TOPIC 5 EXCLUSIVENESS OF REMEDY AND THIRD PARTY LIABILITY

5.1 EXCLUSIVITY OF REMEDY

Section 5(a) of the LHWCA provides:

> **The liability of an employer prescribed in section 4 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 Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, 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, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 4.**

33 U.S.C. § 905(a).

5.1.1 Exclusive Remedy

Section 5(a), which provides that an employer's liability under the LHWCA is "exclusive," precludes injury-related tort claims brought pursuant to state law. Texas Employers' Ins. Ass'n v. Jackson, 820 F.2d 1406, reh'g granted en banc, 828 F.2d 1 (**5th Cir.** 1987), cert. denied, 490 **U.S.** 1035 (1989) (decision includes discussion of when state actions and federal proceedings not explicitly provided for by the LHWCA are preempted by the scope of the LHWCA).

However, an intentional tort claim was not subject to the exclusive remedy provision of the LHWCA in Taylor v. Transocean Terminal Operators, Inc., 785 So.2d 860 (La. App. 4th Cir.), cert. denied, 793 So.2d 1243 (La.), cert. denied, ___ **U.S.** ___, 122 S.Ct. 547 (2001) ("Because the LHWCA provides benefits only for injuries caused by (1) accidents, (2) occupational disease and (3) willful acts of third persons (and "third persons" does not include employers), and an intentional tort by an employer fits none of those three categories, the LHWCA does not provide any benefits

for injuries caused by an intentional tort by an employer. ...[I]t logically follows that LHWCA's exclusive remedy provision does not apply to employer intentional torts either.").

The court in Taylor had posed the issue presented as a purely legal one: "In the case of an intentional tort by (or attributable to) the employer, is the "exclusive remedy" provision of the LHWCA, 33 U.S.C. § 905, applicable so that the employee may recover only compensation benefits and is barred from bringing a tort action against the employer?" The court then noted that Louisiana workers' compensation law has an intentional tort exception and went on to address the LHWCA:

> The complicating factor with respect to the LHWCA is that the LHWCA does not have a specific provision expressly stating that an employer's intentional tort is an exception to the statue's "exclusive remedy" provision. Nevertheless, over the last twenty years, a number of court decisions, from Louisiana and from other jurisdictions, have stated that an employer's intentional tort is an exception to the exclusive remedy provision of the LHWCA and that, is such cases, the employee may bring a tort action against the employer. The decisions so stating included recent ones from Louisiana's First and Fifth Circuit Courts of Appeal. See Malbrough v. Halliburton Logging Services, Inc., 97-0378 (La.App. 1 Cir. 4/8/98), 710 So.2d 1149, 1152; Gauthe v. Asbestos Corp., 97-941 (La.App. 5 Cir. 1/27/98), 708 So.2d 761. Other decisions so stating include ones from the federal district courts for the Eastern and Western Districts of Louisiana. See Johnson v. Odeco Oil & Gas Co., 679 F. Supp. 604, 606-607 (E.D. La. 1987); Sharp v. Elkins, 616 F.Supp. 1561, 1565 (W.D.La. 1985)
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> The position that an intentional tort presents an exception to the exclusive remedy provison of the LHWCA is not new. Two cases so stated at least twenty years ago. See Austin v. Johns-Manville Sales Corp., 508 F.Supp. 313, 316 (D.Me.1981); Houston v. Bechtel Associates, 522 F.Supp. 1094, 1096 (D.D.C. 1981). See also Espadron v. Baker-Houghs, Inc., 97-1951 (La. App. 4 Cir. 4/22/98) 714 So.2d 60,62 (plaintiff, while entitled to LHWCA compensation benefits "may not bring a claim against [his employer] for non-intentional tort.
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> When it was argued that the above cited cases were dicta, the court in Taylor responded:
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> The courts' opinions make clear that each adopted the position that an intentional tort constitutes an exception to the LHWCA's exclusive remedy provision prior to turning to the issue of whether there was, in fact, an intentional tort present in the cases before them. If they had considered the LHWCA's exclusive remedy provisions to be applicable even to cases of employer intentional torts, then they would not have had any need to go on to decide whether there was, in fact, an intentional tort. The fact that, in each case, the courts found that there was no intentional tort simply reflects how strictly they applied the exception for intentional torts. See, e.g., Austin, 508 F.Supp. At 316 ("Nothing short of a specific intent to

injure the employee falls outside of the scope of the [LHWCA]"); Johnson, 679 F.Supp. At 606-607 (willful and wanton misconduct not sufficient to make exception applicable). In any event, even if we were to accept the characterization of these decisions both local and national, both state and federal, both recent and long-established and, perhaps most strikingly, apparently uncontradicted by any other caselaw.

A railroad employee, who is covered by the LHWCA, may not pursue an action under the Federal Employers' Liability Act (FELA), 45 U.S.C.A. § et seq. Chesapeake & Ohio Ry. v. Schwalb, 493 **U.S.** 40 (1989); Etheridge v. Norfolk & Western Railway Co., 9 F.3d 1087 (**4th Cir.** 1993); Hayes v. CSX Transp., Inc., 985 F.2d 137 (**4th Cir.** 1993).

In Johnson v. Odeco Oil & Gas Co., 864 F.2d 40, 44 (**5th Cir.** 1989), despite the plaintiff's contention that the employer made a conscious decision to commit an intentional tort by not evacuating employees from a drilling platform in the Gulf of Mexico during a hurricane, the court concluded that the employee was limited to an exclusive remedy under the LHWCA.

The exclusivity provision of Section 5(a), coupled with Section 14(e), which imposes assessments for late compensation payments, operates to bar a claimant's state cause of action for intentional or bad faith wrongful refusal to pay benefits under the LHWCA. Atkinson v. Gates, McDonald & Co., 838 F.2d 808, 812, 21 BRBS 1 (CRT) (**5th Cir.** 1988). See Grantham v. Avondale Indus., 964 F.2d 471, 473-74 (**5th Cir.** 1992). Compare Hall v. C & P Tel. Co., 809 F.2d 924, 926 (**D.C. Cir.** 1987) (finding state tort claim based on employer's intentional refusal to make timely compensation payments preempted by the LHWCA); Sample v. Johnson, 771 F.2d 1335, 1345-47, 18 BRBS 1 (CRT) (**9th Cir.** 1985), cert. denied, 475 **U.S.** 1019, 1206 (1986) (holding state wrongful refusal to pay claim barred by exclusivity and penalty provisions of the LHWCA).

See 2A Larson, The Law of Workmen's Compensation § 68.34(c), 13-145 (1992) (The majority view is that "the presence in the statute of an administrative penalty for the very conduct on which the tort suit is based ... evidences a legislative intent that the remedy for delay in payments, even vexatious delay, shall remain within the system in the form of some kind of penalty."). Accord Barnard v. Zapata-Haynie Corp., 975 F.2d 919, 921 (**1st Cir.** 1992).

In Brown v. Forest Oil Corp., 29 F.3d 966 (**5th Cir.** 1994), the employee had signed an "Insurance Waiver Agreement" with the employer who did not have LHWCA coverage. The evidence was to the effect that neither party knew that the work in question was covered under the LHWCA rather than under a state workers compensation act. The employee sued under Section 905(a) and also filed a federal breach of contract suit against the employer. However, the **Fifth Circuit** found that the breach of contract claim must fail because the contract was void under the LHWCA. Alternatively, the claimant argued that there was fraud and misrepresentation. However, the **Fifth Circuit** noted that to prevail on these grounds, a claimant must prove that the employer intended to defraud the claimant, or gain an unfair advantage and a resulting loss, or damages.

Although the LHWCA allows an employee to pursue personal injury actions against third parties, it does not allow an employee to maintain a tort action if the employee is a borrowed servant. The word **"employer"** in Section 905(a) **encompasses both general employers and employers who "borrow" a servant from that general employer**. White v. Bethlehem Steel Corp., 222 F.3d 146 (**4th Cir.** 2000); see Huff v. Marine Tank Testing Corp., 631 F.2d 1140 (**4th Cir.** 1980); Peter v. Hess Oil Virgin Islands Corp., 903 F.2d 935 (**3d Cir.** 1990); Gaudet v. Exxon Corp., 562 F.2d 351 (**5th Cir.** 1977). A person can be in the general employ of one company while at the same time being in the particular employ of another "with all the legal consequences of the new relation." See Standard Oil Co. v. Anderson, 212 **U.S.** 215 (1909). In order to determine whether an employee is a borrowed servant, courts must inquire whose work is being performed. This can be done by ascertaining who has the power to control and direct the servants in the performance of their work. However, it is important to distinguish between authoritative direction and control, and the mere suggestion as to details or the necessary cooperation. Anderson.

The authority of the borrowing employer does not have to extend to every incident of an employer-employee relationship; rather, it need only encompass the employee's performance of the particular work in which he is engaged at the time of the accident. Anderson; McCollum v. Smith, 339 F.2d 348, 351 (**9th Cir.** 1964). When the borrowing employer possesses this authoritative direction and control over a particular act, it in effect becomes the employer. In that situation, the only remedy for the employee is through the LHWCA. White. In order to determine direction and control, a court may look at factors such as the supervision of the employee, the ability to unilaterally reject the services of an employee, the payment of wages and benefits either directly or by pass-through, or the duration of employment. Ultimately, any particular factor only informs the primary inquiry–whether the borrowing employer has authoritative direction and control over a worker. White.

5.1.2 Right to Sue Employer If No Coverage

Under Section 5(a), an employer's exclusive liability stemming from employment-related injuries is compensation benefits under the LHWCA. If the employer fails to secure payment of compensation under the LHWCA, however, the right of immunity is lost and the claimant may elect to claim compensation or bring a suit at law or in admiralty for damages against the employer. In such a suit, moreover, the employer may not rely on the defenses of the negligence of a fellow servant, assumption of risk, or contributory negligence.

The **Supreme Court** in Chesapeake & Ohio Railway Co. v. Schwalb, 493 **U.S.** 40, 23 BRBS 96 (CRT) (1989), held that railroad workers injured while maintaining or clearing equipment that is used to load and unload coal from ships are covered by the LHWCA and not the Federal Employers Liability Act (FELA), which provides a negligence cause of action. In Kelly v. Pittsburgh & Conneaut Dock Co., 900 F.2d 89 (**6th Cir.** 1990), the plaintiff-employee's personal injury action under the FELA was foreclosed because his exclusive remedy was provided by the LHWCA, notwithstanding concurrent jurisdiction.

The entry of an order by the judge approving a settlement agreement under the LHWCA constitutes a finding that the injuries suffered are compensable under the LHWCA, barring the injured party from pursuing a Jones Act suit for the same injuries. Sharp v. Johnson Bros. Corp., 973 F.2d 423, 426-27, 26 BRBS 59 (CRT) (**5th Cir.** 1992), cert. denied, 508 **U.S.** 907 (1993). See Vilanova v. United States, 851 F.2d 1, 21 BRBS 144 (CRT) (**1st Cir.** 1988), cert. denied, 488 **U.S.** 1016 (1989) (Congress did not intend to give injured workers two chances to maximize their compensation award).

Where a claimant works for a subcontractor, the subcontractor enjoys the Section 5(a) immunity from suit. The **United States Supreme Court** held in Washington Metropolitan Area Transit Authority v. Johnson, 467 **U.S.** 925 (1984), that a general contractor which purchased compensation insurance covering its subcontractors could enjoy the Section 5(a) immunity. In enacting the 1984 Amendments, Congress specifically disapproved of Johnson, amending Section 5(a) to provide that a general contractor is considered an "employer," and thus enjoys Section 5(a) immunity only where the subcontractor actually fails to provide compensation under the LHWCA and the general contractor thereafter provides the compensation benefits. Frederick v. Mobil Oil Corp., 765 F.2d 442 (**5th Cir.** 1985); Louviere v. Marathon Oil Co., 755 F.2d 428, 17 BRBS 56 (CRT) (**5th Cir.** 1985). (See Topic 4, supra).

The Board in Rice v. McKendree United Methodist Church, 6 BRBS 242 (1977) (Order), directed that the judge, at a hearing where Section 5 was in issue, was limited to deciding the question of employer's insurance coverage when the claimant had moved the issues be so limited. By proceeding with other issues in the case, the judge may have forced the claimant to elect his remedy against the employer.

5.1.3. Contractor/Subcontractor (See Topic 4.)

5.2 THIRD PARTY LIABILITY

5.2.1 Generally

Section 5(b) of the LHWCA prescribes:

> **In the event of injury to a person covered under this Act 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 33 of this Act, 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 Act.**

33 U.S.C. § 905(b).

Section 5(b) permits a claimant to sue a vessel for negligence. A claimant may not base a suit against a vessel on the strict liability theory of the warranty of seaworthiness. A vessel sued for negligence may not seek indemnity from the employer, thus preserving the employer's Section 5(a) immunity. Castorina v. Lykes Bros. Steamship Co., 758 F.2d 1025, 1033, 17 BRBS 68 (CRT) (**5th Cir.**), cert. denied, 474 **U.S.** 846 (1985); see McCarthy v. The Bark Peking, 716 F.2d 130, 133 n.1, 15 BRBS 182, 186 n.1 (CRT) (**2d Cir.** 1983), cert. denied, 465 **U.S.** 1078 (1984); Christensen v. Georgia-Pacific Corp, ___ F.3d ___ (No. 00-35922) (9th Cir. Nov. 9, 2001).

In Rodriquez v. Bowhead Transportation Co., 270 F.3d 1283 (**9th Cir.** 2001), the **Ninth Circuit** held that under Section 905(b), a "time charterer" can be sued as a "vessel." The court

stated, "Our cases make no distinction between charters and shipowners as far as who is a 'vessel' under the LHWCA."

Basic principles governing a vessel's duty to longshoremen are found in Scindia Steam Navigation Co. v. De Los Santos, 451 **U.S.** 156 (1981), which includes two tenets: (1) as a general matter, the shipowner may rely on the stevedore to avoid exposing longshoremen to unreasonable hazards, and (2) the vessel owes to the stevedore and his longshore employees the duty of exercising due care under the circumstances. See Masinter v. Tenneco Oil Co., 867 F.2d 892, 896 (**5th Cir.** 1989), modified on other grounds, 929 F.2d 191, recalled, reformed, 934 F.2d 67 (**5th Cir.** 1991) (three exceptions temper the broad statement of vessel immunity).

The Scindia **Court** provided guidance as to the primary factors of the shipowner's duty to a longshoreman. First, "the shipowner has a "turnover duty," which is to warn the longshoremen of hazards from gear, equipment, tools and workspace to be used in cargo operations 'that are known to the ship or should be known to it in the exercise of reasonable care.'" See England v. Reinauer Transportation Cos., 194 F.3d 265, 270 (**1st. Cir.** 1999), quoting Scindia Steam, 451 **U.S.** at 167. Second, "the vessel is liable for a breach of its "active control duty" if it 'actively involves itself in the cargo operations and negligently injures a longshoreman' or 'if it fails to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas, or from equipment, under the active control of the vessel during the stevedoring operation.'" See id. And third, "under the "duty to intervene," the shipowner has a duty only if 'contract provision, positive law, or custom' dictates 'by way of supervision or inspection [that the shipowner] exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore.'" See id.

In Kirsch v. Plovidba, 971 F.2d 1026, 1029-30 (**3d Cir.** 1992), the **Third Circuit** held that a shipowner was liable for injuries of longshore workers who failed to avoid obvious danger only if the shipowner should have expected workers could not, or would not, avoid danger and conduct cargo operations reasonably safely; see also Gay v. Barge 266, 915 F.2d 1007 (**5th Cir.** 1990) (whether shipowner breached its duty to intervene in the face of actual knowledge of the stevedoring crew's use of a board for a gangway which was the proximate cause of Gay's accident and injury); Randoph v. Laeisz, 896 F.2d 964 (**5th Cir.** 1990) (actual knowledge of a dangerous condition [damaged gangway] does not in and of itself render the vessel's failure to act negligent); Helaire v. Mobil Oil Co., 709 F.2d 1031, 1038-39 (**5th Cir.** 1983) (clarifies the shipowner's duty to intervene in cargo operations conducted by an independent stevedore based on actual knowledge of dangerous conditions and the stevedore's failure to remedy the situation).

In Heavin v. Mobil Oil Exploration & Producing Southeast, 913 F.2d 178, 180 (**5th Cir.** 1990), an employee injured on a drilling platform used by three different oil companies filed a tort action against two of the companies after receiving compensation benefits from the third company. The suit was defended on the theory, which the court adopted, that the oil companies formed a **joint venture** to operate the platform, that the injured worker was an employee of the joint venture, and that the joint venture had immunity from negligence actions as an employer under the LHWCA.

Prior to the 1984 Amendments, the LHWCA provided that the vessel would not be liable if the person was employed by the vessel to provide stevedoring, shipbuilding, or repair services and the injury was caused by the negligence of persons engaged in providing such services. The 1984 Amendments continue this provision for persons providing stevedoring services.

The Amendments increase protection for shipbuilding employers (who might be considered temporary vessel owners) by preventing claimants who provide shipbuilding, repairing, or breaking services from employing the dual capacity doctrine and providing that such claimants may not maintain a suit against their employer or any employees of the employer. Easley v. Southern Shipbuilding Corp., 965 F.2d 1 (**5th Cir.** 1992). Cf. New v. Associated Painting Servs., 863 F.2d 1205 (**5th Cir.** 1989). See Joint Explanatory Statement of the Conference Committee, H.R. Rep. No. 98-1027, 98th Cong. 2d Sess., 23-24, reprinted in Vol. A BRBS 5-69, 5-71; 1984 U.S. Code Cong. & Ad. News 2772, 2774.

The 1984 Amendments to Section 5(b) apply to any injury after the enactment date.

5.2.2 Indemnification

In Smith v. United States, 980 F.2d 1379, 1381 (**11th Cir.** 1993), the court specifically followed Pippen v. Shell Oil Co., 661 F.2d 378, 14 BRBS 66 (**5th Cir.** 1981), in holding that "a suit by a third party against the employer based on a contract of indemnity would not be an action 'on account of' the injury, see § 5(a), but on account of the contract of indemnity." The **Fifth Circuit** further noted that § 5(b) prohibited indemnity actions by vessels only and that the prohibition did not extend to non-vessels or shipyards, as in this case. See for example, Fontenot v. Dual Drilling Co., 179 F.3d 969 (**5th Cir.** 1999), cert. denied, ___ **U.S.** ___, 120 S.Ct. 616 (1999),(in this claim of a non-seaman casing worker on a platform on the Outer Continental Shelf, offshore Louisiana, submission of employer fault was not prohibited by LHWCA § 905(b) since employer here is not a vessel defendant).

Once an employee's status in maritime employment within the meaning of the LHWCA is established, the employer is immune from a vessel owner's indemnification demands. Boudreaux v. American Workover, Inc., 680 F.2d 1034, 14 BRBS 1013 (**5th Cir.** 1982), cert. denied, 459 **U.S.** 1170 (1983).

In Cove Tankers Corp. v. United Ship Repair, 683 F.2d 38, 14 BRBS 916 (**2d Cir.** 1982), after an extensive discussion of the term "navigable waters of the United States," the court limited the issue presented to whether the LHWCA can ever be applied when an injury occurs on the high seas. Based on the special facts of this case, i.e., injuries sustained while employees were performing traditional ship repair functions on a U.S. flag vessel sailing from one American port to another, which deviated into territorial waters of a foreign nation, the **Second Circuit** concluded that the employees were covered by the LHWCA and indemnification was barred by Section 5(b).

Whether an ALJ has jurisdiction to determine the merits of certain contractual rights and liabilities arising from an indemnification agreement between an employer and borrowing employer, and a waiver of subrogation, turns on the interpretation of that portion of Section 19(a) of the LHWCA stating that an ALJ has authority "to hear and determine all questions in respect of such claims." Temporary Employment Services v. Trinity Marine Group, Inc., ___ F.3d ___ (**5th Cir.** 2001). Here the **Fifth Circuit** found that the contract dispute was not integral to the longshore compensation claim and that the ALJ did not have statutory authority to determine this issue.

5.2.3 Dual Capacity Status of Maritime Employer

The legislative history of Section 5(b) demonstrates that a vessel is treated as a distinct entity from its owner. The owner may in fact be an employer within the meaning of the LHWCA. Jones & Laughlin Steel Corp. v. Pfeifer, 462 **U.S.** 523, 530-31 (1983). In Taylor v. Bunge Corp., 845 F.2d 1323, 1327 (**5th Cir.** 1988), the **Fifth Circuit** observed that the LHWCA "creates a harmonious scheme, guaranteeing both that the exclusive remedy against the employer is the employee's action for statutory benefits, and that, in the event of a longshoreman's recovery against a third party, the employer's lien prevents double recovery."

In Taylor, the employee and the vessel (also the employee's employer) entered into a settlement of a third party claim which provided that the vessel would indemnify the employee against the employer's lien for compensation benefits paid. The court held that the compensation carrier, which sought to recover under the lien against the settlement proceeds, was not precluded from doing so by either the dual capacity of the employer-owner or the indemnification terms of the settlement. Id. at 1329-30. See Eagle-Picher Indus. v. United States, 937 F.2d 625, 628 (**D.C. Cir.** 1991).

If a claimant's employer happens also to own the vessel, the claimant can receive compensation benefits from the employer as well as sue the employer **"qua vessel"** for negligence in its capacity as vessel owner. Jones & Laughlin Steel Corp. v. Pfeifer, 462 **U.S.** at 532; Peter v. Hess Oil Virgin Islands Corp., 903 F.2d 935, 948 (**3d Cir.** 1990), cert. denied, 498 **U.S.** 1067 (1991); Roach v. M/V Aqua Grace, 857 F.2d 1575, 1579 (**11th Cir.** 1988); Tran v. Manitowoc Eng'g Co., 767 F.2d 223, 226 (**5th Cir.** 1985).

A time-charterer is not liable for vessel negligence under Section 5(b) unless the cause of the harm is within the charterer's traditional sphere of control and responsibility, or has been transferred thereto by the clear language of the charter agreement. Kerr-McGee Corp. v. Ma-Ju Marine Servs., 830 F.2d 1332 (**5th Cir.** 1987).

In Levene v. Pintail Enterprises, 943 F.2d 528 (**5th Cir.** 1991), cert. denied, 504 **U.S.** 940 (1992), the **Supreme Court** considered whether a vessel owner owed any duties other than those enumerated in Scindia, 451 **U.S.** 156, to its non-stevedore employees when working on a separate barge. Pintail occupied the dual capacity as employer and vessel owner. The injured worker, a heavy equipment operator, contended that Pintail was not immune from a negligence action under

the LHWCA since immunity applied only to injured stevedores performing "stevedoring services" within the meaning of Section 5(b).

The **Fifth Circuit** reasoned that nothing in Section 5(a) grants immunity to employers only if a worker is performing stevedoring operations and that the employer enjoyed full immunity from suit by a non-stevedoring employee. As a vessel owner, Pintail had no responsibility for, or duty of, ordinary care while temporarily in **"constructive control"** over a barge work area and thus could not be found negligent for resulting injuries.

5.3 INDEMNIFICATION IN OCSLA CLAIMS

Section 5(c) of the LHWCA provides:

> **In the event that the negligence of a vessel causes injury to a person entitled to receive benefits under this Act by virtue of section 4 of the Outer Continental Shelf Lands Act (43 U.S.C. 1333), then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel in accordance with the provisions of subsection (b) of this section. Nothing contained in subsection (b) of this section shall preclude the enforcement according to its terms of any reciprocal indemnity provision whereby the employer of a person entitled to receive benefits under this Act by virtue of section 4 of the Outer Continental Shelf Lands Act (43 U.S.C. 1333) and the vessel agree to defend and indemnify the other for cost of defense and loss or liability for damages arising out of or resulting from death or bodily injury to their employees.**

33 U.S.C. § 905(c).

Section 5(c) was added by the 1984 Amendments to allow vessels on the Outer Continental Shelf to enforce contractual indemnity agreements with employers. See Campbell v. Sonat Offshore Drilling, 979 F.2d 1115, 1125 (**5th Cir.** 1992) (reciprocity requirement of § 5(c) is satisfied between casing service contractor and owner of drilling vessel where agreements to indemnify each other are unambiguous and completely reciprocal); Fontenot v. Mesa Petroleum Co., 791 F.2d 1207, 1213 n.3 (**5th Cir.** 1986) (owner of a drilling vessel and a petroleum company entered into a reciprocal agreement to indemnify each other "for injuries sustained by [their own] personnel, contractors and property" which is precisely the type of mutual provision envisioned in and sanctioned by § 5(c)).

The 1984 Amendments to Section 5(c) apply to any injury after the enactment date.