.2d 840 (2d Cir. 1962), *cert. denied*, 371 U.S. 825 (1962). Likewise, the duties of a marine tally clerk in a container loading operation are not "the type of work traditionally done by seamen," and the warranty does not apply. *Gibbard v. S.S. Hawaiian Legislator*, 284 F. Supp. 634, 1968 A.M.C. 1046 (C.D. Calif. 1968). On the other hand, the historical theory that even the longshoreman supplanted the seaman rests on thin historical surmise. "Man may have evolved from the coelacanth, but through all recorded history, the longshoreman has been a land creature." Tetreault, *supra* note 8, at 414. An extreme alternative is to lay up the ship, which cuts off the warranty. *Roper v. United States*, 368 U.S. 20 (1961).

20. See, *e.g.*, *Mortensen v. A/S Glittre*, 348 F.2d 383, 1965 A.M.C. 2016 (2d Cir. 1965) (marine painter); *Booth S.S. Co. v. Meier & Oelhaf Co.*, 262 F.2d 310, (2d Cir. 1958) (engine repairman); *Smith v. Brown & Root Marine Operations Inc.*, 243 F. Supp. 130, 1965 A.M.C. 2368 (W.D. La. 1965), *aff'd* 376 F.2d 852 (5th Cir. 1967) (marine diver). All of these cases also involve third-party recovery by shipowner against contractor-employer.

victim or another consumer, the complex fabric of shipboard operation provides many opportunities for simultaneous interaction between negligent operation and defective condition to produce injury or accident.²¹ Instead of a simple and serial chain from manufacturers through sellers to users, many potential shipboard accidents involve a complex and simultaneous parallel interaction of independent elements, some involving people, others things. This complexity presents the second element of the backdrop against which *Ryan* was developed.

Third-party stevedore-shipowner indemnity. Liability without fault, horizontal development of duty to alias seamen, and complex interaction of causes to produce accidents had in themselves the potential to create a terribly complicated lawsuit. In the case of a longshoreman or harbor worker, there was an additional element that seemed an extremely unfair shifting of liability—the Longshoreman's and Harbor Workers' Act,²² a workmen's compensation statute that prevented the injured man from suing his own employer even though the employer often might be the only active participant in the accident. As a result, to obtain an open-ended jury award the injured longshoreman could and would sue *only* the shipowner under the warranty that was opened to him by the horizontal development of the unseaworthiness doctrine.

Shipowners thus found themselves vulnerable "target" defendants in spite of the fact that the unseaworthiness of their ships often played a very small and passive part in the occurrence of accidents and often involved little or no fault on their part. As a result, they in turn attempted third-party recoveries under various theories against the employers of injured alias seamen.²³ At this point the choice of words again proved to be the key in the development of doctrine.

The first choice favored the contractor. In *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*,²⁴ there was a disparity of fault between ship and stevedore.

Halcyon Lines hired the Haenn Ship Ceiling & Refitting Corporation to make repairs on Halcyon's ship [A]n employee of Haenn was injured aboard the ship while engaged in making these repairs [H]e brought this action for damages against Halcyon On the ground that Haenn's

21. *Crumady v. The J. H. Fisser*, 358 U.S. 423 (1959).

22. 33 U.S.C. § 905 (1964). The exception does not apply to bar the shipowner liability of the stevedore-employer where he is both stevedore and shipowner. *Reed v. The Yaka*, 373 U.S. 410 (1963).

23. Cases are collected in Weinstock, *The Employer's Duty to Indemnify Shipowners for Damages Recovered by Harbor Workers*, 103 U. P.A. L. Rev., 321, 323-27 (1954).

24. 342 U.S. 282 (1952).

negligence had contributed to the injuries, Halcyon brought Haenn in as a third-party defendant . . . [T]he district judge allowed the introduction of evidence tending to show the relative degree of fault of the two parties. On this evidence, the jury returned a special verdict finding Haenn 75 per cent and Halcyon 25 per cent responsible.²⁵

The trial court divided damages,²⁶ but the court of appeals modified the judgment, limiting the contractor's share to its potential liability under the Longshoremen's Act.²⁷ Both sides appealed to the Supreme Court, which reversed, entirely denying contribution from the contractor to the shipowner. In an opinion by Justice Black, Justices Reed and Burton dissenting, the Court said :

Where two vessels collide due to the fault of both, it is established admiralty doctrine that the mutual wrongdoers shall share equally the damages sustained by each, as well as personal injury and property damage inflicted on innocent third parties. This maritime rule is of ancient origin and has been applied in many cases, but this Court has never expressly applied it to non-collision cases. Halcyon now urges us to extend it to non-collision cases and to allow contribution here based upon the relative degree of fault of Halcyon and Haenn as found by the jury. Haenn urges us to hold that there is not right of contribution, or in the alternative, that the right be based upon equal division of all damages. . . .²⁸

The accuracy of the generalization about non-collision cases is immediately open to question: The Court *had* applied the rule to cases other than collisions.²⁹ The Court, however, refused to extend the rule beyond collisions :

In the absence of legislation, courts exercising a common-law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as be-

25. 342 U.S. at 283.

26. *Baccile v. Halcyon Lines*, 89 F. Supp. 756, 1950 A.M.C. 923 (E.D. Pa. 1950).

27. 187 F.2d 403, 1951 A.M.C. 542 (3d Cir. 1951).

28. 342 U.S. at 284.

29. See generally, *Tetreault*, *supra* note 8, at 421-22. Relevant to the present question, lower courts for years unhesitatingly applied the division role to non-collision cases between tow and tug. *E.g.*, *Petition of Marina Mercante Nicaragueuse, S.A.*, 364 F.2d 118, 1966 A.M.C. 2392 (2d Cir. 1966) (capsizing of tug "tripped" against channel bank by tow—though the pilot it furnished was the only tug employee at fault); *Allied Chem. & Dye Corp. v. Tug Christine Moran*, 303 F.2d 197, 1962 A.M.C. 1198 (2d Cir. 1962) (stranding of tow); *Chitty v. M/V Valley Voyager*, 284 F. Supp. 297 (E.D. La. 1968) (capsizing of tow); see note 61 *infra*.

tween joint tortfeasors. . . . To some extent courts exercising jurisdiction in maritime affairs have felt freer than common-law courts in fashioning rules, and we would feel free to do so here if wholly convinced that it would best serve the ends of justice.

We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action. . . .³⁰

The next and succeeding rounds of word choosing went clearly in favor to the shipowners and added the words "warranty of workmanlike service" to the admiralty lawyer's phrase book. In *Ryan Stevedoring Co., Inc., v. Pan-Atlantic S.S. Corp.*,³¹ there again was mixed but lopsided fault. Although there was no finding of degree of fault, the same stevedore (Pan-Atlantic) had loaded and was unloading the ship when cargo rolled out of stow and struck the plaintiff; the reports indicate no fault on the part of the ship's crew other than failure of the ship's officer responsible for stowage to correct an apparently dangerous condition created by the stevedore at the time of loading.³² After a plaintiff's verdict against the shipowner in the first-party portion of the lawsuit, the trial court, trying the third-party issues without a jury, found that the plaintiff had recovered partly because of the shipowner's own negligence and not just because of unseaworthiness. As to liability for negligence, the non-contribution holding of *Halcyon* governed and the court denied indemnity.³³ The Court of Appeals reversed, still treating the shipowner as alternatively liable for negligence and unseaworthiness, but nevertheless entitled to indemnity in either event: If he were negligent, the stevedore's negligence was still active and primary;³⁴ if, on the other

30. 342 U.S. at 284.

31. 350 U.S. 124 (1956).

32. *Palazzolo v. Pan-Atlantic S.S. Corp.*, 111 F. Supp. 505, 1953 A.M.C. 755, (E.D.N.Y. 1953), but note that for the four dissenters of the Supreme Court, this would have been enough. 350 U.S. at 138-39.

33. The testimony of the longshoremen as to the generally dangerous manner in which the cargo was stowed . . . leads to no other conclusion but that the cargo officer in the exercise of reasonable care should have discovered and corrected the condition. . . . Consequently . . . Pan-Atlantic . . . was . . . a joint tort-feasor, and under such circumstances, a contract of indemnity cannot be implied on the part of Ryan. 111 F. Supp. at 507.

34. "[I]ndemnity over is recoverable where, as here, the employer's negligence was the 'sole' active' or 'primary' cause of the accident." 211 F.2d 277, 279 (2d Cir. 1954). The verbal distinction between "active" and "passive" negligence has never been a critical favorite; see Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 IOWA L. REV. 517, 539-43 (1952); and Leflar, *Contribution and Indemnity Between Joint Tortfeasors*, 81 U. PA. L. REV. 130, 154 (1932). For the ultimate demise

hand, he were liable because he had without fault provided an unseaworthy ship, he was entitled to contractual indemnity.

The Supreme Court majority was even less concerned with the ship's negligence. The Court first affirmed by an evenly divided court,³⁵ then affirmed 5-4 with an opinion.³⁶ Justice Black, who wrote for the majority in *Halcyon*, dissented. Justice Burton, who had dissented in *Halcyon*, wrote for the majority, saying that the key to the dispute lay in a "warranty," and this foreclosed more elaborate examination of tort-based indemnity:

The shipowner here holds petitioner's uncontroverted agreement to perform all of the shipowner's stevedoring operations at the time and place where the cargo in question was loaded. . . . Competency and safety of stowage are inescapable elements of the service undertaken. This obligation is not a quasi-contractual obligation implied in law or arising out of a non-contractual relationship. It is the essence of petitioner's stevedoring contract. It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product.³⁷

After *Ryan*, the vertical development of the "warranty of workmanlike service" proceeded rapidly. It became apparent that if the shipowner's duty was absolute, that of the stevedore was more so. Soon after *Ryan*, the court held that the warranty provided full indemnity when the negligence of the stevedore "brought into play" an unseaworthy condition on the ship;³⁸ then it held the warranty to apply where the stevedore brought on board a latently defective piece of equipment.³⁹ Harbor worker-shipowner-marine contractor litigation has become a major business at the trial court level in jurisdictions having major ports.⁴⁰ While

of the active/passive distinction, see *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563 (1958).

35. 349 U.S. 901 (1955).

36. 350 U.S. 125 (1956).

37. 350 U.S. at 133-34.

38. *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423 (1959).

39. *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., Inc.*, 376 U.S. 315 (1964).

40. For example, Chief Judge Clary of the Eastern District of Pennsylvania has testified:

[W]hile in 1961 the longshoremen cases constituted only 8 per cent of the total tort actions, . . . they constituted more than 23 per cent of the total tort actions in June of 1966 We then compared and charted the proportionate increase of maritime cases (longshoreman and Jones Act) with the termination rate of maritime cases. The termination rate was shockingly low. We found that there were no more longshoremen jury cases tried in 1966 than there were in 1961, and that during some intervening years, there had been less

it is not safe to say that the doctrine has reached its full vertical development within the immediate field of harbor workers, the cases involving most common on-board marine contractors have reached a point where there is a reasonable degree of predictability of outcome.⁴¹

The principal remaining area of stress is the effect of the shipowner's own fault on his ability to recover indemnity. In 1958, in *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*,⁴² the Court had another mixed fault case like *Halcyon* in which "the jury found [the shipowner] 'guilty of some act of negligence'" in leaving a jerry-built winch shelter in place. The trial judge directed a verdict in favor of the stevedore on the indemnity issue and a divided court of appeals affirmed. In reversing and remanding for trial, a unanimous Court left this dictum:

We believe that respondent's contractual obligation to perform its duties with reasonable safety related not only to the handling of cargo, as in *Ryan*, but also to the use of equipment incidental thereto, such as the winch shelter involved here. . . . If in that regard respondent rendered a substandard performance which led to foreseeable liability of petitioner, the latter was entitled to indemnity *absent conduct on its part sufficient to preclude recovery*.⁴³

Since *Weyerhaeuser*, there has been constant probing by the employers of harbor workers to find just what conduct will preclude recovery. So far, the reported cases have shown primarily what will not, and the most widely-cited formula is that of *Albanese v. N. V. Nederl. Amerik. Stoomv. Maats.*, which allows indemnity to the shipowner unless his fault is of a degree to "prevent or seriously handicap the stevedore in his ability to do a workmanlike job. Merely concurrent fault is not enough."⁴⁴

longshoremen and Jones Act cases tried than had been tried in 1961. Yet, during the same five-year period, there had been a 340 per cent build-up in the pending longshoremen cases. . . .

Testimony before a subcommittee on improvement and judicial machinery of the committee on the judiciary, United States Senate, *CRISIS IN THE FEDERAL COURTS—1967* at 46, as quoted by the court in *Turner v. Transportacion Maritima Mexicana*, 1968 A.M.C. 1096, 1101 (E.D. Pa. 1968).

41. The author summarizes remaining "problem areas" in Proudfoot, *The Tar Baby: Maritime Personal-Injury Indemnity Actions*, 20 *STAN. L. REV.* 423, 434-45 (1968). An area of further inquiry that still causes some anxiety to shipowners is the possible effect of contractual disclaimers of the warranty of workmanlike service; compare *UNIFORM COMMERCIAL CODE* § 2-316.

42. 355 U.S. 563, 567-68 (1958) (emphasis added).

43. 355 U.S. 563, 567.

44. 346 F.2d 481, 484, 1965 A.M.C. 1201 (2d Cir.), *rev'd on other grounds*, 382 U.S. 283 (1965), *reaffirmed on this point*, 392 F.2d 763, 1968 A.M.C. 800 (2d Cir. 1968), *rev'd sub nom.* *International Terminal Operating Co. v. N.V. Nederl. Amerik. Stoomv. Maats.*, 393 U.S. 74 (1968). A court followed the first court of appeals case in a towing case in *Tebbs v. Baker-Whiteley Towing Co.*, 271 F. Supp. 529 (D. Md. 1967). In each instance the court of appeals held the stevedore liable to indemnify the ship-

It is the horizontal spread of the *Ryan* indemnity doctrine beyond the coverage of the Longshoremen's and Harbor Worker's Act that is relevant to the present subject. In the tug-tow relationship there is no longer a potential injustice like that of *Halcyon* and *Ryan*, for there is no umbrella protecting the tug owner from direct liability to his employee without regard to his own active fault.⁴⁵ Therefore, the imbalance against the shipowner only technically at fault that existed between *Mahnich* and *Ryan* could never exist. Furthermore, the towing industry provides a setting for substantial property and hull damage actions—in which compensation bars to direct litigation never have been a factor at all. When one's attention shifts from harbor workers to tug and towing, the problems that arise from a warranty or superwarranty standard call for more consideration than the recital of appropriate words as soon as it appears that there is a marine contract.

II. THE IMPORTATION OF RYAN TO TOWING CASES

McWilliams Blue Line and the Overkilled Laches Defense. *Ryan* first appeared in a towing case in *McWilliams Blue Line v. Esso Standard Oil Co.*⁴⁶ This was a three-party action for damage to a barge that began between owner and charterer one day before the expiration of the local tort statute of limitations. As years before in *Mahnich*,⁴⁷ this last fact was to prove a catalyst for unexpected judicial innovation.

After the period of the tort statute of limitations had run the charterer impleaded the tug owner and the tug owner raised a defense of laches, relying on the doctrine that admiralty will look to local statutes of limitation in determining the presumptive existence of laches.⁴⁸

At the trial level this defense failed, and the trial court awarded indemnity in a decision dated April 13, 1956—more than three months after *Ryan*—that found no evidence of prejudice resulting from delay, and found that respondent, "by virtue of its relationship . . . with the impleaded respondent, pleaded and proved a claim for indemnity."⁴⁹ In sup-

owner as a matter of law, reversing two jury verdicts in favor of the stevedore. The second Supreme Court decision reinstated the second jury verdict without comment on the court of appeals' language, which by then had been perpetuated in a number of other cases. The shipowner's fault at issue was the failure of a deck officer to act on the stevedore's request to start exhaust blowers in order to clear exhaust fumes from the hold in which plaintiff was eventually overcome.

45. Section 3(a) (1) of the Longshoremen's and Harbor Worker's Act specifically excludes members of a vessel's crew.

46. 245 F.2d 84, 1957 A.M.C. 1213 (2d Cir. 1957).

47. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944).

48. See generally GILMORE & BLACK, 296 n.149 & 630-37.

49. 145 F. Supp. 392, 1956 A.M.C. 1113 (S.D.N.Y. 1956). There are two earlier opinions dealing with the laches issue: 123 F. Supp. 824, 1954 A.M.C. 1134 (S.D.N.Y. 1954), overruling the tug's motion to dismiss on the ground that the charterer's right to indemnity accrued only when he actually was subjected to liability; and 129 F.

port of the second point, the trial court did not cite *Ryan* but did cite the court of appeals decision that *Ryan* affirmed on different reasoning, *Palazzolo v. Pan Atlantic S.S. Corp.*⁵⁰ It is not clear what point the *Palazzolo* citation supports, but it is coupled with a second case⁵¹ that deals only with the proposition that a finding of first-party liability does not, as a matter of law, bar a right of indemnification.

The tug owner appealed. Counsel for the charterer briefed *Palazzolo* because of its distinction between passive and active negligence, anticipating an argument that the judgment on the first party action was conclusive of the fact that the charterer had been at fault and was improperly seeking contribution under the *Halcyon* rule.⁵² The charterer did not rely upon or even cite *Ryan*, nor did he cite *Palazzolo* with reference to the laches defense, which was vulnerable not only to the final approach of the trial court but also to its earlier ruling that a statute of limitations period is measured from the time that a right vests. However, the charterer got the benefit of *Ryan* anyway.

The court of appeals used *Ryan* to overcome the laches argument in still another way—the tug warranted its services; that warranty was a contract; and so the standard for presumptive laches was the six-year New York contract statute of limitations rather than the three-year statute governing torts.⁵³ Far beyond the issue before it, the court's warranty dictum thus placed a tug in the same category as the stevedore and other employers of alias seamen who would otherwise be protected by the Longshoremen's Act.

Thus, in a case in which there was no issue of apportioning liability for shared fault, where the trial court had reached the same result by a very respectable theory and could have by another, and where *Ryan* had not in fact been argued by either party, *Ryan* nevertheless spread horizontally into the business of tugs and towing.

*Dunbar v. Henry DuBois' Sons*⁵⁴—*Mixed Fault, But the Tug's Was Last*. The next case in chronological order was one in which mixed fault

Supp. 36 (S.D.N.Y. 1954), holding the tug's laches defense not subject to an exception (equivalent to a motion to strike under present FED. R. CIV. P. 14(a)), *but only as the laches defense would apply to the direct liability of the tug owner to the barge owner* under what was then admiralty Rule 56, (equivalent to the present FED. R. CIV. P. 14 (c))—and not to the liability of the tug owner to the barge charterer.

50. 211 F.2d 277 (2d Cir. 1954).

51. *Moran Towing and Transp. Corp. v. Navigazione Libera Triestina, S.A.*, 92 F.2d 37 (2d Cir. 1937).

52. See text at notes 24-30 *supra*. His misgiving was not unfounded, for a trial court did rule exactly this way, only to be reversed in the court of appeals. *Dunbar v. Henry DuBois' Sons*, 275 F.2d 304, 1960 A.M.C. 1393 (2d Cir. 1960).

53. 245 F.2d at 87.

54. 275 F.2d 304, 1960 A.M.C. 1393 (2d Cir.), *cert. denied*, 364 U.S. 815 (1960). Counsel for the tow had been counsel for the tug in *McWilliams Blue Line*.

was in much sharper focus. The owner of a capsized floating crane, exposed to liability for the wrongful death of its single crewman based upon the barge's unseaworthiness, sought indemnity from the owner of the towing tug. The trial court granted judgment in the first-party action against the tow on a jury verdict, but dismissed the third-party action on the theory that *Halcyon*⁵⁵ precluded indemnity unless the tow's owner was only passively negligent. The court of appeals reversed and remanded for a new trial, citing not only *Ryan* and *McWilliams Blue Line*, but also *Crumady* and *Weyerhaeuser-Nacirema*.⁵⁶

Thus, in relying on the words of *Ryan* and the more radical cases following it, the court of appeals ignored a substantial body of first-party cases that had brought about a similar result in the same situation—a tug persisting in towing a tow of obviously decreasing seaworthiness—without reliance on an attenuated theory of warranty. Instead, in first-party cases before *Dunbar*,⁵⁷ the courts had treated—and would in the future continue to treat—this type of case as essentially a matter of the tug's last clear chance to avoid the casualty⁵⁸—the general rule that one writer finds as a common element in many cases allowing indemnity without any reference to contract, actual or implied, but without getting into the morass of active and passive negligence.⁵⁹ The distinction is more than simply a matter of words, for the last clear chance cases still accept *Stevens*⁶⁰ and apparently are not limited by *Halcyon*.⁶¹ Thus in the first-party tort-theory cases, there would be three possibilities of liability: tug entirely liable, tug not liable at all, and equal division of damages. But

55. 342 U.S. 282 (1952).

56. 358 U.S. 423 (1959); and 355 U.S. 563 (1958).

Juxtaposing *Crumady* and *McWilliams Blue Line*, it becomes clear that appellant has set forth a cause of action against Bronx Towing by alleging that the unseaworthy condition of the *Trenton* was brought into play by the negligent manner in which the tug *Cortland* performed its towing operations.

275 F.2d at 307.

57. See, e.g., *Curtis Bay Towing Co. v. Southern Lighterage Corp.*, 200 F.2d 33, 1952 A.M.C. 2034 (4th Cir. 1952); *Sternberg Dredging Co. v. Moran Towing and Transp. Co.*, 196 F.2d 1002, 1952 A.M.C. 1118 (2d Cir. 1952); and *Mississippi Valley Barge Line Co. v. T. L. James & Co.*, 144 F. Supp. 662, 1956 A.M.C. 2186 (E.D. La. 1956), *aff'd* 244 F.2d 263, 1957 A.M.C. 1647 (5th Cir.), *cert. denied*, 355 U.S. 871 (1957) (proximate cause).

58. See, e.g., *Chemical Transporter, Inc. v. M. Turecamo, Inc.*, 290 F.2d 496, 1961 A.M.C. 1520 (2d Cir. 1961); and *American Bridge Div. v. Roen Steamship Co.*, 216 F. Supp. 353, 1967 A.M.C. 170 (E.D. Wisc. 1963), *aff'd* 328 F.2d 838, 1967 A.M.C. 167 (7th Cir. 1964).

59. See *Leflar*, *supra* note 34, at 151-54. Last clear chance was discussed in the context of a maritime indemnity case in *Petition of Marina Mercante Nicaragueuse, S.A.*, 364 F.2d 118, 124, 1966 A.M.C. 2392 (2d Cir. 1966); *Petition of Kinsman Transit Co.*, 338 F.2d 708, 719-21, 1964 A.M.C. 2503, 2518-19 (2d Cir. 1964), *cert. denied sub nom.* *Continental Grain Co. v. City of Buffalo*, 380 U.S. 944 (1965).

60. 285 U.S. 195 (1932).

61. 342 U.S. 282 (1952).

under *Ryan* as imported by *Dunbar*, *Halcyon* is also implicit, and the third possibility seems foreclosed.

The Words Without the Consequences: Farrell Lines v. S.S. Birkenstein.⁶² This decision stemmed from a collision between a fully-manned cargo ship, under tow and with a pilot, and a pier.⁶³ There was heavy fog, but the ship's radar was of doubtful adequacy to find the channel.⁶⁴ The ship was not damaged, but the pier was, and its owners and some personal injury plaintiffs sued the ship interests, who impleaded the tug and its owners.⁶⁵

The issues were complicated by the fact that the tug interests, Moran, had furnished the pilot but were protected by a pilotage clause.⁶⁶ Thus, like *McWilliams* and *Dunbar*, the issue was indemnity. Unlike those cases, however, the ship was fully manned. Like *Dunbar*, but unlike *McWilliams*, there were allegations of mixed active fault.

Judge Friendly, sitting by designation, referred to the tug's "warranty of good workmanship"⁶⁷ and later to Moran's "obligation of workmanlike performance."⁶⁸ If the court thus intended to mean a whole-hearted importation of the *McWilliams* dictum, it would seem to follow that there would be just two possible outcomes under the warranty. Either the ship was entirely at fault or, if the tug's fault contributed to the incident and the ship's fault had not handicapped or impeded it in the performance of its warranty, the tug would be liable to indemnify the tow fully since under *Ryan-Halcyon* the stevedore-warrantor is liable to indemnify the shipowner-warrantee even if the latter is also at fault; "merely concurrent fault is not enough" to prevent indemnity.⁶⁹

In fact, the court found the ship entirely at fault and therefore entirely denied recovery over. Yet its dictum discussing the alternative outcome was phrased in terms of contribution, not indemnity:

The parties are also in controversy whether if both sets of interest were faulted, the share of the Moran interests would be

62. 207 F. Supp. 500, 1963 A.M.C. 1846 (S.D.N.Y. 1962).

63. *Id.*

64. "The average officer would realize that with this type of radar on that ship that he is pushing it to the very limit of his [sic] capabilities in that spot, and if he is able to use it, he is very fortunate." *Id.* at 506.

65. The court indicates in the statement of the case that libellant brought action directly against the tug but later says, "The Birkenstein and North German Lloyd denied fault but also asserted that if there was any, it lay at the door of the Moran defendants, whom they impleaded." *Id.* at 502. Perhaps the reference to a direct claim is under what was then Admiralty Rule 56, now FED. R. Crv. P. 14(c).

66. A contractual disclaimer of liability as principal for the acts of a pilot has so far received judicial approval. *Sun Oil Co. v. Dalzell Towing Co.*, 287 U.S. 291 (1932).

67. 207 F. Supp. at 505.

68. *Id.* at 508.

69. See text at note 44 *supra*.

seventy-five per cent (as NGL contends) thirty-three and one-third per cent (as Moran contends), or fifty per cent (for which neither contends).⁷⁰

Thus the court used *McWilliams* warranty words to reach *Stevens* tort-collision consequences—replacing the duty without correspondingly recasting the potential alternative outcomes. The *Birkenstein* is unique in this respect among the reported cases. It is also the only reported case to the date of writing involving a fully-manned active vessel in tow to which the court has even by words applied a warranty standard.

Ignoring One Debate while Getting into Another—Indemnity for Maintenance and Cure. *United States v. Tug Manzanillo*⁷¹ is one of a specialized body of cases in which the shipowner is the employer of a seaman who has recovered payments from the shipowner for maintenance and cure⁷² entirely as the result of another's fault. Here a ship's captain, boarding a tug to ride ashore, fell through an improperly secured hatch. The captain brought and eventually settled a preliminary claim for maintenance and cure against the shipowner, a personal injury claim in tort against the tug owner, and a later maintenance and cure claim against the shipowner. The shipowner claimed indemnification for both maintenance and cure payments.

These facts place the case squarely between two conflicting bodies of authority. A substantial body of cases beginning, by chance, with a towing case, would deny any recovery of indemnity for maintenance and cure—not because of any doubt the tortfeasor's duty to the shipowner, but because of the refusal by the courts to find that breach of this duty was the cause of the shipowner's damage, just as it would be extremely arguable whether a shoreside employer could recover damages for increased employee-benefit premiums resulting from an injury to an employee caused by a third party.⁷³ Once past this hurdle, however, courts even before *Ryan* had found little difficulty awarding indemnity on common law grounds.⁷⁴

The court in *Tug Manzanillo*, however, ignored this debate over damages entirely, but found it necessary to innovate by looking to the

70. 207 F. Supp. at 505.

71. 310 F.2d 220 (9th Cir. 1962).

72. Maintenance and cure is a kind of compulsory maritime health and accident insurance providing for both medical payments and living expenses during disability until maximum "cure" without regard to fault. See generally GILMORE & BLACK, 253-79.

73. The leading case is *The Federal No. 2*, 21 F.2d 313, 1927 A.M.C. 1471 (2d Cir. 1927); additional cases are collected in GILMORE & BLACK 276.

74. The leading case is *Jones v. Waterman S.S. Corp.*, 155 F.2d 992, 1946 A.M.C. 859 (3d Cir. 1946), but see *U.S. v. Standard Oil Co.*, 332 U.S. 301 (1947). The damage issue is discussed generally in GILMORE & BLACK 273-77.

transposed *Ryan* doctrine in order to justify an award of indemnity for both maintenance and cure payments.⁷⁵

It is difficult to understand why the court should have found such difficulty with the liability issue. Unlike the *Dunbar* and *Birkenstein* cases, there was no issue of apportionment of fault or its effect on damages. Instead, like *McWilliams Blue Line*, the *Tug Manzanillo* seems to be one of those cases where the court has brought a far more powerful doctrine to bear on the issue before it than is really needed to bring about a reasonable result. Once clear of the damage issue and stripped of its dictum, the *Tug Manzanillo* simply holds that a party who sustains a loss without fault because of the fault of another may recover indemnity for those payments. No finding of a contractual warranty with its own radical side effects is necessary for such a result.

Two Cases in Which the Words Made a Difference. The next, and at this writing the most recent, cases transposing *Ryan* to towing situations were almost exact contemporaries and were the first in which the word formula has substantially affected the outcome. These cases, *Tebbs v. Baker-Whiteley Towing Co.*⁷⁶ and *Singer v. Dorr*,⁷⁷ were, like their predecessors, indemnity cases.

In *Tebbs*, the ship was a "dead" tanker that the United States marshal had seized in another action. Her former chief mate, Diakakis, remained on board as a lone watchman and skipper. The tug owner had undertaken to shift the ship from one berth to another, providing not only tugs, but also a docking master to ride on board—without the protection of a pilotage clause.⁷⁸ It is his fault on which the *Ryan* issue arose.

The watchman "singled up" a mooring line before arrival of the tugs or pilot, leaving an old, weak springline as the only line preventing forward movement; the pilot failed to check the sufficiency of the line; the tugs placed a strain on it; and it parted, causing the ship to collide with plaintiff's yacht moored ahead of it—a combination of events in which the court found first-party liability to the owner of the damaged yacht on the part of both tug and tow personnel,⁷⁹ posing a question of indemnity between tug and tow.

In deciding the first-party liability of the tug, the court had made the passing statement that "a tug is not an insurer, is bound only to exercise reasonable care, and is ordinarily not required to anticipate negligence on

75. 310 F.2d at 220, 221, 223.

76. 271 F. Supp. 529 (D. Md. 1967) (decided July 6, 1967).

77. 272 F. Supp. 931, 1968 A.M.C. 146 (E.D. La. 1967) (decided June 16, 1967).

78. 271 F. Supp. at 539; see note 66 *supra*.

79. *Id.* at 540.

the part of those in charge of the tow."⁸⁰ It then found this principle inapplicable even to the first-party issue because of the tug company's additional role of providing a docking master to the ship, since the docking master gave control of both tugs and tow to the tug owner.

When, however, it came to indemnity, the principle was pure *Ryan* with all of its consequences:

The claim of the Sands Point and of the government against Baker-Whiteley is based upon the implied warranty of workmanlike performance which Baker-Whiteley assumed when it made its oral contract with the marshal.⁸¹

And the fault of the watchman, though sufficient to bring about the tow's first-party liability, did not prevent indemnity:

The fault on the part of Diakakis — taking in the second springline before the tugs arrived — did not prevent or seriously handicap Baker-Whiteley from doing a workmanlike job. If Eminizer [the pilot] had made any effort to learn what lines were out and what the condition of these lines were, he could have taken steps to avoid the accident.⁸²

Here, the choice of words had clearly affected the outcome. Unquestionably, under the *Stevens* series of cases applying the collision rule, the court would have left first-party liability divided, just as the court had suggested as its alternative finding in the *Birkenstein*.⁸³ On the other hand, it is arguable whether *Tebbs* is a towage case at all — or whether instead it is a pilotage case, for there is no suggestion of fault by the tug owner's employees other than the docking master, who was on board the ship, not a tug. It has been suggested elsewhere that a pilot owes "an implied warranty of competency,"⁸⁴ and a connection between tug and pilot like that in *Tebbs* is common in some localities but is far from universal.

The only way that *Tebbs v. Baker-Whitely* and *Stevens v. The White City* can be resolved at their face values as towage cases is to say that the tug operator owes one duty to the tow owner when the tow itself is damaged and another when someone else is. The *Tebbs* decision apparently makes this distinction, for the court discusses the tow's possible

80. *Id.* at 538.

81. *Id.* at 541.

82. *Id.* at 542.

83. See text at note 44 *supra*.

84. Petition of Marina Mercante Nicaragueuse, S.A. (*The El Salvador*), 248 F. Supp. 15, 37, 1966 A.M.C. 1777 (S.D.N.Y. 1965), *rev'd on other grounds*, 364 F.2d 188, 1966 A.M.C. 2392 (2d Cir. 1966).

warranty of its own seaworthiness to the tug with respect to the tug's *direct* duty to the plaintiff⁸⁵ but ignores it in dealing with the duty to indemnify. While it cannot be denied that under traditional non-maritime law, treatment of the claimant's own standard of care, its breach, and proximate cause differ somewhat depending on whether he is attempting to recover for his own direct loss or to recover indemnity for that of another which he has been forced to bear, there is no reason for perpetuating such an anomaly — which may itself be disappearing in its own field — in an area of the law in which it has not previously existed. The only possible justification for a double standard of duty is historical: *Ryan* came about in a type of litigation in which third party indemnity was the primary form of litigation because of the Longshoremen's and Harbor Worker's Act, while most tug-tow law has been made in situations of direct liability. Nothing in *Ryan's* language or in that of any of its progeny suggests that the stevedore's duty would be any different in a situation giving rise to first party liability, nor does anything in the traditional towage cases suggest a contrary result in an indemnity case.

In the second reported but first decided of this pair of cases, *Singer v. Dorr*,⁸⁶ counsel for the tug owner apparently went a step further in characterization of *Ryan* as a response to a specialized and restricted problem and argued that *Ryan*, if limited to third party actions, was also limited to third party actions where the third party defendant could not be directly liable to the first party. In *Singer*, the tow had been an unmanned river barge—a fact reminiscent of *McWilliams Blue Line*. A tug crewman fell from either the tug or the barge and drowned. His survivors sued both the tug owner (for negligence) and the tow interests (for unseaworthiness), but the trial judge directed a verdict in favor of the latter on a finding of absence of proximate cause. The tow interests, however, cross-claimed against the tug owner, who had lost the main case to the jury, for the costs of defense, and it was on this issue that *Ryan* came into play.

Although the reported opinion stops short of holding the tug liable for defense expenses,⁸⁷ its intent is clear: If the court were to find a breach by the tug of the "warranty of workmanlike service" to the tow which caused the loss, the tug owner would be liable. With respect to the tug's argument that *Ryan* was no more than an expedient to escape the *Mahmich-Halcyon* dilemma, the court said:

85. 271 F. Supp. at 538-39.

86. 272 F. Supp. 931 (E.D. La. 1967).

87. The trial judge had retired after ruling on the first-party case but before ruling on the cross-claim, and the successor panel found that the first-party ruling was not *res judicata* to the cross-claim, reserving the right to decide the latter independently. 272 F. Supp. at 937.

However, we do not believe that the *Ryan* doctrine rests on such a flimsy base, but rather is founded soundly on an attempt to equitably place the burden of defending and paying claims on the one party of the two who was in control of the vessel and whose action resulted in the claim being brought rather than the party technically liable.⁸⁸

What if the tug were not in control? What if the liability of the tow owner were more than just technical? The pure *Ryan* formula seems to assume answers to both questions that did not appeal to the *Singer* court.

The court itself raises a third question which indicates a desire to limit the use of *Ryan* to achievement of immediate justice: Could the barge's unseaworthiness, while not causing the seaman's death, have still caused the survivors to include in the lawsuit⁸⁹ the tow interests ("whose action resulted in the *claim being brought*," not the accident itself). In *Tebbs*, the court applied the *Albanese*⁹⁰ formula of active hindrance and found that the shipowner's negligence contributed to the accident but to an insufficient degree and was therefore swallowed up by the warranty. Similar reasoning in *Singer v. Dorr* would have simplified the lawsuit substantially—an opportunity which the court seemed reluctant to seize. The court could even have approached the problem from the point of view that *Singer's* decedent himself contributed fifty per cent to the accident,⁹¹ so that his own breach of the warranty, as the tug's employee, brought any unseaworthiness of the barge into play.

Not only is there apparent reluctance in *Singer* to use the full remedial force of *Ryan*, but the court appears to be dominated by the parallel between the fact that the tug was in full control of the barge and the similar relationship that exists between stevedore and shipowner:

Both the barge owner and *Ryan* shipowner turn their vessels over to the complete control of another party (tug owner or stevedore) but nonetheless remain absolutely liable for the condition of their vessels under the non-delegable duty to provide a seaworthy vessel. Thus, assuming the initial seaworthiness of the vessel when control is transferred by the owner, the owner's liability to third persons can depend entirely

88. 272 F. Supp. at 936.

89. 272 F. Supp. at 933 n.5, 936 n.8. The question is related to the following language in *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563, 568 (1958): ". . . for, as we have indicated, the duties owing from petitioner to Connolly were not identical with those from petitioner to respondent."

90. See note 44 *supra*.

91. 272 F. Supp. at 934.

on the actions of the party to whom control is transferred and who is under the implied obligation of workmanlike service.⁹²

In contrast, *Tebbs* represents a far more wholehearted reliance on *Ryan* than this quoted language suggests, for there the shipowner interests were not liable to the yacht owner because of the tow's unseaworthiness—they owed no such duty—but because of their watchman's negligence. The primary reason for the granting of indemnity from the tug (pilot) to the tow was the fact that the pilot *did* assume the initial seaworthiness of the vessel and was wrong; the ultimate liability resulted from inaction, not action, by tug personnel, who only shared control over the tow. However, setting aside *Tebbs*, as well as *Birkenstein*, where the court had no apparent intention of granting anything beyond contribution, the concern over control expressed in *Singer* touches an element common to all the other cases transposing *Ryan* to towing, but not previously discussed by a court: Courts have generally transposed and applied *Ryan* where the tug owner was in sole control of the tow. While the *Singer* court refused to limit *Ryan* to an expedient to avoid Longshoremen's Act injustices, it nevertheless hints at limitation of its application in towing to a specialized body of situations where the physical make-up of the tow places entire control of the operation in the tug and the casualty is of such a nature that the tug's fault is its primary cause and the tow owner's loss or liability is artificial and technical.

This limitation would exclude not only *Tebbs* from the limited application of the transposed *Ryan* doctrine, but also a great many other common towing relationships. Where *Ryan* would be applicable, it would not apply to all accidents. While such a limitation overlooks the fact that *Stevens v. The White City*⁹³ was also a sole control case, it nevertheless recognizes the reality that towing often is distinguishable from stevedoring.

III. HOW TOWING AND STEVEDORING DIFFER

If one goes beyond the words of the *Stevens* family of cases and those of *McWilliams Blue Line* and the cases following it, it happens that there are few easy generalizations about the ways in which tows function. Stevedoring varies within narrow limits; towing varies within broad.⁹⁴ A tug may provide all or just some of the motive power for the tow—or there may be instances where the tug is itself towed.⁹⁵ The tow

92. *Id.* at 935.

93. 285 U.S. 195 (1932).

94. A fairly comprehensive discussion of the variety of activities that the word "towing" encompasses appears in BRADY, TUGS, TOWBOATS AND TOWING 1-20 (1967).

95. *E.g.*, *Petition of Marina Mercante Nicaraguese*, 364 F.2d 118, 1966 A.M.C. 2392 (2d Cir. 1966).

may be manned or unmanned and, if manned, its crew may or may not be responsible for control of the tow's maneuvers or just the management of its "internal economy," the management of which may or may not be a factor in a particular casualty.⁹⁶ If an accident results from the overall management of the tow, there may still be a dispute over whether the tug or the tow is in the "dominant mind" in the maneuvers leading up to the accident.

In a variety of factual settings like this, wholesale adoption of *Ryan* with all of its corollary standards, defenses (if any), and remedial consequences has as its only advantage the bringing of legal simplicity to a complex factual situation. In both third party stevedoring cases and all tug-tow cases, first and third party, the courts could arguably be adopting a policy based on the premise that the claims being litigated in reality are almost invariably either insured or brought by or against large self-insurers; therefore occasional apparent injustices produced by artificial, rigid rules of ultimate liability are eventually absorbed in premium and rate adjustments and are more than offset by simplicity of litigation and the reduction of overlapping insurance coverage. By more or less artificially designating the stevedore's—or tug's—underwriter as the ultimate source of payment in an accident except where the shipowner's fault is overwhelming, the courts could, arguably, reduce both the volume and the net cost of litigation.

If this argument is a consideration in the *Ryan* cases, its beneficiaries have yet to appreciate its virtues, for they continue to litigate at an increasing rate on the third-party level.⁹⁷ Furthermore, it has not been too many years since some tow boat operators were trying to achieve the same sort of simplicity by the self-help expedient of disclaiming liability for negligence in their towage contracts. The Supreme Court quickly held this particular type of legal simplicity to be contrary to public policy.⁹⁸ Finally, insurance itself is not entirely artificial, for an

96. *Allied Chem. & Dye Corp. v. Tug Christine Moran*, 303 F.2d 197, 1961 A.M.C. 2620 (2d Cir. 1961); *The Ellenville*, 40 F.2d 47, 1930 A.M.C. 847 (4th Cir. 1930); and *Neptune Transp. Corp. v. Tug Bartow*, 158 F. Supp. 45, 1957 A.M.C. 2046, (S.D.N.Y. 1956). "[A] tug has the right to assume that the tow will carry a competent and sufficient crew, and is not liable for dangers, either from the unseaworthy condition of the barge or for the failure of its owners to properly man and equip the same." *Southgate v. Eastern Transp. Co.*, 21 F.2d 47, 49, 1927 A.M.C. 1295 (4th Cir. 1927).

The tug does not have exclusive control over the tow but only so far as is necessary to enable the tug and those in charge of her to fulfill the engagement. . . . In all other respects and for all other purposes the vessel in tow, its cargo and crew, remain under the authority of its master; and, in emergency the duty is upon him to determine what shall be done for the safety of his vessel and her cargo.

Stevens v. The White City, 285 U.S. 195, 200 (1932).

97. See note 40 *supra*.

98. *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955).

insured's premiums normally reflect past experience; therefore the short term risk-spreading of insurance does not overcome the long-term financial rewards to the insured who has a successful and effective safety program—or who is successful in artificially passing on his liability through indemnity actions, irrespective of the success of his safety program. In a leading case following *Ryan*, the Court has stated its concern with developing safety through placing liability with those having the greatest degree of control over a potentially dangerous situation.⁹⁹ The *Albanese* formula applied in *Tebbs* is difficult to reconcile with this policy even in the stevedoring situation, and the difficulty increases when the doctrine is spread horizontally to more widely varied maritime relationships like towing.

In general, the sweeping artificial policy of using warranty words to select a primary insurer in accidents taking place within the context of any marine contract without further qualifying standards is impractical, contrary to a stated policy of law, and inconsistent with any encouragement of accident prevention by the manipulation of civil liability.

Even if the tug-tow relationship were in some instances governed by policy considerations similar to those affecting the stevedore-shipowner relationship, there are not only frequent factual differences in the relationships between the parties, but also substantial differences in the whole fabric of their established legal relationships. In general, tug owner and tow owner in a towing relationship participate more nearly as equals than do stevedores and shipowners in the handling of cargo.

Joint participation seems to have been a major factor underlying *Stevens v. The White City's* establishment of a duty of ordinary care on the part of the tug.¹⁰⁰ No similar authority governed stevedoring, even before *Halcyon* and *Ryan*. The more one sees a principal-client relationship between two participants in a transaction, the greater is the logic of giving the client the benefit of a higher duty on the part of the principal—especially when the client is himself exposed to a technical liability arising from a stringent duty, as is the shipowner during cargo handling operations. While *Ryan* could be over-generalized bad law in a joint control tow, it is appealing in a case where the tug is, like the stevedore, solely in charge, especially in the case like *Singer v. Dorr*, where the remedy—recovery of defense costs—is somewhat difficult to justify on traditional tort or restitutional principles unless there is present some contractual undertaking to free the tow owner from unjustified lawsuits

99. *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315, 323 (1964). The writer emphasizes this point in a Note on this case, 62 MICH. L. REV. 1446 (1964). See generally Proudfoot, *supra* note 41.

100. See language quoted note 40 *supra*.

by the tug operator's employees.

Division of damages has traditionally been an effective tool in the apportionment of towing losses, while *Halcyon* foreclosed division as a device for the redistribution and rationalization of damages in stevedoring accidents. Although the court in *Singer v. Dorr* rejected the argument that *Ryan* was the product of the Longshoremen's Act, to deny that it was a product of *Halcyon* would be unrealistic. Perhaps the *Ryan* rule does not apply to all maritime service contracts, but only those in which contribution or division is not available, as neither was in *Singer* since the tow owner had been absolved of all direct liability. Division of damages, where it is not foreclosed, is a useful tool for the trial or settlement of lawsuits: It penalizes unsafe practices without unnecessary complexity, and it provides a favorable setting for settlement without creating a serious imbalance of equities. One could do worse in finding a way of dealing with liability for multiple-fault accidents, and possibly the courts in stevedoring cases have.

A striking legal difference between the tug-tow relationship and that between stevedore and shipowner is that the tow owner normally warrants the seaworthiness of his vessel to the tug owner,¹⁰¹ while it is questionable whether the shipowner owes any similar duty to the stevedore.¹⁰² It is possible in a stevedore case in which the ship's unseaworthiness was a factor to apply the *Albanese* formula without particular confusion, if not with a high degree of justice—but where the unseaworthiness of the tow is a contributing factor in a towing accident (in *Singer* the reader will recall it was not), the relationship becomes more entangled in the words of established law: Even if it is granted that the tug owner warrants the tug's services, the tow owner nevertheless owes a cross-warranty of seaworthiness. If each participant owes the other a warranty of either vessel or service, it is difficult to utilize either warranty

101. "The libellant . . . in offering its vessel for tow, holds her out as ' . . . sufficiently staunch and strong to withstand the ordinary perils to be encountered on the voyage.'" *South, Inc. v. Moran Towing & Transp. Co.*, 252 F. Supp. 500, 505, 1965 A.M.C. 2559 (S.D.N.Y. 1965), *aff'd* 360 F.2d 1002, 1966 A.M.C. 1987 (2d Cir. 1966) (holding the tow liable to the tug for loss of towing gear); *accord*, *Allied Chem. & Dye Corp. v. Tug Christine Moran*, 303 F.2d 197, 1962 A.M.C. 1198 (2d Cir. 1962); *Valentine Waterways Corp. v. Tug Choptank*, 260 F. Supp. 210, 212, (E.D. Va. 1966), *aff'd* 380 F.2d 381 (4th Cir. 1967); *Derby Co. v. A. L. Mechling Barge Lines, Inc.*, 258 F. Supp. 206, 211 (E.D. La. 1966); *Frederick Snare Corp. v. Moran Towing and Transp. Co.*, 195 F. Supp. 639, 640, 1961 A.M.C. 2605 (S.D.N.Y. 1961) (also holding the tow liable for loss of towing gear).

102. *Compare* *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 392 F.2d 918 (7th Cir. 1968), *aff'g* 284 F. Supp. 740 (N.D. Ill. 1967), denying the existence of a shipowner's duty to the stevedore, with the court's dictum in *Hage v. D/S International*, 170 F. Supp. 601, 610-11, 1959 A.M.C. 439 (S.D. Calif. 1959), *aff'd sub nom. Metropolitan Stevedoring Co. v. D/S International*, 274 F.2d 875, 1960 A.M.C. 591 (9th Cir. 1960), *cert. denied*, 363 U.S. 803 (1960). The Supreme Court has granted certiorari in the *Federal Marine Terminals* case. 89 S. Ct. 123 (1968).

to make one participant in the venture primarily liable for the costs of an accident unless some warranties carry stronger consequences than others. Unless a court does this, or writes off the cross-warranty, as it did in *Tebbs*, the logical outcome of this situation would be a division of damages—just as it would have been under traditional *Stevens* tort-collision standards except for the words.

IV. CONCLUSION

And so the words of *Ryan*, transposed to tug-tow situations without any apparent consideration for the relevance of the policies and history behind their inception in stevedoring or for the factual and legal differences between stevedoring and towing, have the potential of very radical effects if pressed to their full logical extent or very modest effects if adapted to conform to existing law.

Placed against *Stevens'* attempt to define a legal relationship between tug and tow, the *Ryan* words must be either restricted to indemnity cases, an approach which fits the present cases but is illogical; treated as merely a rephrasing of the *Stevens'* dictum, an approach which is uncharacteristic of the radicalism of *Ryan*; or used to overrule *Stevens* in its entirety, which no court citing *Ryan* in a towing case has indicated that it thought it was doing. Alternatively, towage operations could be divided on their facts between those in which the tug and tow are partners, governed by *Stevens*, and those under the tug's sole control, governed by *Ryan*, though possibly a *Ryan* doctrine modified in its consequences to reflect the realities of tugs and towing.

Until a court critically examines what it does by generally applying *Ryan* in the substantially different context of towing, such application at best reflects fascination with words in preference to the ideas that they are meant to convey. At its indiscriminate worst, it has a potential for substantial unfairness.