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Casenotes: Maritime Law — Land-Based Negligence Standard of Care Established in a Longshoreman's Third Party Action against Vessel Owner Under the Longshoremen's and Harbor Workers' Compensation Act of 1972. *Scindia Steam Navigation Co. v. Santos*, 451 U.S. 156 (1981)

Julia C. Neal
University of Baltimore School of Law

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CASENOTES

MARITIME LAW — LAND-BASED NEGLIGENCE STANDARD OF CARE ESTABLISHED IN A LONGSHOREMAN'S THIRD PARTY ACTION AGAINST VESSEL OWNER UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT OF 1972. *Scindia Steam Navigation Co. v. Santos*, 451 U.S. 156 (1981).

I. INTRODUCTION

The 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act (LHWCA)¹ limited an injured longshoreman's cause of action against a vessel owner to negligence.² However, these amendments failed to state the standard of care required of the vessel owner.³ Consequently, the federal courts have struggled with establishing the proper standard of care that is to be applied in a longshoreman's third party negligence action against a vessel owner.⁴ In *Scindia Steam Navigation Co. v. Santos*,⁵ the Supreme Court held that a vessel owner has no general duty to discover dangerous conditions that develop within the confines of the operations assigned to the stevedore.⁶ However, where the dangerous condition becomes known to the vessel owner, he will under certain circumstances have a duty to act when the dangerous condition arises from the malfunctioning of the vessel's gear

1. Act of Oct. 27, 1972, Pub. L. No. 92-576, 86 Stat. 1251 (amending 33 U.S.C. §§ 901-950 (1970)).

2. 33 U.S.C. § 905(b) (1976). Section 905(b) of the Act provides:

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of Section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. 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.

3. *See id.*

4. *See, e.g.*, Comment, *Shipowner Liability Under Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act: A Proposed Standard of Care*, 9 FORDHAM URB. L.J. 323 (1980); Comment, *Negligence Standards Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: Examining the Viewpoints*, 21 VILL. L. REV. 244 (1976).

5. 451 U.S. 156 (1981).

6. *Id.* at 172. A stevedore is one who is responsible for unloading a ship in port. WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 860 (1965).

being used in the stevedore operations.⁷ This casenote examines the standards of care adopted by the federal circuit courts, analyzes *Scindia* in light of those standards, and evaluates the impact this decision will have on future negligence actions brought under the LHWCA.⁸

II. THE FACTUAL BACKGROUND

Santos, a longshoreman and employee of the Seattle Stevedore Company, was injured while loading a vessel owned by Scindia Steam Navigation Company.⁹ On the day of the accident, his task was to remove sacks of wheat from a pallet board¹⁰ that was lowered into the hatch by a winch¹¹ and then properly stow the sacks of wheat.¹² The winch that was being used, which was part of the ship's gear, was malfunctioning to the extent that when the brakes were applied, it would not come to a complete stop.¹³ The accident which caused Santos' injuries occurred when a pallet board failed to stop until it hit a pallet jack,¹⁴ spilling half the sacks of wheat from the pallet.¹⁵ The hatch tender, believing the remaining sacks were secure enough not to fall, ordered the winch operator to raise the pallet about fifteen feet. Santos and three other longshoremen were permitted to clear away the spilled sacks. A few minutes later, more sacks fell from the pallet, striking and injuring Santos.¹⁶

Santos instituted a third party action against Scindia Steam Navigation Company for negligence pursuant to section 905(b) of the

7. 451 U.S. 156, 175-76 (1981).

8. 33 U.S.C. § 905(b) (1976).

9. *Scindia Steam Navigation Co. v. Santos*, 451 U.S. 156, 158 (1981).

10. A pallet is "a portable platform of wood or other material for handling, storage, or movement of materials and packages in warehouses, factories, or vehicles." WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 606 (1965).

11. A winch is "a powerful machine with one or more drums on which to coil a rope, cable or chain for hauling or hoisting." *Id.* at 1022.

12. *Scindia Steam Navigation Co. v. Santos*, 451 U.S. 156, 160 (1981).

13. Santos' accident occurred on December 10, 1972. The winch driver had complained to his foreman on December 8th that the brakes were not holding on the winches; instead, they would travel several more feet before the brakes could stop the descent of the load. Brief for Respondent at 4-7, *Scindia Steam Navigation Co. v. Santos*, 451 U.S. 156 (1981).

14. "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." *Scindia Steam Navigation Co. v. Santos*, 451 U.S. 156, 160 (1981).

15. *Id.*

16. *Id.* Three sacks struck Santos, one hitting him in the back of the neck. Brief for Respondent at 6, *Scindia Steam Navigation Co. v. Santos*, 451 U.S. 156 (1981).

There was some disagreement as to whether the additional sacks fell because of the braking mechanism allowing the suspended pallet to slip a few times, working loose the additional sacks that fell, or whether the additional sacks fell because the pallet board was swinging back and forth. *Scindia Steam Navigation Co. v. Santos*, 451 U.S. 156, 160 (1981).

LHWCA.¹⁷ The United States District Court for the Western District of Washington, applying the *Restatement* standard,¹⁸ held that there was no genuine issue as to any material facts and entered judgment in favor of Scindia Steam Navigation Company.¹⁹ The United States Court of Appeals for the Ninth Circuit, reversing the district court, held that the controlling standard for actions brought under section 905(b) is a "reasonable care under the circumstances approach."²⁰ Under this view, the court of appeals found that there were material facts in dispute that were to be resolved by a jury.²¹

III. HISTORICAL BACKGROUND

A. *The Early Development*

For many years, the longshoremen's work of unloading and loading vessels was treated as a non-maritime activity.²² But in 1914, the Supreme Court announced that actions by longshoremen against stevedores for injuries were to be subject to admiralty jurisdiction.²³ At this

17. 33 U.S.C. § 905(b) (1976).

18. RESTATEMENT (SECOND) OF TORTS §§ 343, 343A (1965).

19. 451 U.S. 156, 162 (1981). The standard applied by the district court was as follows:

[A] shipowner is not liable for dangerous conditions created by the stevedore's negligence while the stevedore was in exclusive control over the manner and the area of the work . . . nor is the shipowner under a duty to warn the stevedore or his employees of dangers or open and obvious defects which are known to the stevedore or his employees or which are so obvious and apparent that they may reasonably be expected to discover them.

1976 A.M.C. 2583, 2585 (W.D. Wash. 1976), *rev'd*, 598 F.2d 480 (9th Cir. 1979), *aff'd*, 451 U.S. 156 (1981).

20. 598 F.2d 480, 485 (9th Cir. 1979), *aff'd*, 451 U.S. 156 (1981). The "reasonable care under the circumstances approach" includes the following standard:

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.

Id.

21. *Id.* at 489. The Supreme Court stated that the court of appeals found the following facts to be in dispute:

[W]hether the shipowner knew or should have known of the defective winch; whether Seattle was in exclusive control of the loading in the sense that only Seattle could have repaired the winch; whether the defective operation of the winch had caused the initial spillage of the sacks, thus necessitating a cleanup, or had later been the proximate cause of the additional sacks falling from the pallet and injuring Santos.

451 U.S. 156, 164 (1981); *see Santos v. Scindia Steam Navigation Co.*, 598 F.2d 480, 489-91 (9th Cir. 1979), *aff'd*, 451 U.S. 156 (1981).

22. *See Tetreault, Seamen, Seaworthiness, and the Rights of Harbor Workers*, 39 CORNELL L.Q. 381 (1954).

23. *Atlantic Transp. Co. v. Imbrovek*, 234 U.S. 52, 61-62 (1914).

time, there were no applicable compensation statutes under admiralty law.²⁴ In 1917, three states' workmen's compensation statutes passed constitutional muster²⁵ and Congress attempted to provide longshoremen coverage under these systems.²⁶ Each time, the Supreme Court held that longshoremen could not receive the benefits of state compensation because of the need for federal uniformity in maritime matters.²⁷ Consequently, throughout the mid-1920's, longshoremen lacked any remedy for injuries that occurred on the job.²⁸ The Supreme Court's reaction to the longshoremen's dilemma was manifested in the 1926 decision of *International Stevedoring Co. v. Haverty*,²⁹ where the Court held that longshoremen were seamen and, therefore, were within the coverage of the Jones Act.³⁰ Congressional reaction to this decision came quickly and, in 1927, the LHWCA was enacted.³¹

The LHWCA, similar to most workmen's compensation statutes, made compensation benefits the longshoreman's exclusive remedy against the stevedore,³² thus eliminating the longshoremen's newly acquired cause of action under the Jones Act. In addition, the LHWCA provided that longshoremen could bring an action against any third party who may have caused their injuries,³³ but it did not specify under what theory the third party action could be brought. Initially, third party actions under the LHWCA were based in negligence and were usually brought against the vessel owner.³⁴

This scheme began to change in 1946, when the Supreme Court announced in *Seas Shipping Co. v. Sieracki*³⁵ that the warranty of seaworthiness was available to longshoremen injured while performing traditional seamen tasks.³⁶ Since the warranty of seaworthiness became a type of liability without fault,³⁷ and thus easier to prove, most third party actions against the vessel owner after *Sieracki* were brought

24. G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 438 (2d ed. 1975).

25. *New York Cent. R.R. v. White*, 243 U.S. 188 (1917); *Hawkins v. Bleakly*, 243 U.S. 210 (1917); *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917).

26. Act of June 10, 1922, ch. 216, 42 Stat. 634 (1922); Act of October 6, 1917, ch. 97, 405 Stat. 395 (1917).

27. *See Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920).

28. Comment, *The Injured Longshoreman vs. The Shipowner After 1972: Business Invitees, Land-Based Standards, and Assumption of Risk*, 28 HASTINGS L.J. 771, 774 (1977).

29. 272 U.S. 50 (1926).

30. *Id.* The Jones Act, 46 U.S.C. § 688 (1976), is the seaman's remedy for personal injuries caused by negligence by the vessel.

31. Longshoremen's and Harbor Workers' Compensation Act, ch. 509, §§ 1-51, 44 Stat. 1424 (1927) (current version at 33 U.S.C. §§ 901-950 (1976)).

32. *Id.* § 5, 44 Stat. at 1426.

33. *Id.* § 33a, 44 Stat. at 1440.

34. *See, e.g., Anderson v. Lorentzen*, 160 F.2d 173 (2d Cir. 1947); *The Etna*, 43 F. Supp. 303 (E.D. Pa. 1942).

35. 328 U.S. 85 (1946).

36. *Id.* at 99.

37. For a discussion of the warranty of seaworthiness, see Chamlee, *The Absolute*

under the theory of unseaworthiness rather than negligence.³⁸

The *Sieracki* decision led the way for circumvention of the exclusive remedy provision of the LHWCA. In 1956, responding to the heavy burden placed on the vessel owners under the unseaworthiness doctrine,³⁹ the Supreme Court held that when a vessel owner was found liable because of unseaworthiness, the stevedore could be sued for indemnification when the injury was caused by him.⁴⁰ Thus, the stevedore was paying twice for the same injury, through compensation benefits and indemnification. In 1963, the Supreme Court held that a longshoreman hired directly by the charterer of a vessel could sue his employer under the doctrine of unseaworthiness,⁴¹ resulting in a complete destruction of the provisions of the LHWCA.

B. *The 1972 Amendments*

Congressional response to the judicial destruction of the exclusive remedy provision of the 1927 Act and the subsequent flood of litigation was the enactment of the 1972 amendments to the LHWCA.⁴² Under section 905(b) it was provided that third party actions by longshoremen against vessel owners are to be based in negligence.⁴³ The unseaworthiness remedy has been eliminated and indemnity actions by the vessel owner against the stevedoring companies are prohibited.⁴⁴ Thus, Congress has specifically provided that compensation benefits are the longshoremen's exclusive remedy against the stevedore.

Problems under the 1972 amendments have not arisen under the exclusive remedy provision dealing with stevedores, but with the negligence cause of action against third parties. Although the 1972 amendments made it clear that a negligence action is the longshoremen's exclusive remedy against vessel owners, Congress failed to provide any specific statutory language as to the standard of care to be used.⁴⁵ Thus, the federal courts have been faced with the task of determining

Warranty of Seaworthiness: A History and Comparative Study, 24 MERCER L. REV. 519 (1973).

38. See Comment, *The Vessel Owner's Standard of Care under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act*, 23 LOY. L. REV. 986, 988 (1977).
39. The unseaworthiness doctrine enabled a vessel owner to be found liable even where the stevedore had caused the unseaworthy condition. See *Alaska S.S. Co. v. Petterson*, 347 U.S. 396 (1954), *aff'g* 205 F.2d 478 (9th Cir. 1953).
40. *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 132-35 (1956).
41. *Reed v. Steamship Yaka*, 373 U.S. 410, 414 (1963).
42. Act of Oct. 27, 1972, Pub. L. No. 92-576, 86 Stat. 1251 (amending 33 U.S.C. §§ 901-950 (1970)). The purpose of these amendments was to upgrade the benefits, extend the compensation coverage to protect additional workers, promulgate necessary administrative reforms, and provide a specified cause of action for damages against third parties. Brief for Respondent at I-1, *Scindia Steam Navigation Co. v. Santos*, 451 U.S. 156 (1981).
43. 33 U.S.C. § 905(b) (1976). For the text of § 905(b), see note 2 *supra*.
44. 33 U.S.C. § 905(b) (1976).
45. See *id.*

whether the appropriate standard of care is to be derived from maritime negligence concepts or from land-based liability principles.⁴⁶ Although Congress chose to entrust the judiciary with the responsibility of developing a standard of care,⁴⁷ the courts are limited to developing the standard of care in accordance with federal law.⁴⁸ Therefore, the courts are to apply only the admiralty concept of comparative negligence in any case where the injured longshoreman's negligence may have contributed to his injuries.⁴⁹

Although for several years after the enactment of the 1972 amendments the federal courts avoided the enunciation of any specific standard of care in third party actions against the vessel owner,⁵⁰ two basic schools of thought have recently developed.⁵¹ Following the lead of the Second Circuit, a majority of courts have either explicitly or implicitly adopted sections 343 and 343A of the *Restatement (Second) of Torts* as the appropriate standard of care owed by a vessel owner to the longshoremen.⁵²

In *Evans v. Transportacion Maritime Mexicana S.S. "Campeche"*,⁵³ the Second Circuit re-evaluated section 905(b) and found a congressional intent to place vessel owners in the same position when sued as their land-based counterparts.⁵⁴ The court construed this as requiring a direct application of land-based tort concepts and, therefore, section 343A of the *Restatement (Second) of Torts* was the most appropriate standard for determining negligence under section 905(b).⁵⁵ Using the *Restatement* standard, the *Evans* court found that a vessel owner is not "liable for injuries resulting from known or obvious dangers unless the

46. See, e.g., *Riddle v. Exxon Transp. Co.*, 563 F.2d 1103, 1109-10 (4th Cir. 1977).

47. H.R. REP. NO. 92-1441, 92d Cong., 2d Sess., reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4698, 4704.

Under this standard, as adopted by the Committee, there will of course, be disputes as to whether the vessel was negligent in a particular case. Such issues can only be resolved through the application of accepted principles of Tort Law and the ordinary process of litigation - just as they are in cases involving alleged negligence by land-based third parties.

Id.

48. H.R. REP. NO. 92-1441, 92d Cong., 2d Sess., reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4698, 4705.

49. *Id.*

50. Comment, *Shipowner Liability Under Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act: A Proposed Standard of Care*, 9 FORDHAM URB. L.J. 323, 330 (1980).

51. See text accompanying notes 52-63 *infra*.

52. At present, the Second, Fourth, Fifth and Seventh Circuits have adhered to the reasoning of sections 343 and 343A of the *Restatement*. See, e.g., *Giglio v. Farrell Lines, Inc.*, 613 F.2d 429, 431-32 (2d Cir. 1980); *Stockstill v. Gypsum Transp.*, 607 F.2d 1112, 1116 (5th Cir. 1979); *Clemons v. Mitsui O.S.K. Lines, Ltd.*, 596 F.2d 746, 748-49 (7th Cir. 1979); *Riddle v. Exxon Transp. Co.*, 563 F.2d 1103, 1111-12 (4th Cir. 1977).

53. 639 F.2d 848 (2d Cir. 1981).

54. See *id.* at 851-52.

55. *Id.* at 855.

shipowner should anticipate the harm despite the obviousness of the danger."⁵⁶ Thus, there is no liability where the vessel owner has no notice of the defect.⁵⁷ However, the vessel owner must take steps to protect the longshoremen where the defect is non-obvious or concealed and he knows of the defect which presents an unreasonable risk of harm.⁵⁸ When the dangerous defect arises during the stevedoring operations, the vessel owner must act when he reasonably anticipates that the longshoremen will not be able to avoid the dangerous condition.⁵⁹ Ordinarily, the vessel owner may rely on the stevedore to perform his job in a safe manner, but under certain circumstances it would be unreasonable for the vessel owner to rely on the stevedore to remedy the dangerous condition.⁶⁰

On the other hand, the minority of courts have interpreted the legislative history of section 905(b)⁶¹ as requiring a uniform body of negligence law derived from analogies to land-based concepts.⁶² Accordingly, these courts have applied the uniform maritime standard of reasonable care under the circumstances.⁶³

IV. THE *SCINDIA* COURT'S HOLDING

In *Scindia*,⁶⁴ the Supreme Court, for the first time since the enactment of the 1972 amendments, addressed the problem of what standard of care is applicable in third party actions by longshoremen against a vessel owner under section 905(b).⁶⁵ Noting the considerable disagreement among federal courts as to the construction and application of section 905(b),⁶⁶ Justice White, who delivered the opinion of the Court,⁶⁷ recognized that the section's language and its legislative his-

56. *Id.*

57. *Id.*

58. *Id.*; see RESTATEMENT (SECOND) OF TORTS § 343 (1965).

59. 639 F.2d 848, 856 (2d Cir. 1981).

60. *Id.* The court gave several examples of when the shipowner should intervene. Such circumstances include:

Where the dangerous condition would be too difficult for the stevedore alone to remedy, or where the custom in the industry places the burden of acting on the shipowner, or the ship affirmatively joins in the decision to continue despite the hazard, it would not be realistic to say that the shipowner's reliance on the stevedore is justified.

Id.

61. H.R. REP. NO. 92-1441, 92d Cong., 2d Sess., reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4698, 4703.

62. See *Johnson v. A/S Ivarans Rederi*, 613 F.2d 334, 348 (1st Cir. 1980); *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 610 F.2d 116, 125 (3d Cir. 1979); *Lawson v. United States*, 605 F.2d 448, 452 (9th Cir. 1979).

63. See note 20 *supra* for text of reasonable care under the circumstances standard.

64. 451 U.S. 156 (1981).

65. 33 U.S.C. § 905(b) (1976).

66. 451 U.S. 156, 165 (1981).

67. The Court's opinion was joined by all of the other members of the Court except Justice Burger, who took no part in the consideration or decision of the case. Justice Brennan filed a concurring opinion in which Justices Marshall and Blackmun

tory did not provide any guidance for the judiciary to apply a specific standard of care.⁶⁸

After acknowledging the vessel owner's duty of care "under the circumstances" to provide reasonably safe equipment and working conditions for the stevedore,⁶⁹ the Court turned its attention to the vessel owner's duty under section 905(b) after the stevedore's cargo operations have begun.⁷⁰ *Scindia* had contended that the vessel owner has no duty to either supervise and inspect the stevedore's cargo operations or to exercise reasonable care to discover and correct dangerous conditions that develop during the stevedore's operations.⁷¹ *Santos* countered with the court of appeals' rationale that the vessel owner has a continuing duty to use reasonable care in discovering dangerous conditions and to exercise reasonable care under the circumstances to protect the longshoremen.⁷²

The *Scindia* Court quickly rejected *Santos*' view of a continuing general duty to supervise and inspect because it would place a nondelegable duty on the shipowner which Congress sought to eliminate by enacting the 1972 amendments.⁷³ Implicitly responding to *Scindia*'s argument, the Court acknowledged the vessel owner's right to expect that the stevedore would avoid exposing the longshoremen to unreasonable dangers and that the stevedore would perform his tasks properly without supervision by the shipowner.⁷⁴ In light of the stevedore's duty, the Court concluded that, except where modified by positive law, customs, or contract provisions, the shipowner has no general duty to exercise reasonable care to discover, by supervision or inspection, dangerous conditions that develop during the stevedore's cargo operations in areas that are assigned to the stevedore.⁷⁵

The more difficult issue addressed by the Court was the vessel owner's duty to the longshoremen upon learning of a dangerous condition in the cargo operations that is also known to the stevedore, which may cause injury to the longshoremen.⁷⁶ *Scindia* argued that the vessel owner is entitled to rely on the expertise of the stevedore and, therefore, is not liable for injuries caused by dangers known by or obvious to the stevedore.⁷⁷ Although the Court found support for this position in past cases,⁷⁸ it recognized that both the Ninth and Second Circuits have re-

joined. Justice Powell filed a concurring opinion in which Justice Rehnquist joined.

68. *Id.*

69. *Id.* at 166-67.

70. *Id.* at 167.

71. *Id.*

72. *Id.* at 168.

73. *Id.* at 169.

74. *Id.* at 170.

75. *Id.* at 172.

76. *Id.* at 172-73.

77. *Id.* at 173.

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

jected this argument.⁷⁹ Recognizing the difference between the two circuits' positions, the *Scindia* Court adopted the position of the Second Circuit, as stated in *Evans v. Transportacion Maritime Mexicana S.S. "Campeche"*,⁸⁰ but limited the vessel owner's duty to act where the vessel owner knows or should know of the malfunction of the ship's gear being used in the cargo operations⁸¹ and it would be "improvident" not to act because the stevedore failed to act reasonably.⁸² Support for this position arises from safety and health regulations that are applied to longshoring. These regulations require that visibly unsafe gear shall not be used until safe.⁸³ More specifically, the regulations require that when a winch is unable to hold the load it shall not be used, but such defect should be reported to the officer in charge of the vessel.⁸⁴ Thus, under the regulations the shipowner has the duty to repair the winch and should intervene if it is aware of the condition.

The two concurring opinions in *Scindia* were generally consistent with the Court's opinion. The opinion by Justice Brennan, joined by Justices Marshall and Blackmun,⁸⁵ reiterated the standards set out in Justice White's holding.⁸⁶ However, the concurring opinion went one step further and specified what the shipowner must do when it knows of the dangerous condition and has a reasonable belief that the stevedore will not remedy the condition.⁸⁷ The opinion by Justice Powell, with whom Justice Rehnquist joined,⁸⁸ emphasized the distinction between the standard adopted by the Court and the "reasonableness standard" embraced by the Ninth Circuit.⁸⁹

V. ANALYSIS

In *Scindia Steam Navigation Co. v. Santos*,⁹⁰ the Supreme Court was presented with the opportunity to clarify an area of the law that has created disagreement between the circuits⁹¹ and has received attention from legal commentators.⁹² *Scindia* indicates the present unwillingness of the Court to specifically set forth the appropriate standard

79. *Id.* at 174.

80. 639 F.2d 848 (2d Cir. 1981). See text accompanying notes 53-60 *supra*.

81. 451 U.S. 156, 175 (1981).

82. *Id.*

83. 29 C.F.R. § 1918.51(b) (1980).

84. *Id.* § 1918.53(a)(5).

85. 451 U.S. 156, 179 (1981) (Brennan, J., concurring).

86. *Id.*

87. *Id.* (Brennan, J., concurring). "[T]he 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.*

88. *Id.* at 180 (Powell, J., concurring).

89. *Id.*

90. 451 U.S. 156 (1981).

91. For a general discussion of all the standards applied throughout the circuits, see Annot., 50 A.L.R. FED. 278 (1980).

92. See, e.g., Gorman, *The Longshoremen's and Harbor Workers' Compensation Act — After the 1972 Amendments*, 6 J. MAR. L. & COM. 1 (1974); Comment, *The*

for all actions brought under section 905(b) of the LHWCA. The opinion announced very narrow holdings, applicable primarily to defective ship's gear, with no indication of what position would be taken under different factual circumstances.

One of the more significant aspects of the *Scindia* decision was the reaffirmance of principles established prior to the 1972 amendments of the LHWCA.⁹³ In *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*,⁹⁴ the Supreme Court held that a shipowner owed a duty to the stevedore and his longshoremen to exercise reasonable care under the circumstances. Not only did the *Scindia* Court reiterate this position, it also stated that this duty requires the shipowner to have the ship and its equipment in such condition that the stevedore will be able to carry on cargo operations with reasonable safety.⁹⁵ The *Scindia* opinion also reestablished the principle that the shipowner has a duty to warn of known, non-obvious dangers that may be encountered during the cargo operations.⁹⁶ This standard appears to be based on the *Restatement (Second) of Torts*, sections 343 and 343A,⁹⁷ but is stated in the context of stevedoring operations.

The first holding announced by the *Scindia* Court, that a shipowner has no general duty to supervise or inspect stevedoring operations to discover dangerous conditions, is subject to several exceptions. These exceptions — positive law, contract provision or custom — may alter this no-duty rule to a duty to discover dangerous defects that develop during the stevedoring operations.⁹⁸ Positive law apparently refers to any applicable statutes and regulations that have been enacted.⁹⁹ The contract provision exception seems to apply to the right of the vessel owner and stevedore to contract for imposing a duty on the owner to inspect during the stevedoring operations.¹⁰⁰ The third exception, custom, might be invoked when it is shown that in the particular area it is a practice in the ordinary course of business to conduct regular inspections of the stevedoring operation.¹⁰¹ In addition, the Court's enunciation of the shipowner's precise duty includes modifying language that raises more questions than it effectively answers. The shipowner has no "general" duty to inspect or correct faulty equipment,¹⁰² implying that beyond the positive law, contract and custom exceptions,

Longshoremen's and Harbor Workers' Compensation Act and the Invitee Standard: Maritime Law Gone Aground?, 53 WASH. L. REV. 663 (1978).

93. *Scindia Steam Navigation Co. v. Santos*, 451 U.S. 156, 167 (1981).

94. 394 U.S. 404 (1969).

95. 451 U.S. 156, 167 (1981).

96. *Id.*

97. Brief for Petitioner at 13-14, *Scindia Steam Navigation Co. v. Santos*, 451 U.S. 156 (1981).

98. *Scindia Steam Navigation Co. v. Santos*, 451 U.S. 156, 172 (1981).

99. See BLACK'S LAW DICTIONARY 1046 (5th ed. 1979).

100. See *Moore v. Smotkin*, 79 Ariz. 77, 80, 283 P.2d 1029, 1030 (1955).

101. See *Goslin v. Kurn*, 351 Mo. 395, 173 S.W.2d 79 (1943).

102. 451 U.S. 156, 172 (1981).

there will be other circumstances in which the court may find exceptions to this no-duty rule.

Another limitation on the holding is that there is no duty to discover dangerous conditions that develop during the cargo operations.¹⁰³ Therefore, the shipowner should realize that with every dangerous condition there will be a question of whether it developed before or after the start of the cargo operations to determine if the shipowner owed any duty to the stevedore. Finally, no duty exists if the condition develops within the confines of the cargo operations that are assigned to the stevedore.¹⁰⁴ Due to the ambiguity of "confines" and "assigned," the actual meaning of these two words, when applied to factual situations, will ultimately have to be defined by the Court.

The second holding in *Scindia*, that there may be circumstances which require the shipowner to act, where he knows of the dangerous condition and where he may not reasonably assume that the stevedore will correct a malfunction of the ship's gear,¹⁰⁵ seems to apply the *Restatement (Second) of Torts*, section 343A. Although the Court apparently endorsed the Second Circuit's position,¹⁰⁶ the opinion sidestepped the actual adoption of the *Restatement*, sections 343 and 343A.¹⁰⁷ It has been argued, however, that the *Restatement* standard is antithetical to section 905(b).¹⁰⁸ This stems from the legislative intent that a plaintiff's recovery should be limited by the concept of comparative negligence,¹⁰⁹ while the authors of the *Restatement* have clearly indicated that contributory negligence and assumption of risk have a direct bearing upon liability under sections 343 and 343A.¹¹⁰

In situations that involve dangerous conditions arising from defective ship's gear, it still is not clear under what circumstances the shipowner should act. The operative test used by the *Scindia* Court leaves the shipowner's duty to intervene a factual question,¹¹¹ placing the shipowner in a very awkward position. However, any positive law on the subject may control. After *Scindia* the shipowner should at least

103. *Id.*

104. *Id.*

105. *Id.* at 175.

106. *Evans v. Transportacion Maritime Mexicana S.S. "Campeche"*, 639 F.2d 848 (2d Cir. 1981).

107. 451 U.S. 156, 168 n.14 (1981).

108. *Johnson v. A/S Ivarans Rederi*, 613 F.2d 334, 347 (1st Cir. 1980); *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 610 F.2d 116, 125 (3d Cir. 1979); *Gallardo v. Westfal-Larsen & Co.*, 435 F. Supp. 484, 492 (N.D. Cal. 1977).

109. *See* Brief for Respondent at I-12, *Scindia Steam Navigation Co. v. Santos*, 451 U.S. 156 (1981).

110. RESTATEMENT (SECOND) OF TORTS § 343, Comment d (1965); *id.* § 343A, Comment d. *But see* *Evans v. Transportacion Maritime Mexicana S.S. "Campeche"*, 639 F.2d 848, 857 n.10 (2d Cir. 1981) (where the doctrine of comparative negligence is observed, there should be no problem in applying § 343A).

111. *See Scindia Steam Navigation Co. v. Santos*, 451 U.S. 156, 175-78 (1981); *Evans v. Transportacion Maritime Mexicana S.S. "Campeche"*, 639 F.2d 848, 857 (2d Cir. 1981).

intervene whenever he knows of a dangerous condition arising from malfunctioning ship's gear, if the stevedore continues to work.¹¹²

The Court gave no indication as to whether it will adopt the same position if factual circumstances other than ship's gear are involved. This could mean that when the Court is presented with circumstances not involving ship's gear, it will extend the *Scindia* holding and, therefore, may eventually fully implement the Second Circuit's "anticipation theory." However, the Court stated that the possible duty to intervene may entail an examination of the regulations as to who has the right and duty to make a given repair.¹¹³ Therefore, regulations or positive law may also play an active part in helping to define the duty to intervene in circumstances where the dangers arise from something other than the ship's gear.¹¹⁴

VI. CONCLUSION

In *Scindia* the Supreme Court held that shipowners have no general duty during cargo operations to inspect for dangerous conditions that may develop, subject to the requirement that when a shipowner becomes aware of a dangerous condition arising from malfunctioning ship's gear, he may have a duty to act. These holdings, being very limited in scope, leave many questions that will ultimately have to be answered. However, the *Scindia* Court establishes that the negligence standard of care is to be a land-based one. Therefore, the jurisdictions that adhere to the *Restatement (Second) of Torts* position have properly interpreted the 1972 amendments to the LHWCA. Accordingly, the maritime reasonable care under the circumstances approach is rejected. Whether the *Scindia* holding will be extended to encompass other dangerous conditions is yet to be seen. It seems probable that the Court will adopt a position close to that of the Second Circuit. However, until that time, the need for uniformity in maritime law will not be met.

Julia C. Neal

112. See note 60 *supra*.

113. 451 U.S. 156, 177-76 (1981).

114. *Id.*