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PART II

THIRD PARTY HARBORWORKERS' CLAIMS IN MARINE  
CONSTRUCTION ACCIDENTS

**I. BACKGROUND**

The Longshore and Harborworkers' Compensation Act, 33 U.S.C. §901, provides that workers covered under the statute may maintain a lawsuit for damages against a vessel owner for negligence pursuant to §905(b) of the LHWCA. Section 905(b) of the LHWCA states as follows:

**(b) Negligence of vessel.**

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

33 U.S.C. §905(b).

The standard of care owed to an injured stevedore by a vessel owner is limited. Those duties were enunciated and described in the seminal Supreme Court case

Scindia Steam Navigation Co. v. De Los Santos, 451 US166, 101 S.Ct. 1614 (1981). In Scindia, the Supreme Court enunciated the following three scenarios whereby a vessel owner could be held to be negligent:

(a) The Turnover Duty

First, the shipowner must use reasonable care to turn over the vessel to the employer in such condition that the expert and experienced employer is able, by the exercise of reasonable care, to carry on its operations with reasonable safety to persons and property. The shipowner must also warn the employer of any hazards that should be known to the vessel but are unknown and not obvious to the employer. Id. at 167, 101 S.Ct. at 1622. (“Turnover duty.”)

(b) The Active Control Duty

Secondly, once the employer takes over, the shipowner must exercise reasonable care to prevent injuries to longshoremen in areas that remain under the active control of the vessel. Id. (“Active control” duty.)

(c) Duty to Intervene

Thirdly, if the vessel has knowledge of the danger and should anticipate that the employer will not, or cannot, correct the danger, then the vessel must intervene and eliminate or neutralize the hazard. Scindia, at 175, 101 S.Ct. at 1626. See Howlett v. Birkdale Shipping Co. S.A., 114 S.Ct. 2057, 2064 (1994).

**II. RIGHTS AND RESPONSIBILITIES OF DUAL CAPACITY OWNERS.**

33 U.S.C. §905(b) provides harbor workers the right to sue the owner of a ship for damages due to injuries sustained due to “vessel negligence.” When the employer owns (or is the owner pro hac vice of) the ship on which the longshoreman is injured, and the injury was caused by the employer’s negligence as vessel owner, there is an

exception to employer immunity under the LHWCA. See Reed v. The YAKA, 373 U.S. 410 (1963). The purpose of this exception was to place the injured longshoreman in the same position as if the vessel were separately owned, viz possessing both a right to compensation and a right to sue the shipowner. To prevail, Plaintiff must show that the vessel owner's negligence, if any, is attributable to it as vessel owner, rather than as Plaintiff's insured LHWCA employer. Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523 (1983).

The Second Circuit had adopted a rule that altered these duties. Hellenic Lines v. Fannetti, 684 F.2d 424 (2<sup>nd</sup> Cir. 1982). Fannetti involved a longshoreman who was employed by the stevedoring arm of a vessel owner's operations. While aboard a vessel owned by his employer, he slipped and injured himself.

Fannetti refused to apply the Scindia rule that a shipowner was entitled to rely on the stevedore to correct obvious dangerous conditions, and instead held that the shipowner could not rely on its employees, (the longshoremen), to correct a condition that its employees, (the ship's crew), created.

In Fannetti, the crew negligently created the greasy condition which caused the longshoreman to slip. The Court felt uncomfortable holding that when an employer, as a vessel owner, negligently creates a hazardous condition on deck, it can look in the mirror and rely on the employer as a stevedore to remedy the condition as it develops. Therefore, the Second Circuit held that in no instance may an employer in a dual capacity case rely on the expertise of its stevedoring employees to work or discharge the vessel with reasonable safety to those employees. That is, since the vessel owner and stevedore were owned by the same corporation, the vessel owner would be

charged with the same knowledge that only the stevedore could gain through its operations, and vice versa.

There is some question as to whether Fannetti is still good law, particularly in the context of harborworkers/ marine construction workers. In September 2000, the Second Circuit clarified this issue to a great extent in Gravatt v. City of New York, 226 F.3d 108 (2<sup>nd</sup> Cir. 2000). Gravatt held that a marine construction worker was not afforded a greater standard of care by the vessel owner who happens to be his dual capacity employer.

Gravatt involved a harborworker who was injured when a load of lumber slipped from the grasp of a crane. The load bounced on the deck of the barge, striking Gravatt in the back of the leg. The lumber on the barge was placed there in a criss-crossed condition during the duration of a construction project and the criss-crossed condition was a contributing factor to the accident.

Judge Sweet, of the Southern District of New York, applying Fanetti, held that the harborworker could go forward with a suit for negligence because of the existence of the negligent condition on the barge which allegedly contributed to the accident. Judge Sweet went further and stated that even if the Scindia criteria were applied to the facts in Gravatt, the barge owner would still be liable, because the criss-crossed lumber violated the turnover duty.

The Second Circuit reversed, stating that the duties of a vessel owner who owns or employs a harborworker should not be heightened, since to do so would be to create a situation of almost strict liability. See, also, Morehead v. Atkinson-Kewitt, 975 F.3d

603 (1<sup>st</sup> Cir. 1996); Castorina v. Lykes Bros., 758 F.2d 1025 (5<sup>th</sup> Cir. 1985). The Second Circuit in Gravatt followed the Morehead line of cases, stating that since the defendant's negligence was committed only in its role as plaintiff's employer, and not in its role as a vessel owner, the employer was not liable in tort under §905(b) of the LHWCA.

Therefore, a vessel owner acting as its own stevedore is liable only for its negligence as occasioned in its owner capacity, not for the negligence of its stevedoring operations. The negligence of the employer's agents, acting in tasks constituting harbor worker employment, may not be imputed to their employer in its capacity as a vessel owner. Put another way, if a dual capacity defendant's alleged negligent conduct occurred in the course of harborworker or construction activity, the defendant's liability is limited under §905(a) to statutory workers' compensation payments. The negligent actions of dual capacity defendants must therefore be analyzed to examine whether they were undertaken in pursuance of their role as vessel owners or as employers.

Moreover, the First Circuit dealt with Fanetti in its decision in Morehead, stating,

"[r]earranging duties of care as in Fanetti raises serious problems, discussed hereafter, by enlarging an employer's tort liability beyond the purposes of the 1972 Amendments. Cf. Howlett, 512 U.S. at \_\_\_\_\_, 114 S. Ct. at 2063. Fanetti, moreover, was decided before Jones & Laughlin was handed down in the Supreme Court. We do not think that the Second Circuit today would endorse Fanetti's broadened duty of care, given the Supreme Court's remark 'that a vessel owner acting as its own stevedore is liable only for negligence in its 'owner' capacity, not for negligence in its 'stevedore' capacity.' Jones & Laughlin, 462 U.S. at 531 n. 6, 103 S. Ct. at 2547 n. 7. This comment suggests that the Court expected the limited vessel liability in Scindia to carry over to dual capacity situations as well. No later case from the Second Circuit, or from any other circuit, has been called to our attention following Fanetti's enlargement of a vessel's duty in a dual capacity situation."

Morehead, 97 F.3d at 611.

It appears that under the aforementioned Gravatt and Morehead cases, a harborworker would have to prove that his injury was caused by the negligence of his employer in its capacity as a vessel owner. That is, the employer must be wearing his vessel owning "hat" at the time of the injury.

### **III. RECOVERY OF THE LHWCA LIEN**

Section 33 of the LHWCA provides that a compensation paying employer may obtain its lien back for disability payments, medical benefits and even attorney fees, should the claimant make a recovery against a third party. The lien is asserted against the recovery at the time the recovery against the third party is made.

If an injured plaintiff recovers against a third-party under the dual capacity doctrine, can the dual capacity employer then assert his lien against said recovery? In Gravatt, the plaintiff settled a portion of his liability with the City of New York and with the project engineer, Nanik Massand, P.E., for approximately \$1.5 million. He had been paid in the range of \$200,000 for workers compensation benefits under the LHWCA. The LHWCA dual capacity employer was exonerated from vessel owning liability and it appears that it may also assert its workers' compensation lien against Gravatt's recovery from the City and Nanik Massand.

It appears rational that a compensation paying employer could assert this lien despite its dual capacity status, given that the policy reasons behind the statutory creation of this lien is so that the injured longshoreman does not receive double

recovery, and a windfall at the expense and detriment of the employer. The status of the Gravatt lien case will be monitored closely for this reason.

#### IV. **APPLICATION OF STATE LAW TO MARINE CONSTRUCTION ACCIDENTS**

Prior to December, 2000, if an injury occurred on navigable waters under New York State territorial waters, there was a question as to whether an injured longshoreman could also invoke strict liability provisions of the New York State Labor Law §240 as against non-vessel owning maritime defendants. See, Torres v. City of New York, 177 A.D.2d 97 (2d Dept. 1997); Erickson v. Long Island Lighting Co., 236 A.D.2d 439 (2d Dept. 1997); Rigopoulos v. City of New York, 236 A.D.2d 459 (2<sup>nd</sup> Dept. 1995). In Erickson and Rigopoulos, the Second Department had taken the view that such state claims were superceded by federal admiralty law, holding that the rights and liabilities of the parties under the General Maritime law could not be enlarged or impaired by state statutes like the strict liability provisions contained in §240 of the New York Labor Law. See, also, Tibak v. City of New York, 154 A.D.2d 313 (1<sup>st</sup> Dept. 1995); Sutherland v. City of New York, 266 A.D.2d 373 (1<sup>st</sup> Dept. 1999).

The Court of Appeals of New York recently decided, in Cammon v. City of New York, 2000 N.Y.Lexis 3902 (NY. Dec. 21, 2000), that the Labor Law could supplement the General Maritime Law and create additional causes of actions to be asserted against non-vessel owning maritime defendants, such as pier owners and marine construction sub- contractors.

In Cammon, the plaintiff, a dock builder, was injured when repairing a wood fender system at the South Bronx Marine Transfer Station, a land based structure. The plaintiff then commenced an action against the City of New York, in its capacity as the owner/operator of the Transfer Station, and Anjack Marco, the general contractor. Plaintiff alleged liability to these entities under New York Labor Law §§200, 240(1) and 241(6). The City and Anjack moved to dismiss, alleging that defendants' liability was limited to pure negligence since the strict liability statutes were pre-empted by the Federal Maritime Law.

The Court of Appeals found that the Labor Law did not generally conflict with the Federal Maritime Law and permitted the §240 Labor Law claims to go forward. The Cammon Court did comment that it was limiting its holding in Cammon to the specific facts of the case. "Because strict liability is not wholly at odds with Federal maritime principles, we see no reason for the Labor Law's provisions to be displaced in the context of this local land based repair," stated the Court.

One important distinction must be made with regard to Cammon. Cammon did not involve a suit brought against a vessel under the LHWCA. It is questionable whether Cammon can be applied to augment the rights of longshoremen as against vessel owners. Because of Congress' intent through Section 905(b) to specifically limit the duties of vessel owners to negligence only, it is arguable that New York Labor Law claims, as applied to vessel owners in §905(b) suits, would be pre-empted. The viability of the application of the New York Labor Law to §905(b) actions against vessels will be discussed in further detail below.

In terms of whether pier owners can be subject to Labor Law causes of action (as they were in Cammon), we again turn to the District Court decision in Gravatt. The

Cammon decision is similar to the Gravatt District Court holding with respect to the non-vessel owning defendants. Gravatt sued the pier owner, the City of New York, and the general contractor under Labor Law 240, and those defendants argued that Labor Law §240 was preempted by maritime law. Judge Sweet granted the plaintiff's motion, holding that the 240 claims against the City and the engineer were not preempted, and that the defendants had no defenses as to the liability for §240 violations. (A similar decision was followed in the companion case to Gravatt, Berg v. City of New York, which appeared in the New York Law Journal on July 20, 2000, page 22, column 4, in which Judge Stahlman applied Judge Sweet's reasoning to a separate accident involving one of Gravatt's coworkers.)

Judge Sweet's decision and the Court of Appeals decision in Cammon seem somewhat dangerous. Both tribunals fail to recognize the Labor Law conflicts with the general maritime law by imposing strict and vicarious liability on the property owners, based on a non-delegable duty which is not recognized by maritime law, and which is contrary to the principles of comparative fault. Under the general maritime law, Gravatt and Cammon would have had to have proven negligence to recover from the parties who caused their injury. Normally, pier owners owe plaintiffs a duty of reasonable care under the circumstances, similar to what a vessel's passengers are owed under the Kermarec standard. Kermarec v. Campagnia Generale Maritime, 358 U.S. 625 (1959). See Cascelli v. Martech Int'l, 774 F.2d 1322, 1328 (5<sup>th</sup> Cir. 1985); Bubla v. Bradshaw, 795 F.2d 349 (4<sup>th</sup> Cir. 1986). Therefore, the Labor Law conflicts with the general maritime law by making it easier for injured workers to recover damages from pier owners. Neither Judge Sweet nor the Court of Appeals of New York addressed this issue in their decisions. In this regard, it is arguable that both the trial court decision

concerning Labor Law in Gravatt, and the Cammon decision decided by the Court of Appeals, are wrongly decided.

Unfortunately for defendant pier owners and shipyard owners, Cammon appears to be the law of the land in New York at this juncture. It is important to note that the non vessel owner defendants in Gravatt never appealed this issue to the Second Circuit. One is only left to wonder whether the outcome in Cammon could have been decided differently had they done so.

More dangerous is the recent trend in New York Courts to apply Cammon and extend it to injuries that occur aboard vessels. In Songui v. City of New York, the Second Department held that a welder injured when he fell from a scaffold inside a New York City Department of Sanitation barge was entitled to recovery under §241(6) of the Labor Law. Justice Mastro, at the time sitting in Supreme Court Richmond County, granted the City's motion to dismiss the plaintiff's claim under Labor Law §240(1), holding that, as a strict liability statute, it was inconsistent with the LHWCA's §905(b). However, Justice Mastro refused to dismiss the plaintiff's claim under Labor Law 241(6), holding that 241(6) was not inconsistent with the LHWCA, as it is a statute which allows for liability predicated on fault, and therefore wholly consistent with §905(b). The Second Department affirmed the Order, upholding the liability of the plaintiff's 241(6) claim against the vessel owner, concluding that the vessel owner would not be subject to liability without fault under 241(6), and therefore the application of 241(6) would not be inconsistent with federal maritime law and §905(b) of the LHWCA. See Songui v. City of New York, 770 NYS 2d 103 (2d Dept. 2003). See also Emmanuelle v. Sheridan Transportation, 779 NYS 2d 168 (1st Dept. 2004) (plaintiff rigger who was helping to tie up a gangway to allow access to a tank barge from a drydock in the Brooklyn Navy Yard

had his Jones Act and §240 claims dismissed prior to trial; First Department affirms §240 dismissal because it was preempted by federal law<sup>1</sup>).

Unfortunately, the Second Department seems to be in conflict with the First Department. In Aguilar v. Henry Marine Services, the Second Department permitted a §240 case to go forward against the vessel owner despite the clear language of §905(b) prohibiting anything but negligence actions against vessel owners. Aguilar v. Henry Marine Services, 785 NYS 2d 95 (2d Dept. 2004). While assisting with drydock services on a tug owned by Henry Marine, Aguilar tripped on a hose and fell 15 to 20 feet over the side. Aguilar moved for summary judgment on the issue of liability under §240. The Supreme Court Kings County denied both motions. The Second Department granted summary judgment to the plaintiff, describing the vessel repair work as the land-based alteration of a vessel, and not dealing at all with the issue of §240 being in conflict with the plain language of §905(b), nor dealing with the issue of preemption. It appears that the tug's lawyers attempted to characterize the shipyard's work as routine maintenance outside the scope of the Labor Law, but this was rejected as well. However, it does not appear that the tug's attorneys put forth an argument regarding federal preemption.

Aguilar directly conflicts with Emmanuelle and Songui, and also conflicts directly with the plain language of §905(b). This is an extension of Cammon that is clearly not the intent of the Cammon Court. Compare Olsen v. James Miller Marine Services, 791 NYS 2d 92 (1<sup>st</sup> Dept. 2005). In Olsen, an LHWCA employee aboard a barge owned by his employer was performing work in connection with the rehabilitation of a pier. He stepped onto plywood covering a hole in the center of the barge, and the plywood slid

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<sup>1</sup> It is important to note that in Emmanuelle, Justice Tom, writing for the entire Court, distinguished Cammon because the injury to Emmanuelle was not land-based, and the defendants were vessel owners

out from under him causing him to fall into the hole. In his “dual capacity case,” the plaintiff alleged 240 Labor Law, and the defendants moved for summary judgment. The First Department held that the LHWCA did not necessarily preempt the Labor Law claims against the general contractor, but appeared to dismiss the 240 claim against the barge owning employer, presumably as being in conflict with §905(b) of the LHWCA.

It appears that the state of the law is in flux at this juncture in New York State harborworker cases with respect to the application of New York Labor Law and §905(b). If the claim is against the land owner as opposed to a vessel owner, it appears clear that §240 will apply. In the case of vessel owners, it appears that although §240 may or may not apply (depending on the type of defendant), §241(6) appears to be a viable cause of action, despite the language of §905(b) of the LHWCA.

#### **V. PARTICULAR PROBLEMS FACED BY SHIPYARDS AND THEIR WORKERS**

Shipyard workers cannot maintain third-party actions against their employers under §905(b). In that regard, 33 U.S.C. §905(b) states, in pertinent part as follows:

If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer.

Therefore, if a ship repair yard happens to be the owner, or owner *pro hac vice*, of a vessel, and violates a turnover duty regarding that vessel, the shipyard is immune to a §905(b) suit brought by one of its employees.

Nevertheless, a ship repair yard will likely face third-party liability exposure for injuries sustained by sub-contractors, who are generally considered to be business invitees. Such individuals may have causes of action under New York State's labor law if they are injured in a shipyard, pursuant to Cammon. For example, if a subcontractor of a ship repair yard has a worker injured at a job site, the worker may have a state based Labor Law claim against the shipyard.

While shipyards are immune to third party lawsuits by their workers, shipyard workers often attempt to sue the owners of vessels upon which they are injured while the vessels are under repair. In those situations, would Cammon apply to supplement the LHWCA cause of action? As discussed, supra, it is unlikely that the New York State Labor Law will be able to trump a federal statute, the LHWCA. The LHWCA limits the claims of an injured maritime worker to those of negligence against a vessel owner. See, H.R. Rep. No. 92-1441, 1972 U.S.C.C.A.N. 4698, 4704. Congress also intended that the claims asserted by an injured maritime worker under §905(b) were to be developed as a matter of uniform federal maritime law and not by incorporated the tort law of the particular state in which the action arose. Id. at 4705. The LHWCA seems to bar workers from pursuing all but negligence claims against vessel owners, and application of the strict liability provisions of the NY Labor Law may be barred.

## **VI. CROSS-CLAIMS**

Pursuant to §905(a) of the LHWCA, tort based indemnity and contribution claims are not valid. §905(a) states as follows:

"The liability of an employer prescribed in §905 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in an admiralty on account of such injury or death."

See also, Lopez v. Oldendorf, 579 F.2d 714 (2<sup>nd</sup> Cir. 1976).

Therefore, provisions seeking indemnity and contribution from compensation paying employers are invalid, as are third-party suits seeking indemnity against and contribution from employers. See, Zapico v. Bucyrus-Erie, 1978 AMC 1629 (2<sup>nd</sup> Cir. 1978)<sup>2</sup>. This rule differs from the New York State's Workers' Compensation Law, which allows compensation paying employers to be named as third-party defendants for "grave injuries" as that term is described in §11 of the New York State Workers Compensation Act.

It should be noted that in cases of dual capacity employers and vessel owners, cross-claims for indemnity and contribution usually survive as against a shipowner, even though the shipowner/employer is a compensation paying employer under the LHWCA. See, Tran v. Manitowoc Engineering Co., 767 F.2d 223 (5<sup>th</sup> Cir. 1985).

Nevertheless, express contractual indemnity provisions may survive between non-compensation paying parties. These contractual indemnities may be express or implied, but one famous maritime law commentator indicated that implied contractual indemnity should be "applied sparingly and purposefully by the law." T. Schoenbaum, Admiralty & Maritime Law, §4-15, p. 151 (1987). Nevertheless, courts have previously found valid implied indemnity situations. For example implied contractual indemnity

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<sup>2</sup> Courts have somewhat eroded the absoluteness of this rule. At least two decisions indicate that non vessel owning defendants to an LHWCA employee's lawsuit may bring an action for indemnity against a compensation paying employer, especially where an express contractual term exists between that defendant and the compensation paying employer. See Marr Equipment Corp. v. ITO of New England, 437 NE 1026 \_\_\_\_\_, (Mass. App. Ct. 1982); Vargas v. American Export Lines, Inc., 1986 AMC 805, 810 (1<sup>st</sup> Dept. 1985) (express

arises where there are unique special factors, demonstrating that the parties intended that the would be indemnitor would bear the ultimate responsibility for the plaintiff's safety. See, Zapico, supra.

Such situations of implied indemnity can usually be found in third-party beneficiary situations. Assume a barge owner is shipping construction materials to a job site, per a contract with Company "A". Company "B" is the project engineer. The vessel and both A and B are sued for personal injuries sustained by a harborworker. A's contract with the vessel contains indemnity provisions. B has no contract with the vessel, but cross-claims against the vessel for indemnity.

Courts may find that if B is a third-party beneficiary of the contract between A and the Owner, the indemnity agreement is "express", leaving a much lower burden to prove its validity. Indeed, indemnity provisions in contracts between two parties, for the benefit of a third party, have been held to be valid if the indemnity comes within the concept of the "zone of responsibility", (i.e., whether the services rendered were not only for the benefit of the other party to a contract, but also for the ultimate benefit of another foreseeable party. See, Paladino v. A.P. Moller, 1989 A.M.C. 513, 520 (Sup. Ct. N.Y. 1988).

The Second Department of the Appellate Division indicated that where a direct contractual relationship between the parties exists, a cross-claim for indemnity will survive. However, where there is **no** direct contractual relationship, the party seeking indemnity must prove that it is the intended beneficiary of a contract. See, Gjursten v.

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contractual indemnity provision between non vessel owning defendant and employer valid and enforceable.)  
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Mawson & Mawson, Inc., 1988 A.M.C. 1484 (App.Div. 2<sup>nd</sup> Dept. 1987) In Giursten, a general contractor, who was not a party to a contract between two subcontractors, (one of which was the plaintiff's employer), was held to be an intended third-party beneficiary to the contract for the purposes of worker safety. Therefore, the general contractor's cross-claim against the subcontractor/employer was permitted to stand. See, also, Vargas v. American Export Lines, 1986 A.M.C. 805, 810 (App. Div. 1<sup>st</sup> Dept.1985) (indemnity provisions between employer and non-vessel owning contractor valid and enforceable).

Another difficulty involving the problems that Cammon has visited upon us is how Cammon will affect claims for indemnity and contribution. Recently decided by the Second Department was a case involving a dual capacity employer refurbishing a pier in Manhasset Bay. Mulhern v. Manhasset Bay Yacht Club et. al. (2007 NY Slip Op 6420; 2007 N.Y. App. Div. LEXIS 9057) The barge owner employed an individual who was adjudicated to be a Jones Act seaman. The putative seaman sued not only his employer, but the property owner under §§240 and 241(6) of the Labor Law. At a trial on liability only, he was adjudicated to be a Jones Act seaman, and then, the Jones Act seaman was awarded liability in his favor under §§200, 240 and 241(6) of the Labor Law, against the property owner. The property owner had brought an implied indemnity cause of action under the Ryan doctrine<sup>3</sup> against the Jones Act employer, claiming that he violated the duty of workmanlike performance.

The Second Department held that the contract to refurbish the pier was not a maritime contract and, therefore, it does not invoke Ryan indemnity. That is, a contract for the refurbishment of an extension of the land, e.g. a pier, is a land-based and not a

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<sup>3</sup> Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124 (1956). The Ryan doctrine is based upon an implied warranty of workmanlike performance. Simply put, a contractor may have a cause of action against the provider of services for breach of an implied warranty in a maritime contract.

maritime contract. The Second Department dismissed the Third Party Plaintiff's claim for implied indemnity under Ryan.

Nevertheless, this case illustrates the problem that Cammon brings: because the Court of Appeals permitted Jones Act seamen and LHWCA workers to sue riparian property owners (pier owners) under §§200, 240 and 241(6) of the Labor Law, these pier owners are now able to attempt to lay their Labor Law liability at the feet of would be maritime employers. This is clearly not what the Court of Appeals in Cammon intended, nor does it comport with the general maritime law. Although the general maritime law only recognizes implied indemnity under these circumstances for maritime contracts, not land-based contracts, we can envision situations which could invoke implied indemnity claims for a Labor Law defendant's liability exposure. This is just a small example of the type of unwanted difficulties that Cammon has unwittingly wrought on defendants in marine construction cases.

## **VII. INSURANCE COVERAGE ISSUES**

Naturally, in dual capacity marine construction accidents, claims issues may arise with regard to insurance coverage. Oftentimes, a compensation paying employer who is also the general contractor on a work site agrees to hold the property owner harmless. For example, marine general contractors who contract with the City often contain an indemnification and hold harmless agreement for the benefit of the City of New York. The marine general contractors will undertake a duty to indemnify and hold harmless the City of New York by retaining counsel for and paying for the defense of the City. Assuming that the marine general contractor is sued as a *pro hac vice* owner under §905(b), his P&I coverage may be invoked. If he is a dual capacity employer as well, his workers compensation/employer's liability coverage may also be invoked. His

Commercial General Liability/Contractor's Liability Coverage may be invoked for any claim for indemnification as well.

As discussed, supra, co-defendants will often attempt to establish certain cross-claims under common law indemnity and contribution schemes, as well as for contract based indemnity and contribution schemes. Should a contract based indemnity or contribution claim survive, it may be the case that the employer's LHWCA/Employer's liability coverage will not apply. The contractual CGL underwriter should always be put on notice of any potential cross-claim from co-defendants involving contractual responsibilities. See, generally, Hawthorne v. South Bronx Community Corp., 78 NY2d 433 (1991) (both workers' compensation and CGL carrier had duty to indemnify even though CGL carrier had contractual coverage; workers' compensation carrier could be required to provide common law indemnity to CGL carrier).

### **CONCLUSION**

The various issues surrounding marine construction litigation has been quick to evolve in recent years. These cases involve issues of pre-emption, insurance coverage and varying degrees of duties, depending on whether the assured is a vessel owner, employer, general contractor, pier or property owner, or sub-contractor, or some or all of the above. The rules appear to be ever changing in this emerging, complex field.