The New Negligence Standard for Shipowners and Longshoremen - *Scindia Steam Navigation Co. v. De Los Santos*

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NOTES

THE NEW NEGLIGENCE STANDARD FOR SHIPOWNERS AND LONGSHOREMEN—Scindia Steam Navigation Co. v. De Los Santos

INTRODUCTION

In Scindia Steam Navigation Co. v. De Los Santos, the United States Supreme Court addressed the question of which standard of negligence applies to actions brought under section 905(b) of the Longshoremen’s and Harbor Workers’ Compensation Act. Under section 905(b), a longshoreman may bring an action against the shipowner if the longshoreman’s injury is proximately caused by the negligence of the shipowner. Because Congress failed to define negligence under this section of the Act, much controversy has arisen in the lower courts over which standard of negligence should apply to longshoremen’s actions. In Scindia, the Supreme Court adopted the “reasonable care under the circumstances” standard.

This article will briefly describe the state of the law prior to Scindia. Next, the Scindia decision will be examined followed by an analysis of the standard adopted by the Court. Finally, the im-

1. 101 S. Ct. 1614 (1981). This article will refer to the Supreme Court’s opinion as Scindia and to the Ninth Circuit’s opinion as Santos. Santos v. Scindia Steam Navigation Co., 598 F.2d 480 (9th Cir. 1979).
3. Section 905(b) provides in pertinent part:
   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. . . . 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.
4. See notes 29-42 infra and accompanying text.
impact of the decision on longshoremen’s actions brought under section 905(b) will be discussed.

BACKGROUND

The Longshoremen’s and Harbor Workers’ Compensation Act (LHWCA) is the workers’ compensation act of the longshoring industry. The Act was amended in 1972, significantly affecting liability among shipowners, stevedores, and longshoremen. Prior to the amendments, an injured longshoreman, in addition to collecting compensation benefits from his employer, could also sue the shipowner alleging unseaworthiness and negligence. The shipowner could subsequently sue for indemnity the stevedore company that employed the longshoreman. Under the amendments,

5. The original act was passed by Congress in 1927. Longshoremen’s and Harbor Workers’ Compensation Act, Pub. L. No. 69-803, 44 Stat. 1424 (1927) (current version at 33 U.S.C. §§ 901-950 (1976)). Congress had not acted prior to this time, since it expected longshoremen to be covered by the workers’ compensation statutes of the states where they were employed. The Supreme Court found this approach to be unconstitutional in Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917). The Court determined that stevedoring was essentially a maritime matter within the federal admiralty jurisdiction. Congress, therefore, subsequently provided longshoremen with a national workers’ compensation scheme by means of the 1927 Act. For a detailed discussion of the history of the Longshoremen’s and Harbor Workers’ Compensation Act (LHWCA) see Note, Developing a Consistent Theory of Vessel Liability to Injured Longshoremen Under the LHWCA, 45 BROOKLYN L. REV. 731, 733-34 (1979).


7. The terms “shipowner” and “vessel” will be used interchangeably in this article, since § 902 defines “vessel” as:

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


8. Although the term “stevedore” is sometimes used to refer to workers who load or unload cargo, BLACK’S LAW DICTIONARY 1268 (5th ed. 1979), throughout this article “stevedore” will refer to the longshoreman’s employer.

9. The term “longshoreman” as used in this article will refer to those parties entitled to recover damages under the Act. It should be noted that certain workers not engaged in longshoring operations, including harborworkers, ship repairmen, shipbuilders, and ship breakers, are entitled to recover for injuries. 33 U.S.C. § 902(3) (1976).


11. Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956). The Court in this case determined that by contractually undertaking to stow the cargo in a reasonably safe manner, the stevedore warrants its services to the shipowner. A breach of this warranty may give rise to a claim for indemnification.

For a discussion of Ryan, Sieracki, and other Supreme Court holdings that induced Congress to pass the 1972 amendments, see Steinberg, The 1972 Amendments to the Longshoremen’s and Harbor Workers’ Compensation Act: Negligence Actions by Longshoremen
the amount of compensation paid to an injured longshoreman by
his employer, the stevedore company, was increased.13 The long-
shoreman's right to bring a strict liability action for unseaworthi-
ness against the shipowner was revoked, however, making the only
available action against the shipowner one for negligence which re-
quires a showing of actual or constructive knowledge.13 The
amendments also prohibit the shipowner from suing the stevedore
company for indemnity.14

A primary concern of Congress in amending the LHWCA was
the improvement of safety conditions in the longshoring industry.16
Congress attempted to meet this goal in two ways. First, it placed
primary responsibility for safe working conditions on the stevedore
company. Congress reasoned that the stevedore company was in

*Against Shipowners—A Proposed Solution, 37 Ohio St. L.J. 767, 770-773 (1976).*

12. The amendments provide that the longshoreman receives a percentage of the na-
tional average weekly wage rather than the maximum $70.00 per week allowed under the old
law. 33 U.S.C. § 906(b)(1) (1976). "The term 'national average weekly wage' means the na-
tional average weekly earnings of production or nonsupervisory workers on private non-agri-

13. "The liability of the vessel under this subsection shall not be based upon the war-
 ranty 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." 33

The difference between unseaworthiness and negligence has been described as follows:

The former, analogous to a warranty concept, premised a shipowner's liability on
the presence of a defective condition in his vessel or any part thereof, which ren-
dered it unfit for the purposes for which it was to be used. Once such a defective
condition was found, a shipowner was cast in damages for injuries proximately
caused by the condition of the ship, without regard to traditional negligence con-
cepts of fault or due care. Thus, an injured longshoreman, having demonstrated
the presence of a defective condition, recovered on a theory of strict liability.

1978). Unseaworthiness and negligence are related in that the same defective condition can
give rise to a finding of both negligence and unseaworthiness. Id. See also G. Gilmore & C.
Black, The Law of Admiralty § 6-57 at 452 (2d ed. 1975) [hereinafter cited as Gilmore &
Black].

14. "[T]he employer shall not be liable to the vessel for such damages directly or indi-
rectly and any agreements or warranties to the contrary shall be void." 33 U.S.C. § 905(b)
(1976).

Ad. News 4699 [hereinafter referred to as House Report]. See also Hazen & Toriello, Long-
shoremen's Personal Injury Actions Under the 1972 Amendments to the Longshoremen's
and Harbor Workers' Compensation Act, 53 St. John's L. Rev. 1, 10 (1978) [hereinafter
referred to as Hazen & Toriello].

The longshoring industry has an unusually high accident rate. The injury frequency rate
was well over four times the average for manufacturing operations at the time the amend-
ments were passed. Theis, Amended Section Five of the Longshoremen's and Harbor Work-
the best position to ensure the longshoreman's safety. Second, to cover the situation where neither the stevedore company nor the longshoreman was solely at fault in causing the injury, Congress provided in section 905(b) that the shipowner would be liable if its negligence contributed to a longshoreman's injury, thereby encouraging the shipowner to assist in the prevention of accidents.

Concerning third party damage actions, section 905(b) was intended to place a worker injured on a ship in the same position as a non-maritime employee injured on shore. Generally, a non-maritime employee injured on the job may bring an action against a third party for negligence if the third party's negligence is a proximate cause of the injury. But Congress failed to define negligence under section 905(b). The legislators did specify, however, that the negligence standard should be uniform and should be determined as a matter of federal law. Congress envisioned a standard modeled upon land-based standards of negligence, but with certain maritime principles of law also applying. Specifically, these maritime principles included comparative negligence rather than contributory negligence, and the rule of admiralty that precludes the defense of assumption of risk.

16. HOUSE REPORT at 4699. See also Hazen & Toriello, supra note 15, at 8-10.
17. HOUSE REPORT at 4704. See also Hazen & Toriello, supra note 15, at 8-10.
18. HOUSE REPORT at 4703.
20. The House Report states:
   [T]he Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal Law.
   HOUSE REPORT at 4705.
   21. The House Report states:
   The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position vis a vis his rights against the vessel as a third party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances.
   Id. at 4704.
   22. The House Report states:
   The admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury. Also, the Committee intends that the admiralty rule which precludes the defense of "assumption of risk" in an action by an injured employee shall also be applicable.
   Id. at 4705.
It is not surprising that, faced with these confusing and contradictory statements in the legislative history, the courts had difficulty in defining the applicable standard of negligence under section 905(b). Commentators suggested various negligence standards. One possibility was the standard applied to seamen under the Jones Act, which requires a seaman to show the existence of a duty, the negligent violation of that duty by the shipowner, and a causal relationship between the shipowner's negligence and the seaman's injury. The jury in such case may give a verdict for the seaman if it finds that the shipowner's negligence played even a slight part in bringing about the injury. Another negligence standard considered was the general maritime standard of reasonable care under the circumstances, as set forth in Kermarec v. Compagnie Generale Transatlantique. In Kermarec, the Supreme Court held that "the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case." Finally, application of the common law principles of negligence as embodied in the Restatement (Second) of Torts was suggested.

Although the majority of courts faced with section 905(b) cases applied the standards of the Restatement, these courts failed to apply the same sections of the Restatement. Some courts adopted

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23. 46 U.S.C. § 688 (1976). The Jones Act entitles an injured seaman to sue the shipowner based on the shipowner's negligence. For further discussion, see Gilmore & Black, supra note 13, §§ 6-20 to 6-37.
24. Gilmore & Black, supra note 13, §§ 6-34 to 6-37, 6-57 at 453-55.
25. See Robertson, Negligence Actions by Longshoremen Against Shipowners Under Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act, 3 Mar. Law. 1 (1977) [hereinafter cited as Robertson].
27. Id. at 632.
sections 343 and 343A,\textsuperscript{30} believing that the shipowner's duty of care is equivalent to that of a landowner, while the longshoreman's position is comparable to that of an invitee.\textsuperscript{31} Those decisions held that a shipowner was not required to warn of open and obvious dangers unless it should have anticipated that an injury would occur to a longshoreman despite the obviousness of the danger. Other courts applied section 409,\textsuperscript{32} which deals with independent contractors.\textsuperscript{33} Under that section, the shipowner is considered the employer of an independent contractor, the stevedore company. The shipowner is not liable for damage caused by the independent contractor's employees, unless one of the specific exceptions to the rule applies.

Besides the Restatement standard, the other approach most often applied by the courts was the reasonable care under the circumstances standard of \textit{Kermarec v. Compagnie Generale Transatlantique}.\textsuperscript{34} In \textit{Kermarec}, a visitor on the ship suffered an injury

\begin{quote}
\textsuperscript{30} Section 343 provides:
A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

Section 343A states:
A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious, unless the possessor should anticipate the harm despite such knowledge or obviousness. 

\textit{Restatement (Second) of Torts} §§ 343, 343A (1965).
\end{quote}

\begin{quote}

\textsuperscript{32} Section 409 provides: "[T]he employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants." 

\textit{Restatement (Second) of Torts} § 409 (1965).
\end{quote}

\begin{quote}


\textsuperscript{34} 358 U.S. 625 (1959).
resulting from the defective operation of the ship's stairs. The Court held that the shipowner owes a duty of reasonable care under the circumstances. This holding was reaffirmed in Federal Marine Terminals, Inc. v. Burnside Shipping Co., a suit in which the stevedore company sought damages from the shipowner for compensation benefits the stevedore company was required to pay to the deceased longshoreman's dependents as a result of the shipowner's negligence. The Court in Burnside held that federal law imposes on the shipowner the duty to the stevedore company of exercising reasonable care under the circumstances.

The reasonable care under the circumstances approach became popular among certain courts that had grown dissatisfied with the application of the Restatement. This dissatisfaction was attributable in part to the fact that the Restatement, particularly in sections 343 and 343A, incorporates both the defense of contributory negligence and that of assumption of risk. This dissatisfaction with the Restatement position led to the Ninth Circuit's decision in Santos.

THE DECISION: Scindia Steam Navigation Co. v. De Los Santos

Factual Background

Plaintiff, Lauro de los Santos, was injured when he and other longshoremen employed by the Seattle Stevedoring Company were loading sacks of wheat in the hold of a ship owned by the defendant, Scindia. The longshoremen were using a winch, which was

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35. Id. at 626.
36. Id. at 629-32.
38. Id. at 409.
39. Id. at 414-18.
42. Santos v. Scindia Steam Navigation Co., 598 F.2d 480 (9th Cir. 1979). See Comment, Section 905(b) and a Standard of Negligence: Cosmos or Chaos?, 4 MAR. LAW. 305 (1979) [hereinafter cited as Comment, Cosmos or Chaos?].
43. A winch is “any of various machines or instruments for hauling or pushing: as a
part of the ship's gear, to lower pallets of wheat into the hold. Seattle Stevedoring controlled the loading procedure.44

The winch had been malfunctioning for two days, and it was still malfunctioning on the day of the accident. The braking mechanism would occasionally slip, causing the load to fall freely for several feet before coming to a stop. Just prior to the injury to plaintiff, the pallet did not stop as it should have before striking a pallet jack,45 although the winch operator had applied the brake. As a result, a number of wheat sacks spilled.46 After the winch driver raised the pallet, the hatch tender, an employee of Seattle who was directing the driver, determined that the sacks remaining on the pallet would not fall. Santos, therefore, began clearing the spilled sacks. Some wheat sacks did fall, however, striking Santos and causing his injuries.47

The District Court's Decision

The district court granted summary judgment for the shipowner, holding that land-based standards of negligence applied.48 Under such standards, a shipowner is not liable for dangerous conditions created by the stevedore's negligence while the stevedore is in exclusive control of the loading operations. Here the court found that the defective winch was an open and obvious danger. The court held that even if the shipowner knew or should have known that the winch was defective, the shipowner was not liable as a matter of law under sections 343 and 343A of the Restatement, since it

44. 598 F.2d at 482.
45. "A pallet jack is a small, wheeled, cartlike vehicle with prongs on the front like a forklift with which the longshoremen in the hold would cart the pallet load to the wings of the hold where they would then remove the sacks and stow them by hand." 101 S. Ct. at 1618 n. 5.
46. 598 F.2d at 482.
47. Id. Several material facts of the case were in dispute. It is uncertain whether the shipowner actually knew about the condition of the winch, whether the stevedore had exclusive control over the gear and the premises, whether the first sacks were spilled due to the pallet striking the pallet jack or because the winch failed to stop the pallet before it struck the jack, and how the sacks fell which hit Santos. Id. at 489-91. Since the case was decided on a motion for summary judgment in favor of the shipowner, the facts are presented in this article in the light most favorable to the plaintiff. This was the approach taken by the court of appeals. Id. at 482.
had no duty to warn the stevedore company or the stevedore’s employees of open and obvious dangers. 49

The Ninth Circuit’s Decision

The district court’s decision was reversed and remanded by the Ninth Circuit. 50 The court of appeals determined that the correct standard of negligence was not that set forth in sections 343 and 343A, but rather that of reasonable care under the circumstances. 51 It arrived at this standard after reviewing the congressional intent behind the 1972 amendments and cited five specific concerns: safety; assurance of uniformity by application of federal law; abolition of the unseaworthiness remedy for longshoremen; application of comparative negligence rather than contributory negligence; and elimination of the defense of assumption of risk. 52 In light of these concerns, the court adopted the following standard of negligence under section 905(b):

A vessel is subject to liability for injuries to longshoremen working on or near the vessel caused by conditions on the vessel if, but only if, the shipowner (a) knows of, or by the exercise of reasonable care would discover, the condition, and should realize that it involves an unreasonable risk of harm to such longshoremen, and (b) the shipowner fails to exercise reasonable care under the circumstances to protect the longshoremen against the danger. 53

The court gave three reasons for not following those circuits which had adopted sections 343 and 343A of the Restatement as the standard of negligence under section 905(b). First, it found those sections inconsistent with congressional intent to apply the doctrine of comparative negligence to these cases rather than the doctrines of contributory negligence and assumption of risk. 54 According to the court, the Restatement sections further undermine Congress’s intention of creating economic incentives to promote safer work conditions and reduce accidents. Second, the court cited the Supreme Court’s decision in Kermarec v. Compagnie General

49. 1976 AMC at 2586 (W.D. Wash.).
The court found in the alternative that the condition of the winch could not have been the proximate cause of Santos’s injury. Id. at 2587.
50. Santos v. Scindia Steam Navigation Co., 598 F.2d 480 (9th Cir. 1979).
51. Id. at 486.
52. Id. at 484-85.
53. Id. at 485.
54. Id. at 486.
Transatlantique\textsuperscript{56} in support of its adoption of the reasonable care under the circumstances approach. Third, the court stated that it was not impinging on legislative policy by adopting this negligence standard, because the Act's legislative history makes no reference to the Restatement or to real property tort law terminology.\textsuperscript{56}

Following the decision of the court of appeals, one commentator heralded the Santos standard as "an end to chaos."\textsuperscript{57} Other courts, however, reaffirmed their application of the Restatement negligence standards to longshoremen's actions.\textsuperscript{58} For example, in Guidry \emph{v. Continental Oil Co.},\textsuperscript{59} the Fifth Circuit acknowledged the Santos standard, reviewed the facts of the case in light of that standard, but applied and emphasized the Restatement standard.\textsuperscript{60} In \textit{Evans v. Transportacion Maritime Mexicana SS "Campeche"},\textsuperscript{61} the Second Circuit applied the Restatement standard and rejected the Ninth Circuit's contention that application of sections 343 and 343A necessarily implies the availability of the defenses of assumption of risk or contributory negligence.\textsuperscript{62}

\textbf{The Supreme Court's Decision}

The Opinion of the Court

When the Ninth Circuit declined to rehear the case, the Su-

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\textsuperscript{55} 358 U.S. 625 (1959).
\textsuperscript{56} 598 F.2d at 486-88.
\textsuperscript{57} Comment, \textit{Cosmos or Chaos?}, supra note 42 at 316-21 (1979). See also \textit{George, The Content of the Negligence Action by Longshoremen Against Shipowners Under the 1972 Amendments to the Longshoremen [sic] and Harbor Workers' Compensation Act—A Postscript}, 11 J. MAR. L. & COM. 253, 256 (1980), where the author states that, "Santos represents a scholarly and persuasive analysis and interpretation of the applicable negligence standard to be applied in 905(b) cases and should serve as an appropriate authority when the Supreme Court ultimately decides the issue of the standard of negligence applicable in 905(b) cases."


\textsuperscript{59} 640 F.2d 523 (5th Cir. 1981).
\textsuperscript{60} Id. at 531-32.
\textsuperscript{61} 639 F.2d 848 (2d Cir. 1981).
\textsuperscript{62} Id. at 857 n. 10.
Scindia Steam Navigation Co.

The Supreme Court granted *certiorari* due to the conflict among the circuits regarding the standard of care to be applied under section 905(b). In a unanimous decision, the Supreme Court affirmed the decision of the court of appeals and held that under *Marine Terminals v. Burnside Shipping Co.* the vessel owes a duty to the stevedore and longshoremen to exercise due care under the circumstances. According to Justice White, author of the Court's opinion, this duty at least requires that the shipowner exercise ordinary care under the circumstances when turning over the ship and its equipment to the stevedore, and that the ship be in such condition that the stevedore could carry on its cargo operations with reasonable safety. This duty also requires that the shipowner warn a stevedore of any dangerous condition of the ship or its equipment of which the shipowner knows or should know, which the stevedore is likely to encounter in its operations, and which is not likely to be obvious to or anticipated by the stevedore.

The Court further stated that when the vessel is actively involved in stevedoring operations and a longshoreman is injured due to the vessel's negligence, the vessel may be held liable. Similarly, if an area of the ship or its equipment remains in the control of the shipowner during loading or unloading, and the shipowner fails to exercise due care and exposes the longshoreman to danger, the ship will be liable for any resulting injury to the longshoreman.

If the vessel does not actively take part in the stevedoring operations, then its duty is more limited. In contrast to the Ninth Circuit, the Supreme Court took the position that the vessel's duty to the longshoreman requires neither inspection nor supervision of the stevedore's operations. The Court believed that imposing a continuing duty on the shipowner to take reasonable steps to discover and correct dangerous conditions that develop during the loading or unloading process would be inconsistent with the

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65. Id.
67. 101 S. Ct. at 1621.
68. Id.
69. Id. at 1622.
70. Id.
LHWCA. The Court reasoned that when Congress passed the 1972 amendments, Congress intended to end shipowner liability based on the theory of unseaworthiness or nondelegable duty.\(^7^1\)

The Court further held that the shipowner is entitled to rely on the stevedore to avoid exposing its employees to unreasonable dangers. The shipowner's reliance is warranted because an express provision in the Act\(^7^2\) requires the stevedore to provide a reasonably safe place to work. This reliance is also appropriate because the stevedore normally warrants to discharge its duties in a workman-like manner. The shipowner, therefore, has no duty to supervise or inspect the stevedore's operations absent contract provision, positive law, or custom to the contrary.\(^7^3\)

The Court next addressed the issue of the shipowner's duty when both the vessel and the stevedore have knowledge of a dangerous condition which exists or develops during the cargo operations. The Court held that, when danger to the longshoreman arises because the ship's gear malfunctions, the shipowner's duty to act depends on the circumstances. Although in this case the decision to continue using the malfunctioning winch was a matter of judgment for the stevedore, the Court suggested the possibility that the stevedore's judgment was so obviously improvident that if the shipowner knew of the winch's condition and its continued use, the shipowner should have realized the unreasonable risk it presented to the longshoreman, and should have intervened to repair it. The Court stated that a similar duty to intervene would also arise where the defect existed from the outset. In that situation, the shipowner would be deemed to have been aware of the condition.\(^7^4\)

For purposes of determining if the shipowner had breached its duty, the Court considered the legal duties of the stevedore and

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\(^7^1\) Id. at 1622-23.
\(^7^2\) That section provides:

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


\(^7^3\) 101 S. Ct. at 1624.

\(^7^4\) Id. at 1624-26.
the vessel's justifiable expectations that those duties will be performed. The duties imposed on the vessel by statute, regulation, or custom and the contract between the stevedore and the shipowner were also held to be relevant. 76

The Court reviewed the regulations dealing with the use of the ship's gear by the stevedore and suggested that when a defective winch is discovered it should be reported to and repaired by the shipowner, not the stevedore. 76 If this standard is applied, then several material facts, including the shipowner's knowledge, remain in dispute. If a jury finds that the shipowner was aware that the winch was defective after loading operations began, the shipowner will be attributed with actual knowledge. If, however, the winch was defective when the ship was turned over to the stevedore, a finding of knowledge would also follow. Assuming the shipowner is chargeable with knowledge, then the next material fact for resolution will be whether the stevedore's decision to proceed with cargo operations was improvident. In this case, whether the winch was so clearly unsafe that the shipowner should have stepped in and halted the loading operation until the winch was repaired was a determination for a jury. The case was, therefore, remanded to the district court to be tried by a jury. 77

The Concurring Opinions

Two concurring opinions were filed in which five of the justices joined. 78 Justices Marshall and Blackmun joined with Justice Brennan who expressed his views under the 1972 amendments. 79

75. Id. at 1626.
76. Id. at 1626-27.

The relevant regulations as cited by the Court state: "Any component of cargo handling gear . . . which is visibly unsafe shall not be used until made safe." Safety and Health Regulations for Longshoring, 29 C.F.R. § 1918.51(b) (1980). "Any defect or malfunction of winches shall be reported immediately to the officer in charge of the vessel." 29 C.F.R. § 1918.53(a)(5). "When the electromagnetic or other service brake is unable to hold the load, the winch shall not be used." 29 C.F.R. § 1918.53(c)(1). "Employees shall not be permitted to tamper with or adjust electric control circuits." 29 C.F.R. § 1918.53(c)(2).

77. 101 S. Ct. at 1626-27.
78. Id. at 1628. All the concurring justices concurred both in the decision and in Justice White's opinion.
79. Justice Brennan wrote:

(1) a shipowner has a general duty to exercise reasonable care under the circumstances; (2) in exercising reasonable care, the shipowner must take reasonable steps to determine whether the ship's equipment is safe before turning that equipment over to the stevedore; (3) the shipowner has a duty to inspect the equipment turned over to the stevedore or to supervise the stevedore if a custom, contract provision, law or regulation creates either of those duties; and (4) if the shipowner
Justice Brennan's position is actually a consolidated listing of the rules which the Court laid down in this decision.

Justice Powell's concurring opinion, joined by Justice Rehnquist, emphasized the distinctions between the Supreme Court's approach and the Ninth Circuit's reasonableness standard. Justice Powell noted that, under the Supreme Court's approach, the shipowner has no duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions which arise within the confines of the stevedore's operations, whereas the Ninth Circuit held that the shipowner owes a continuing duty to inspect and supervise even if the ship is turned over to the stevedore in safe condition. Furthermore, according to Powell, under the majority position the shipowner has only a limited duty regarding obvious dangers of which it has knowledge. Thus, the shipowner can rely on the stevedore to provide a safe workplace. The shipowner's duty arises only when the judgment of the stevedore to continue work in the face of dangerous conditions is "obviously improvident." The Ninth Circuit did not phrase its criteria in terms of "obvious improvidence," but rather in terms of "reasonableness."

Justice Powell referred to the standard adopted by the court of appeals as a "more general reasonableness standard." In his view, the problem with that more general standard was its failure to deal with the problems of allocating responsibility between the stevedore and the shipowner. He voiced the fear that a jury, applying the general reasonableness standard, would in most cases find the shipowner liable, even though it might have been "reasonable" for the vessel to rely on the stevedore to prevent injury to the longshoreman. This result would be likely because the only question presented to the jury is whether the shipowner's failure to take action to prevent an injury due to an obvious danger was reasona-

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has actual knowledge that equipment in the control of the stevedore is in an unsafe condition, and a reasonable belief that the stevedore will not remedy that condition, the shipowner has a duty either to halt the stevedoring operation, to make the stevedore eliminate the unsafe condition, or to eliminate the unsafe condition itself.

*Id.* (Brennan, J., concurring).
80. *Id.* (Powell, J., concurring).
81. 598 F.2d 480.
82. 101 S. Ct. at 1628. (Powell, J., concurring).
83. 598 F.2d 480.
84. 101 S. Ct. at 1628. (Powell, J., concurring).
ANALYSIS

As Justice Powell's statement implies, the standard adopted by the Supreme Court is more specific than that of the court of appeals. The Ninth Circuit's standard was viewed by other courts and commentators as an approach which was less rigid than the Restatement standard. Therefore, shipowners were more likely to be found liable under the Ninth Circuit's standard than when the Restatement sections were applied. In *Scindia*, although the Court adopted the reasonable care under the circumstances standard of the court of appeals, it modified that principle.

The Court attempted to formulate guidelines for judging both the shipowner's actions as well as its omissions. The Court laid down some general rules governing when the shipowner has a duty to act, which rules can be delineated with reference to specific time frames. Under the shipowner's limited duty as set forth in *Scindia*, the ship and its equipment must be in a safe condition for the stevedore's use before the stevedore comes aboard. When the steve-

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85. Id. at 1628-29. (Powell, J., concurring).

The few decisions in which the plaintiff longshoreman prevailed prior to the Ninth Circuit's decision in *Santos* include the following: Canizzo v. Farrell Lines, Inc., 579 F.2d 682 (2d Cir. 1978), cert. denied, 439 U.S. 929 (1978); Samuels v. Empresa Lineas Maritimas Argentinas, 573 F.2d 884 (5th Cir. 1978); Croshaw v. Koninklijke Nedloyd, B.V. Rijswijk, 398 F. Supp. 1224 (D. Or. 1975); Hubbard v. Great Pacific Shipping Co., 1975 AMC 1518 (D. Or. 1975); Dodge v. Mitsui Shintaku Ginko K.K. Tokyo, 1975 AMC 1505 (D. Or. 1974). See also Robertson, *Negligence Actions by Longshoremen Against Shipowners Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act*, 7 J. MAR. L. & COM. 447, 453 (1976). Once the reasonable care standard was applied, the tide turned. In each case where *Santos* was adopted the shipowner was found liable. See cases cited at note 58 supra.
dore comes aboard, the shipowner must warn it of any hidden dangers of which the shipowner knows or should know. During the stevedoring operations, the shipowner has no duty to discover dangerous conditions unless a contract provision, positive law, or custom provides otherwise. During the cargo operations, however, if the shipowner receives notice of a defective condition, it may have a duty to act.

The *Scindia* opinion fails to clearly articulate the last rule. The Court refused to adopt the broad principle that a duty arises during cargo operations in every circumstance where the shipowner becomes aware of a dangerous condition. Although the Supreme Court acknowledged the stance of the Second Circuit in *Evans v. Transportacion Maritime Mexicana SS “Campeche”*, it did not adopt that court’s position. In *Evans*, the Second Circuit stated that the shipowner has a duty to act if it anticipates or should anticipate that the stevedore will not or cannot correct a dangerous condition which arises during the cargo operations. In *Scindia*, the Court limited its holding to the facts of the particular case before it. Under those facts, it suggested that the stevedore’s judgment to continue the work despite the danger posed by the defective winch may have been so improvident that the shipowner should have intervened and stopped the loading operation.

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87. 639 F.2d 848 (2d Cir. 1981).
88. The Court stated:

   We are presently unprepared to agree that the shipowner has precisely the duty described by the Court of Appeals for the Second Circuit, but for the reasons that follow we agree that there are circumstances in which the shipowner has a duty to act where the danger to the longshoreman arises from the malfunctioning of the ship’s gear being used in the cargo operations.

101 S. Ct. at 1626.
89. 639 F.2d at 856.
90. *But see* Justice Brennan’s concurring opinion, where he did not limit himself to the facts of the case, but stated a general rule that if the shipowner has a “reasonable belief that the stevedore will not remedy that condition, the shipowner has a duty either to halt the stevedoring operation, to make the stevedore eliminate the unsafe condition, or to eliminate the unsafe condition itself.” 101 S. Ct. at 1628. (Brennan, J., concurring). Justice Powell also stated a general rule in his concurring opinion. “Only where the judgment of the stevedore is ‘obviously improvident,’ and this poor judgment either is known to the shipowner or reasonably should be anticipated under the circumstances, does the shipowner have a duty to intervene.” *Id.* (citation omitted) (Powell, J., concurring). Note that nowhere in the opinions is there any indication of what “reasonable belief” or “obviously improvident” means, except for the reference to “customs and regulations allocating responsibility for particular repairs.” *Id.* (Powell, J., concurring).
Scindia Steam Navigation Co.

Reasonable Care Under the Circumstances

Although the decision offers little guidance for applying the standard in future cases, the Court did set forth some limits as to how “reasonable care under the circumstances” should be defined. The Court indicated that the trier of fact should look to the legal duties imposed upon the stevedore as well as to the vessel’s justifiable expectation that those duties will be performed. Also relevant, according to the Court, are the statutes, regulations, and customs which place a continuing duty on the vessel to repair the ship’s equipment used by the stevedore. Finally, the Court stated that the contract between the shipowner and the stevedore should also be considered.

The Restatement and Land-Based Principles

Although the Court in Scindia adopted the reasonable care under the circumstances approach, it did not completely discard land-based principles of tort law as set forth in the Restatement. Justice White, writing for the Court, indicated that while the Restatement sections did not offer sure guidance for section 905(b) cases, those provisions were not irrelevant. In his concurring opinion, Justice Powell pointed out that he considered the Court’s opinion to be consistent with the application of the Restatement standard. These two references to land-based principles strongly suggest that the Restatement provisions are pertinent in defining the reasonable care under the circumstances standard. It is also clear, however, that the Restatement sections alone will no longer be determinative of cases decided under section 905(b).

The Scindia decision further clarifies that any vestiges of the assumption of risk or contributory negligence defenses as incorporated in the Restatement are no longer applicable. This is exemplified by Justice White’s rejection of the shipowner’s argument that Santos should have refused to continue working when the winch was obviously dangerous. Openness and obviousness of a danger

91. Id. at 1626.
92. Id. n. 23.
93. Id. at 1622 n. 14. Justice White did not elaborate on this point. His statement indicates, however, that the relevancy of the Restatement sections is still an open question.
94. Justice Powell stated that the Restatement standard “is consistent with the plain intent of Congress to impose the primary responsibility on the stevedore. Although it is unnecessary in this case for the Court to adopt this standard fully, I do not understand our opinion to be inconsistent with it.” Id. at 1628 n. 1.
95. Justice White agreed with the court of appeals:
may still be relevant, however, to the issue of whether the shipowner acted reasonably under the circumstances.

**IMPACT OF Scindia**

Five cases have been decided since *Scindia* providing the lower courts with an opportunity to apply the standard adopted by the Supreme Court. Those decisions indicate that the standard of negligence under section 905(b) is still unclear. A review of the decisions will illustrate this point.

*Bush v. Sumitomo Bank and Trust Co.* was a case in which the facts were essentially the same as those in *Scindia*. The district court, therefore, had no difficulty in applying the new standard. In

[T]he shipowner may not defend on the ground that Santos should have refused to continue working in face of an obviously dangerous winch which its employer, Seattle, was continuing to use. The District Court erred in ruling otherwise, since the defense of assumption of risk is unavailable in § 905(b) litigation.

*Id.* at 1626 n. 22.


In another case, *Polk v. Valdoro Cia Naviera, S.A.*, No. 79-1728 (6th Cir. June 30, 1981), the court of appeals discussed the *Scindia* standard, but could not apply it due to a lack of credible evidence in the case. The court affirmed a judgment entered on a directed verdict against the longshoreman.

In *Wild v. Lykes Bros. S.S. Corp.*, 650 F.2d 772 (5th Cir. 1981), the court of appeals remanded the case to the district court for reconsideration of a motion for summary judgment for the defendant shipowner in light of *Scindia*.

Several cases had petitioned for writs of *certiorari* during the time that *Scindia* was before the Supreme Court. In the following cases the petitions for writ of *certiorari* were granted, the judgments were vacated, and the cases were remanded to the courts of appeals for further consideration in light of *Scindia*: Futo v. Lykes Bros., 619 F.2d 81 (5th Cir. 1980), *cert. granted, judgment vacated, and remanded*, 49 U.S.L.W. 3824 (1981); Griffith v. Wheeling-Pittsburgh Steel Corp., 610 F.2d 116 (3d Cir. 1979), *cert. granted, judgment vacated, and remanded*, sub nom. American Commercial Lines v. Griffith, 49 U.S.L.W. 3824 (1981); Bachtel v. Mammoth Bulk Carriers, Ltd., 605 F.2d 438 (9th Cir. 1979), *cert. granted, judgment vacated, and remanded*, 49 U.S.L.W. 3863 (1981); McCarthy v. Silver Bulk Shipping, Ltd., 487 F. Supp. 1021 (E.D. Pa. 1980), *cert. granted, judgment vacated, and remanded*, 49 U.S.L.W. 3824 (1981).


Other cases were remanded to the district courts by the appellate courts after *Scindia*. *See, e.g.*, McCullough v. S.S. Coppename, 648 F.2d 1036 (6th Cir. 1981); Roberts v. Andrew Martin Sea Serv., Inc., 648 F.2d 1064 (5th Cir. 1981).

*Bush*, the plaintiff was injured due to the malfunctioning of the ship's crane used in the loading operations. The court found that the shipowner was aware of the faulty condition, that the stevedore should have ceased using the crane because it was unsafe, and that the shipowner should have stopped the loading operation until the crane was repaired.\(^9\) This case exemplifies what the *Scindia* decision referred to as an "obviously improvident" decision by the stevedore.\(^9\) The stevedore decided to continue working in the face of a danger, thus triggering a duty to intervene on the part of the shipowner.

The other four cases present situations which differ factually from *Scindia*. In *Turner v. Japan Lines, Ltd.*\(^10\) and *Melanson v. Caribou Reefers, Ltd.*\(^10\) each plaintiff's injury was caused by a condition of the ship's cargo. In *Turner*, the shipowner was held to be liable, whereas in *Melanson*, it was not. In the latter case, the longshoreman suffered a heart attack a month after lifting an unexpectedly heavy load caused by two cartons sticking together. The cartons were frozen, allegedly because the ship was negligently loaded in rain and mist. A member of the ship's crew had even attempted to pry some of the cartons free with a crowbar. Thus, it was clear that not only was the shipowner aware of the condition, but it also took an active part in the cargo operations. The court, however, affirmed summary judgment for the shipowner on the ground that under *Scindia* the shipowner owed no legal duty to the longshoreman. This result followed because in the *Melanson* court's view the stevedore's judgment was not "obviously improvident" and the frozen condition of the cartons did not pose "an unreasonable risk of harm to the longshoreman."\(^10\) Alternatively, the court ruled that the defendant shipowner's conduct was reasonable in light of the facts. Finally, the court said that even if the cargo was loaded improperly, loading was the responsibility of the stevedoring company and not that of the shipowner. According to the court, the vessel will not be held responsible for a condition of the cargo.\(^10\)

In *Turner*,\(^10\) the longshoreman was injured by a cargo condition

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98. *Id.* at 1056.
100. 651 F.2d 1300 (9th Cir. 1981).
102. *Id.* slip op. at 4.
103. *Id.* slip op. at 6.
created by a different stevedore company in a different port where the cargo was improperly loaded. The cargo of plywood was not stowed properly, causing part of it to collapse under the plaintiff's weight. The court found that in this case, based upon evidence of customary duty, the shipowner had a duty to supervise the loading operations. The Ninth Circuit, reversing the district court's judgment for the vessel, held that the vessel had a duty to protect the longshoreman against a concealed danger created by a foreign stevedore, which the vessel could have remedied or warned of if it had exercised reasonable care.106

The differing results in these two cases are not easily explained. Both courts applied the negligence standard as set forth in Scindia. In both cases the dangerous condition was caused by a stevedoring company in another port, and the shipowner either knew or should have known of the dangerous condition. The Melanson court's finding that the condition in that case posed no unreasonable risk of harm illustrates how critical the facts are when applying the Scindia standard. A court's conclusion as to what is unreasonable or what is an obviously improvident decision appears to be a subjective determination, although a supposedly objective test of reasonableness is applied.

In Robertson v. Jeffboat, Inc.,108 the Sixth Circuit had little difficulty applying the Scindia standard because the facts were relatively simple. The plaintiff drowned when he fell off the barge he was helping construct because of inadequate lighting and the absence of safety measures. The court relied on Scindia's holding that the shipowner owes a duty of care to workers for dangerous conditions of which it has actual knowledge. In the court's view, there was no doubt that the shipowner had actual knowledge of the dangerous condition. The shipowner was also the employer and knew that the plaintiff would be working in poorly lit and unsafe conditions on the night of the accident. Therefore, the court held that the shipowner was liable for negligence.107

Sarauw v. Oceanic Navigation Corp.108 presents a more complex fact situation than Scindia, since the equipment which caused the injury was owned by the stevedore company. In Sarauw, the longshoreman was injured when the gangway, owned by the stevedore

105. Id. at 1304.
106. 651 F.2d 434 (6th Cir. 1981).
107. Id.
company, fell to the dock because it was improperly secured. The Third Circuit found the shipowner liable for failing to exercise reasonable care to secure the gangway and maintain it in a safe condition. Its holding was premised in part on the belief that the gangway, once secured to the ship, actually became a part of the vessel, because it was the only means by which the crew could embark or disembark. The court also based its decision on evidence that it was the shipowner and not the stevedore that maintained control over the gangway and had a customary duty to inspect it.\textsuperscript{109}

The shipowner denied liability, alleging that its duty had been modified by contract.\textsuperscript{110} The court acknowledged that \textit{Scindia} stated that the contract between the shipowner and stevedore may be relevant in determining the duty of the shipowner. The court, however, rejected the shipowner’s argument stating, “[w]e are not convinced, however, that \textit{Scindia} instructs that a shipowner may contract away its duty of care with respect to such an essential appurtenance of the ship as the gangway.”\textsuperscript{111} The court also examined the custom in the industry, another consideration pointed to in \textit{Scindia}, and found that although the duty to inspect and supervise a gangway may be shared with the stevedore by contract, there was evidence that custom dictates that the duty may not be transferred completely.\textsuperscript{112}

In finding the shipowner liable for a defective condition arising from the stevedore’s equipment which was under the active control of the shipowner,\textsuperscript{113} the \textit{Sarauw} court went one step beyond \textit{Scindia}. The facts in \textit{Scindia} did not present the Court with an opportunity to address the question of liability when it is the stevedore’s equipment, rather than the shipowner’s, which is defective. The concurring opinion reasoned that the \textit{Sarauw} holding was consistent with the policy underlying the \textit{Scindia} decision, because the shipowner’s liability arises only where the shipowner had control over a defective condition. The shipowner would not be held liable for conditions which were solely attributable to the

\begin{itemize}
\item \textsuperscript{109} \textit{Id.} at 528.
\item \textsuperscript{110} \textit{Id.} at 528-29.
\item \textsuperscript{111} \textit{Id.} The court is stating, in effect, that the shipowner has a nondelegable duty in regard to the gangway. For further discussion of the concept of nondelegable duty, see note 15 infra.
\item \textsuperscript{112} \textit{Id.} at 529.
\item \textsuperscript{113} According to the court, “[c]ontrol over the defective condition remains a crucial factor in imposing liability.” \textit{Id.} at 530.
\end{itemize}
stevedore.114

The court's theory that a shipowner should be held liable even for equipment it does not own when it assumes and retains control over that equipment seems correct. The result in this particular case, however, is disturbing. Most troubling in the court's preclusion of the shipowner's right to contract away its duty of gangway inspection. Although the conclusion that the duty cannot be contracted away is based on custom, the court appears to be retreating to the nondelegable duty theory115 and camouflaging its retreat under the guise of deferring to industry custom.

CONCLUSION

*Scindia* represents a step towards clarification of the standard of negligence under section 905(b) of the LHWCA. The decision does not, however, completely resolve the issue. Although it is clear that the new standard is reasonable care under the circumstances, what constitutes reasonable care in every circumstance has not been clearly delineated. "Inevitably, however, the rule will undergo refinement as it is applied to various categories of cases."116 This refinement process is appropriate, however, since essentially what the Court did was to adopt a negligence standard. In negligence cases, the trier of fact makes the determination of what a reasonable person would do. Similarly, in longshoremen's actions under section 905(b) of the LHWCA, the trier of fact should determine what would be reasonable under the circumstances of each case.

The Supreme Court might assist in the process of refining the new standard by setting guidelines when it decides cases in particular areas. Just as in land-based negligence cases there are categories such as slip and fall and attractive nuisance cases, actions brought under section 905(b) could be categorized and duties delineated under each category, so that a shipowner would know exactly what its responsibilities are in different situations. Thus, the Court, when presented with a case dealing with foreign substances such as oil on the ship's deck or a case involving equipment owned by the stevedore, could provide analytical models for the lower

114. *Id.*
115. Under the nondelegable duty theory, the shipowner has certain responsibilities which it can never delegate. Essentially, it is a form of strict liability or a form of unseaworthiness called by another name. Robertson, *Negligence Actions by Longshoremen Against Shipowners Under Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act*, 3 Mar. Law. 1, 5 (1977).
courts to follow in determining what is reasonable under specific types of circumstances. In this way, the Court would develop the new standard of reasonable care under the circumstances on an area by area basis.

VICTORIA L. BUSH