ADMIRALTY—TORTS—IN NONCOLLISION CASES CONTRIBUTION WILL LIE WHERE NO COUNTERVAILING CONSIDERATIONS DETRACT FROM THE MARITIME RULE ALLOWING CONTRIBUTION BETWEEN JOINT TORTFEASORS.

While loading a vessel operated by respondents,[1] a longshoreman[2] sustained personal injuries when he stepped into a concealed gap between crates of cargo previously loaded by petitioner.[3] The longshoreman brought suit in federal district court for damages against respondents, who impleaded petitioner, alleging that if any injuries to the longshoreman were the result of negligence other than his own, then such injury resulted from the negligence of petitioner.[4] The district court found both parties at fault and divided the liability equally. Petitioner appealed,[5] asserting that contribution is not available in a noncollision maritime case. The Court of Appeals for the Fifth Circuit rejected this contention,[6] affirming the award because petitioner, not being the employer of the longshoreman, was not shielded from liability.[7] On a writ of certiorari to the United States Supreme Court, *held*, affirmed. Contribution in noncollision cases will lie where no countervailing considerations detract from the well-established maritime rule allowing contribution between joint tortfeasors. *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 94 S. Ct. 2174 (1974).

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[1] The vessel, the S.S. Karina, was owned by respondent Fritz Kopke and was under the time-charter to respondent Alcoa Steamship Company.

[2] The longshoreman, Troy Sessions, was an employee of Mid-Gulf Stevedores, Inc.

[3] Petitioner Cooper Stevedoring Co. had loaded the vessel in Mobile, Alabama, before it proceeded to Houston, Texas, where the injuries occurred.

[4] Respondents also filed a similar third-party complaint against the longshoreman's employer, Mid-Gulf. Prior to trial Mid-Gulf agreed to indemnify respondents against any recovery the longshoreman might obtain. Mid-Gulf was then dismissed as a defendant and Mid-Gulf's attorneys were substituted as counsel for the respondents.

[5] Respondents also cross-appealed, claiming a right to full indemnity from petitioner on the basis of Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956) [hereinafter *Ryan*] (Stevedoring company obligated to indemnify shipowner for damages caused by Stevedore's improper storage of cargo). The Fifth Circuit Court of Appeals held that *Ryan* did not apply here since respondents had failed to fulfill their primary responsibility under the arrangement with petitioner to assure that some type of dunnage was placed on top of the cargo. Sessions v. Fritz Kopke, Inc., 479 F.2d 1041, 1042 (5th Cir. 1973).

[6] Sessions v. Fritz Kopke, Inc., 479 F.2d 1041 (5th Cir. 1973).

[7] *Id.* Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905 (1970), *as amended*, 33 U.S.C. § 905 (b) (Supp. II, 1972) [hereinafter cited as the Act]:

> The liability of an employer prescribed in section 904 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 admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

While the common law has traditionally disallowed contribution among joint tortfeasors,[8] in admiralty law such contribution is a well established rule in collision cases involving mutual fault.[9] This rule pertaining to contribution in vessel collision cases was subsequently expanded to cover cases involving collisions between vessels and inanimate shore objects[10] and to cases involving cargo damage or personal injury not resulting from collision.[11] By 1922 it appeared that American courts had finally laid to rest any distinction between collision and noncollision cases in determining whether damages should be divided.[12] However, this distinction was later resurrected in *Halcyon Lines v. Haenn Ship Corp.*[13] A writ of certiorari had been granted in *Halcyon*[14] to clear up the controversy raised by the passage of the Longshoremen's and Harbor Workers' Compensation Act.[15] The Court denied the shipowner contribution from the

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[8] *See* W. PROSSER, LAW OF TORTS 305 (4th ed. 1971).

[9] *See, e.g.*, The Washington, 76 U.S. (9 Wall.) 513 (1869); The Alabama, 92 U.S. 695 (1875).

This concept of contribution in admiralty cases can be traced as far back as the twelfth century laws of Oleron. By 1815 this doctrine became firmly entrenched in English law in The Woodrop-Sims, 165 Eng. Rep. 1422 (Adm. 1815). By way of dictum, Sir William Scott stated that where a loss occurred through a collision between two vessels and both parties are to blame, the rule of law was that the loss must be apportioned between them. Scott's dictum was adopted in the United States by the Supreme Court in The Schooner Catharine v. Dickinson, 58 U.S. (17 How.) 170 (1854).

For a general discussion of the application of the doctrine in American courts, see Mr. Justice Bradley's opinion in The North Star, 106 U.S. 17 (1882), and Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases*, 45 CAL. L. REV. 305 (1957).

[10] Atlee v. Packet Co., 88 U.S. (21 Wall.) 389 (1874); Louis Dreyfuss v. Seaboard Great Lakes Corp., 69 F.2d 71 (2d Cir. 1934).

[11] For contribution in noncollision property damage cases, *see* The Bordentown, 16 F. 270 (S.D.N.Y. 1883); Snow v. Carruth, 22 F. Cas. 724 (No. 13144) (D. Mass. 1856).

For division of damages in a noncollision personal injury case, *see* The Explorer, 20 F. 135 (C.C.E.D. La. 1884). *See also* The Max Morris, 137 U.S. 1 (1890), where the Court cited several district court cases as precedents for extending division of damages to noncollision cases: The Steam Tug William Cox, 3 F. 645 (S.D.N.Y. 1880), *aff'd*, 9 F. 672 (S.D.N.Y. 1881); The Steam Tug William Murtaugh, 3 F. 404 (S.D.N.Y. 1880); The Syracuse, 18 F. 828 (S.D.N.Y. 1883).

[12] *See* White Oak Transp. Co. v. Boston, Cape Cod & N.Y. Canal Co., 258 U.S. 341 (1922); The Jethou, 2 F.2d 286 (9th Cir. 1924).

[13] 342 U.S. 282 (1952) [hereinafter *Halcyon*]. Haenn had been hired to make repairs on Halcyon's ship, and an employee of Haenn sustained personal injuries due to the fault of both Halcyon and Haenn. Suit was brought against Halcyon, who impleaded Haenn as a third-party defendant. Although the jury returned a special verdict finding Haenn and Halcyon seventy-five and twenty-five per cent at fault, respectively, judgment was entered dividing the liability equally. Baccile v. Halcyon Lines, 187 F.2d 403 (3d Cir. 1951).

[14] 342 U.S. 809 (1951).

[15] 33 U.S.C. §§ 901-950 (1970). *See* note 7 *supra*. The lower courts were undecided as to what effect the Act had on the issue of contribution in cases involving an employer covered by this statute. *See* American Mutual Ins. Co. v. Matthews, 182 F.2d 322 (2d Cir. 1950) (employer's limitation of liability under the Act barred contribution); United States v. Rothchild Int'l Stevedoring Co., 183 F.2d 181 (9th Cir. 1950) (the Act did not bar contribution because the employer knew of defect and failed to warn employee); Baccile v. Halcyon Lines, 187 F.2d 403 (3d Cir. 1951) (contribution allowed but limited to the amount which the injured employee could have compelled the employer to pay had he elected to claim compensation under the Act).

injured workman's employer but did so in a manner which did not make clear its grounds for denial. The Court did not specifically say that the statutory immunity provided to the employer under the Act would preclude contribution,[16] but said instead "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."[17] In addition, in what came to be known as the *Halcyon* dictum, the Court threw the law into a considerable state of confusion by stating that the contribution rule had not yet been extended to noncollision maritime cases in general.[18]

Numerous lower courts, relying on the *Halcyon* dictum, adopted the view that *Halcyon* stood for no contribution in noncollision cases.[19] The Fifth Circuit

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In American Stevedores, Inc. v. Porello, 330 U.S. 446 (1946), the Supreme Court avoided a direct ruling on the effect of the Act by reversing the holding of the court of appeals that the Act precluded contribution where the statutory immunity factor is present. The Court found that an express indemnity clause in the contract between the two joint tortfeasors and *not* the Act itself was the major issue in the case.

[16] It is significant that the author of *Halcyon*, Mr. Justice Black, expressly asserted in Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315 (1963) (Black, J., dissenting), that *Halcyon* stood for the proposition that the Act precluded contribution:

> . . .[W]e held that a system of compensation which Congress established in the Longshoremen's and Harbor Workers' Compensation Act (citation omitted) as the sole liability of a stevedoring company to its employees prevented a shipowner from shifting all or part of his liability to the injured longshoreman onto the stevedoring company, the longshoreman's employer.

[17] 342 U.S. at 285. Congressional action, however, was not forthcoming. Four bills dealing with this issue were introduced in the period from *Halcyon* to present: S. 2312, 87th Cong., 1st Sess. (1961); H.R. 7911, 87th Cong., 1st Sess. (1961); S. 555, 88th Cong., 1st Sess. (1963); H.R. 1070, 88th Cong., 1st Sess. (1963). Not one was reported out of committee.

[18] 342 U.S. at 284:

> 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 noncollision cases.* Halcyon now urges us to extend it to noncollision cases and to allow a contribution here based upon the relative degree of fault of Halcyon and Haenn as found by the jury. (emphasis added)

In holding that "this Court has never expressly applied it to noncollision cases," Justice Black obviously overlooked the decisions in The Max Morris, 137 U.S. 1 (1890), and White Oak Transp. Co. v. Boston, Cape Cod & N.Y. Canal Co., 258 U.S. 341 (1922). *See* notes 11 and 12 *supra*.

[19] *See* Mendez v. States Marine Lines, Inc., 421 F.2d 851 (3d Cir. 1970); King v. Waterman Steamship, 272 F.2d 823 (3d Cir. 1959); Read v. United States, 201 F.2d 762 (3d Cir. 1953); Saus v. Delta Concrete Co., 368 F. Supp. 297 (W.D. Pa. 1973); Nickert v. Puget Sound Tug & Barge Co., 335 F. Supp. 1158 (W.D. Wash. 1972); In Re Standard Oil Co., 325 F. Supp. 388 (N.D. Cal. 1971); Sears, Roebuck & Co. v. American President Lines, 345 F. Supp. 395 (N.D. Cal. 1971).

Remarkably, the Supreme Court itself circumvented the *Halcyon* decision by use of an indemnity theory in Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co., 350 U.S. 124 (1956). A longshoreman covered by the Act sued a shipowner for personal injuries sustained, alleging unseaworthiness of the ship. The shipowner filed a third— party indemnity action against the longshoreman's employer. The Court decided in favor of the shipowner, finding an independent contractual obligation on the part of the employer in promising to stow cargo "with reasonable safety." Hence, a breach

Court of Appeals openly disputed this conclusion. On two occasions[20] the court held that *Halcyon* stated a limited rule that contribution would not be allowed in noncollision cases from a statutorily immune joint tortfeasor. Similarly, the Second Circuit affirmed the *Halcyon* dictum in *Benazet v. Atlantic Coast Line R.R.*,[21] a case involving statutory immunity. But faced with a different situation, where the statutory immunity factor was absent, the Second Circuit altered its interpretation of *Halcyon*, allowing contribution in *In Re Seaboard Shipping Corp.*[22] Both cases were appealed to the Supreme Court; a writ of certiorari was granted in *Benazet*[23] but was denied in *Seaboard*.[24]

This discrepancy in granting certiorari appeared to indicate that the Supreme Court was not yet willing to make a definitive statement on the issues raised by *Halcyon*. The opinion affirming *Benazet* merely implied that *Halcyon* must be limited to the facts in the case. In fact, had the Court intended to affirm *Halcyon* without any reservations, it should have denied certiorari since the facts in the two cases were essentially the same.[25] *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*[26] presented the Court with another opportunity to rectify the confusion created by the *Halcyon* decision. In *Cooper Stevedoring* the Court stated: ". . . *Halcyon* stands for a more limited rule than the absolute bar

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of contract action accrued to the shipowner aside from any tort action; the entire loss was shifted from the tortious shipowner to the tortious stevedoring company, who under *Halcyon* could not have been liable. Justice Black authored a vigorous dissent, asserting that the Court was undermining the *Halcyon* rationale. *Ryan*, *id.* at 135 (Black, J., dissenting).

The *Ryan* indemnity doctrine was followed and even extended by some courts. *See* Federal Marine Terminals Inc. v. Burnside Shipping Co., 394 U.S. 488 (1969); Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315 (1964); Waterman S.S. Corp. v. Dugan & McNamara, Inc., 364 U.S. 421 (1960); Crumady v. The Joachim Hendrik Fisser, 358 U.S. 423 (1959); Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 353 U.S. 563 (1958). *See generally* Milburn, *Halcyon Revisited: Contribution Between Joint Tortfeasors in Non-Collision Maritime Cases*, INSTITUTE OF CONTINUING LEGAL EDUCATION IN GEORGIA, SEMINAR ON ADMIRALTY LAW, ATLANTA, 1972, at DM-1 (1972).

[20] Horton & Horton, Inc. v. T/S J.E. Dyer, 428 F.2d 1131 (5th Cir. 1970), *cert. denied*, 400 U.S. 993 (1970); Watz v. Zapata Offshore Co., 431 F.2d 100 (5th Cir. 1970).

[21] 422 F.2d 694 (2d Cir. 1971), *aff'd per curiam sub nom.* Atlantic Coast Line R.R. v. Erie Lackawanna R.R., 406 U.S. 340 (1972) [hereinafter *Benazet*]. The facts here were essentially the same as those in *Halcyon*. Plaintiff Benazet, an employee of Erie, sued Atlantic for the personal injuries he incurred while working on a box car owned by Atlantic. Atlantic, in turn, sought contribution from Erie as a joint tortfeasor, but its contention was squarely rejected on the authority of *Halcyon*.

[22] 449 F.2d 132 (2d Cir. 1971), *cert. denied sub nom.* Seaboard Shipping Corp. v. Moran Inland Waterways Corp., 406 U.S. 949 (1972).

[23] 404 U.S. 909 (1971). The Court affirmed in a surprising one-line opinion: "We agree that in *this* noncollision admiralty case the District Court properly dismissed petitioner's third party complaint for contribution against respondent Erie on the authority of *Halcyon* . . . ."(citation omitted) 406 U.S. 340 (1972). (emphasis added)

[24] 406 U.S. 949 (1972).

[25] This same implication is at least suggested by the denial of certiorari in *Seaboard*. *See generally* Allbritton, *Contribution Among Joint Tortfeasors in Non-Collision Maritime Cases*, 4 J. MARITIME L. 425 (1972).

[26] 94 S. Ct. 2174 (1974) [hereinafter *Cooper Stevedoring*].

against contribution in noncollision cases. . . ."[27] In the opinion of the Court *Halcyon* was still good law, but the Court limited its application to situations where the party from whom contribution was sought was statutorily immune from direct tort liability.[28] The Court found none of the countervailing considerations present in *Halcyon* and *Benazet* to "detract from the well established maritime rule allowing contribution between joint tortfeasors."[29]

Since *Cooper Stevedoring* has applied the division of damage rule to a noncollision case, the practical effect will be to affirm the contribution rule in maritime cases generally, subject to the *Halcyon* limitation. The ultimate reason for allowing contribution is compelling. It is obviously unjust to force one negligent party to pay the entire award when another has contributed to the injury. This injustice is magnified by the fact that the injured party can indiscriminately choose which of the joint tortfeasors he wishes to sue. Moreover, there appears to be no valid distinction between collision and noncollision cases generally, since no noteworthy distinction was ever drawn until the *Halcyon* decision. The only rationale given there for making such a distinction was that the Court had never directly applied the contribution rule to noncollision cases.[30]

Although *Cooper Stevedoring* abolishes this distinction, the decision falters in two respects. First, the Court states that *Halcyon* stands for a limited rule[31] without expressly defining that rule.[32] The problem is compounded since the rule is not even apparent from a reading of *Halcyon* itself.[33] The Court in

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[27] *Id.* at 2177.

[28] The Act, which provides an injured workman's employer with such immunity, was amended in 1972 to rectify the injustices resulting from the *Ryan* indemnity doctrine. The amended statute reads in part:

> (b) 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.

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905 (b) (Supp. II, 1972), *amending* 33 U.S.C. § 905 (1970).

[29] 94 S. Ct. at 2178.

[30] *See* note 18 *supra*.

[31] 94 S. Ct. at 2177. The Court held that " . . . *Halcyon* stands for a more limited rule than the absolute bar against contribution in noncollision cases. . . ."

[32] The Court merely implies that the *Halcyon* rule disallows contribution between joint tortfeasors where the one from whom contribution is sought is statutorily immune from liability. This implication is apparent from the Court's affirmation of the circuit court's decision, which held this to be the *Halcyon* rule. Sessions v. Fritz Kopke, Inc., 479 F.2d 1041 (5th Cir. 1974). The court of appeals had relied upon earlier Fifth and Second Circuit decisions which interpreted *Halcyon* in a like manner. See notes 20 and 22 *supra*.

[33] Aside from stating the *Halcyon* dictum (apparently holding that there is no right of contribution in noncollision cases), the Court refused to allow contribution since Congress had made no provisions for the effect the Act should have on contribution in this factual situation. 342 U.S. at 286.

Cooper Stevedoring had the opportunity to define the *Halcyon* rule but chose not to do so. Instead, it has obviously abrogated this responsibility to the courts of appeals. With no high court pronouncement on this issue, the door may now be open to confusion, just as *Halcyon* opened the door to twenty years of inconsistent interpretations.

Second, more confusion may result from the Court's use of the phrase "countervailing consideration."[34] *Cooper Stevedoring* establishes statutory immunity as one such consideration, but are there others? Naturally, the Court is under no obligation to list every possible factor which might disallow contribution, but the Court's failure to be more explicit could conceivably leave the lower courts struggling.

Personal injury suits in admiralty are frequently presented to the lower courts, and these courts need some positive guidance as to the handling of contribution claims. Should confusion result from the *Cooper Stevedoring* Court's failure to provide this guidance, then hopefully the Supreme Court will grant certiorari in the proper instance and clarify the deficiencies apparent in *Cooper Stevedoring*.

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[34] The Court stated: "On the facts of this case, then, no countervailing considerations detract from the well-established maritime rule allowing contribution between joint tortfeasors." 94 S. Ct. at 2178.