loaded onto or unloaded from vessels, barges, or containers. Blundo was assigned his tasks at the beginning of each day and until he arrived at the terminal he did not know whether he would be working on a ship or on shore. He was reassigned during the day if he completed the task to which he was assigned initially. App 63–69, 112.

On January 8, 1974, ITO assigned Blundo to check cargo being "stripped" or removed from a container on the 19th Street side of the pier. The container Blundo was checking had been taken off a vessel at another pier facility outside of Brooklyn and brought overland unopened by an independent trucking company to the 21st Street Pier. It was Blundo's job to break the seal that had been placed on the container in a foreign port and show it to United States Customs Agents. After the seal was broken, Blundo was to check the contents of the container against a manifest sheet describing the cargo, the consignees, and the ship on, and port from which, the cargo had been transported. He was to mark each item of cargo with an identifying number. After the checking, the cargo was to be placed on pallets, sorted according to consignees, and put in a bonded warehouse pending customs inspection. Blundo was injured as he was marking the cargo stripped from the container, when he slipped on some ice on the pier. Id., at 69–74, 86–90.

Blundo sought compensation under the LHWCA. The Administrative Law Judge concluded that Blundo satisfied the

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coverage requirements of the Act and the Benefits Review Board (BRB) affirmed.[3]

Respondent Ralph Caputo was a member of a regular longshoring "gang" that worked for Pittston Stevedoring Co.[4] When his gang

3. Under the 1972 Amendments, contested compensation claims are heard by an administrative law judge. 33 USC § 919(d) (1970 ed Supp V) [33 USCS § 919(d)]. Review is then available from the BRB, a three-member board appointed by the Secretary of Labor. The BRB, created by the 1972 Amendments, is empowered "to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under [the LHWCA]." 33 USC § 921(b)(1), (3) (1970 ed Supp V) [33 USCS § 921(b)(1), (3)]; see generally 20 CFR §§ 801–802 (1976). The decisions of the BRB are subject to review in the courts of appeals. 33 USC § 921(c) (1970 ed Supp V) [33 USCS § 921(c)].

Prior to the 1972 Amendments, cases were heard in the first instance by deputy commissioners and review was then available in the district courts. 33 USC § 921 [33 USCS § 921]. There was no administrative review procedure for LHWCA claims.

The Benefits Review Board Service (BRBS) is the unofficial reporter of the Board's decisions. The BRB's decision in Blundo's case may be found at 2 BRBS 376 (1975) as well as in Pet for Cert App in No. 76–454, p 45a. The Administrative Law Judge's decision is reproduced id., at 49a. A synopsis of it may be found at 1 BRBS 71 (ALJ) (1975).

4. It is necessary, at this point, to introduce some terminology. "A stevedore or stevedore contractor is responsible for loading or unloading a ship in port by contract with a shipowner, agent, or charter operator." U.S. Dept. of Labor, Office of Workers' Compensation Programs Task Force Report, Longshore and Harbor Workers' Compensation Program 103 (1976). "[A] marine terminal operator, who may own or lease the terminal property, is responsible for the safe handling of the ship, the delivery and receipt of the ship's cargo, and all movement and handling of that cargo between the point-of-rest and any place on the marine terminal property except to shipside." Ibid.

Typically, the work of getting the cargo on and off the ship is done by a "gang" of longshoremen "distributed between the ship and the pier so they can move cargo in an uninterrupted flow." Id., at 104. A member of the gang may be designated by the equipment he operates, e.g., a winchman or hustler operator, or by the area in which he works, e.g., holdman. A typical longshore gang ranges from 12 to 20 workers. Because ship arrivals are irregular, the demand for a gang varies from day to day. Ibid.

was not needed, Caputo went to the

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waterfront hiring hall, where he was hired by the day by other stevedoring companies or terminal operators with work available. He had been hired on some occasions by Northeast Stevedoring Co. to work as a member of a stevedore gang on ships at the 39th Street Pier in Brooklyn; on other occasions he had been hired by petitioner Northeast Marine Terminal Co., Inc. (Northeast), for work in its terminal operations at the same location. App 8–10, 14–16.

On April 16, 1973, Caputo was hired by Northeast to work as a "terminal labor[er]." Pet for Cert in No. 76-444, p 48a; App 8, 14. A terminal laborer may be assigned to load and unload containers, lighters, barges, and trucks. App 8; Brief for Petitioners in No. 76-444, p 4. When he arrived at the terminal, Caputo was assigned, along with a checker and forklift driver, to help consignees' truckmen load their trucks with cargo that had been discharged from ships at Northeast's terminal. Caputo was injured while rolling a dolly loaded with cheese into a consignee's truck. App 27–40.

The Administrative Law Judge found that Caputo satisfied the requirements of the Act and awarded him compensation. The BRB affirmed.

The employers in both cases filed petitions to review the

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decisions and the Court of Appeals for the Second Circuit consolidated the cases. After thorough consideration of the language, history, and purposes of the 1972 Amendments, the court held, one judge dissenting, that the injuries of both respondents were compensable under the LHWCA. In view of the conflict over the coverage afforded by the 1972 Amendments, we granted certiorari to consider both cases. 429 US 998, 50 L Ed 2d 607, 97 S Ct 522 (1977). We affirm.

II

Congress enacted the Longshoremen's and Harbor Workers' Compensation Act in 1927, 44 Stat 1424, after this Court had thwarted the efforts of the States and of Congress

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to provide compensation for maritime workers injured on navigable waters through state compensation programs. In 1917, the Court, in Southern Pacific Co. v Jensen, 244 US 205, 61 L Ed 1086, 37 S Ct 524, held that the States were without power to extend a workmen's compensation remedy to longshoremen injured on the gangplank between a ship and a pier. The decision left longshoremen injured on the seaward side of a pier without a compensation remedy while longshoremen injured on the pier were protected by state compensation acts. State Industrial Commission v Nordenholt Corp. 259 US 263, 66 L Ed 933, 42 S Ct 473, 25 ALR 1013 (1922). Dissatisfied with the gap in coverage thus created, and recognizing that the amphibious nature of longshoremen's work made it desirable to have "one law to cover their whole employment, whether directly part of the process of loading or unloading a ship or not," Congress sought to authorize States to apply their compensation statutes to injuries seaward of the Jensen line.[12] Its attempts to allow such uniform state systems, however, were struck down

12. HR Rep No. 639, 67th Cong, 2d Sess, 2 (1922). More fully, the Report noted:

"It is easy to understand the reason why the representatives of the workmen ask for compensation under State laws. The longshoremen are no more peripatetic workmen than are the repair men. They do not leave the port in which they work; they do not go into different jurisdictions. They are part of the local labor force and are permanently subject to the same conditions as are other local workmen. The work of longshoremen is not all on ship. Much of it is on the wharves. They may be at one moment unloading a dray or a railroad car or moving articles from one point on the dock to another, the next actually engaged in the process of loading or unloading cargo. Their need for uniformity is one law to cover their whole employment, whether directly part of the process of loading or unloading a ship or not."

See also S Rep No. 139, 65th Cong, 1st sess, 1 (1917).

as unlawful delegations of congressional power. Washington v W. C. Dawson & Co. 264 US 219, 68 L Ed 646, 44 S Ct 302 (1924); Knickerbocker Ice Co. v Stewart, 253 US 149, 64 L Ed 834, 40 S Ct 438, 11 ALR 1145 (1920). Finally, convinced that the only way to provide workmen's compensation for longshoremen and harborworkers

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injured on navigable waters was to enact a federal system, Congress, in 1927, passed the LHWCA.

The Act was, in a sense, a typical workmen's compensation system, compensating an employee for injuries "arising out of and in the course of employment." But it was designed simply to be a gapfiller—to fill the void created by the inability of the States to remedy injuries on navigable waters. Thus, it provided coverage only for injuries occurring "upon the navigable waters of the United States" and permitted compensation awards only "if recovery .... through workmen's compensation proceedings [could] not validly be provided by state law."

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Congress' initial apprehension of the difficulties inherent in the existence of two compensation systems for injuries sustained by amphibious workers proved to be well-founded. The courts spent the next 45 years trying to ascertain the respective spheres of coverage of the state and federal systems. As two commentators described it, "the relationship between [LHWCA] and the otherwise applicable State Compensation Act [was] shrouded in impenetrable confusion." G. Gilmore & C. Black, Law of Admiralty 409 (2d ed 1975) (Gilmore). It is unnecessary to examine in detail the Court's efforts to dispel the confusion. Suffice it to say that while the Court permitted recovery under state remedies in particular situations seaward of the Jensen line, see, e.g., Davis v Washington Labor Dept. 317 US 249, 87 L Ed 246, 63 S Ct 225 (1942), the Court made it clear that federal coverage stopped at the water's edge. Nacirema Operating Co. v Johnson, 396 US 212, 24 L Ed 2d 371, 90 S Ct 347 (1969).

In Nacirema Operating Co., supra, the Court held that the Act did not cover longshoremen killed or injured on a pier while attaching cargo to ships' cranes for loading onto the ships, even though coverage might have existed had the men been hurled into the water by the accident, Marine Stevedoring Corp. v Oosting, 238 F Supp 78 (ED Va 1965), affd 398 F2d 900 (CA4 1968) (en banc), or been injured on the

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deck of the ship while performing part of the same operation, Calbeck v Travelers Ins. Co. 370 US 114, 8 L Ed 2d 368, 82 S Ct 1196 (1962). The dissent protested the incongruity and unfairness of having coverage determined by "where the body falls" and argued that the Act was "status oriented, reaching all injuries sustained by longshoremen in the course of their employment." 396 US at 224, 24 L Ed 2d 371, 90 S Ct 347 (Douglas, J., dissenting). The majority, however, did not agree.

> "There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. But even construing the [Extension of Admiralty Jurisdiction Act of 1948, 46 USC § 740] [46 USCS § 740,] to amend the Longshoremen's Act would not effect this result, since longshoremen injured on a pier by pier-based equipment would still remain outside the Act. And construing the Longshoremen's Act to coincide with the limits of admiralty jurisdiction—whatever they may be and however they may change—simply replaces one line with another whose uncertain contours can only perpetuate on the landward side of the Jensen line, the same confusion that previously existed on the seaward side. While we have no doubt that Congress

had the power to choose either of these paths in defining the coverage of its compensation remedy, the plain fact is that it chose instead the line in Jensen separating water from land at the edge of the pier. The invitation to move that line landward must be addressed to Congress, not to this Court." Id., at 223-224, 24 L Ed 2d 371, 90 S Ct 347.[17]

In 1972, Congress moved the line.

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The 1972 Amendments were the first significant effort to reform the 1927 Act and the judicial gloss that had been attached to it. The main concern of the 1972 Amendments was not with the scope of coverage but with accommodating the desires of three interested groups: (1) shipowners who were discontented with the decisions allowing many maritime workers to use the doctrine of "seaworthiness" to recover full damages from shipowners regardless of fault; (2) employers of the longshoremen who, under another judicially created doctrine, could be required to indemnify shipowners and thereby lose the benefit of the intended exclusivity of the compensation remedy; and (3) workers who wanted to improve the benefit schedule deemed inadequate by all parties.[18] Congress sought to meet these desires by "specifically

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eliminating suits against vessels brought for injuries to longshoremen under the doctrine of seaworthiness and outlawing indemnification actions and 'hold harmless' or indemnity agreements[; continuing] to allow suits against vessels or other third parties for negligence[; and raising] benefits to a level commensurate with present day salaries and with the needs of injured workers whose sole support will be payments under the Act." Rep 5.[19]

In increasing the benefits, however, Congress recognized that the disparity between the federal compensation rates and the significantly

17. The Court reiterated its suggestion to Congress in Victory Carriers, Inc. v Law, supra, which held that a longshoreman injured on the pier by a pier-based forklift could not recover from the shipowner under a warranty of seaworthiness. The Court noted the sturdiness of the Jensen line in the absence of statutory modification. It observed, however, that "if denying federal remedies to longshoremen injured on land is intolerable Congress has ample power under Arts I and III of the Constitution to enact a suitable solution." 404 US, at 216, 30 L Ed 2d 383, 92 S Ct 418.

18. The Report of the Senate Committee on Labor and Public Welfare described the need for the bill:

"The Longshoremen's and Harbor Workers' Compensation Act was last amended in 1961, at which time the maximum benefit under the Act was set at $70 per week. . . . Clearly, in order to provide adequate income replacement for disabled workers covered under this law a substantial increase in benefits is urgently required.

. . . .

"While every one has agreed since at least the mid-1960's that the benefits under this Act should be raised, there has been some dispute over the years as to whether such benefits should be raised so long as this compensation law was not the exclusive remedy for an injured worker. It has been the feeling of most employers that while they were willing to guarantee payment to an injured worker regardless of fault, they would only do so if the right to such payment was the exclusive remedy and they would not be subject to additional law suits because of that injury.

"Since 1946, due to a number of decisions by the U. S. Supreme Court it has been possible for an injured longshoreman to avail himself of the benefits of the Longshoremen's and Harbor Workers' Compensation Act and to sue the owner of the ship on which he was working for damages as a result of this injury. The Supreme Court has ruled that such ship owner, under the doctrine of seaworthiness, was liable for damages caused by any injury regardless of fault. In addition, shipping companies generally have succeeded in recovering the damages for which they are held liable to injured longshoremen from the stevedore on theories of express or implied warranty, thereby transferring their liability to the stevedore company, the actual employer of the longshoremen." S Rep 4.

"The end result is that, despite the provision in the Act which limits an employer's liability to the compensation and medical benefits provided in the Act, a stevedore-employer is indirectly liable for damages to an injured longshoreman who utilizes the technique of suing the vessel under the unseaworthiness doctrine." Id., at 9.

"The social costs of these law suits, the delays, crowding of court calendars and the need to pay for lawyers' services have seldom resulted in a real increase in actual benefits for injured workers." Id., at 4.

19. See Pub L 92-576, §§ 5-11, 18, 86 Stat 1253.

lower state rates would exacerbate the harshness of the already unpopular Jensen line. It also realized that modern technology had moved much of the longshoreman's work onto the land so that if coverage were not extended, there would be many workers who would be relegated to what Congress deemed clearly inadequate state compensation systems.

To remedy these problems, Congress extended the coverage shoreward. It broadened the definition of "navigable waters of the United States" to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." At the same time, Congress amended the definition of the persons covered

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by the Act. Previously, so long as a work-related injury occurred on navigable waters and the injured worker was not a member of a narrowly defined class, the worker would be eligible for federal compensation provided that his or her employer had at least one employee engaged in maritime employment. It was not necessary that the injured employee be so employed. Pennsylvania R Co. v O'Rourke, 344 US 334, 340–342, 97 L Ed 367, 73 S Ct 302 (1953). But with the definition of "navigable waters" expanded by the 1972 Amendments to include such a large geographical area, it became necessary to describe affirmatively the class of workers Congress desired to compensate. It therefore added the requirement that the injured worker be "engaged in maritime employment," which it defined to include "any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but . . . not . . . a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." 33 USC § 902(3) (1970 ed Supp V) [33 USCS § 902(3)].[23]

The 1972 Amendments thus changed what had been essentially

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only a "situs" test of eligibility for compensation to one looking to both the "situs" of the injury and the "status" of the injured. We must now determine whether respondents Caputo and Blundo satisfied these requirements.

III

We turn first to the question whether Caputo and Blundo satisfied the "status" test—that is, whether they were "engaged in maritime employment" and therefore "employees" at the time of their injuries.[24] The question is made difficult

23. The definition of "employer" was changed so as to correspond with the broadened definition of navigable waters. Title 33 USC § 902(4) (1970 ed Supp V) [33 USCS § 902(4)] now reads:

"The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."

24. There is no question in these cases that the injuries "arose out of and in the course of employment" and that the employers are statutory employers. See Pet for Cert App in No. 76-454, pp 53a-54a; Pet for Cert in No. 76-444, pp 52a-53a; Brief for Petitioners in No. 76-444, p 3.

by the failure of Congress to define the relevant terms—"maritime employment," "longshoremen," "longshoring operations"[25]—in either the text of the Act or its legislative history.[26]

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The closest Congress came to defining the key terms is the "typical example" of shoreward coverage provided in the Committee Reports.[27] The example clearly indicates an

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intent to cover those workers involved in the essential elements of unloading a vessel—taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area. The example also makes it clear that persons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered. Thus, employees such as truckdrivers whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered. Also excluded are employees who perform purely clerical tasks and are not engaged in the handling of cargo. But while the example is useful for identifying the outer bounds of who is clearly excluded and who is clearly included, it does not speak to all situations.[28] In par-

25. As the definition of employee makes clear, the category of persons engaged in maritime employment includes more than longshoremen and persons engaged in longshoring operations. It is, however, unnecessary in this case to look beyond these two subcategories.

This case also does not involve the question whether Congress excluded people who would have been covered before the 1972 Amendments; that is, workers who are injured on navigable waters as previously defined. See Weyerhaeuser Co. v Gilmore, 528 F2d 957 (CA9); cert denied, 429 US 868, 50 L Ed 2d 148, 97 S Ct 179 (1976).

26. The Reports and discussions used only the terms of the statute without elaboration. Thus, for example, the Section-by-Section Analysis in the Senate Report states:

"Section 2(a) amends section 2(3) of the Act to define an 'employee' as any person engaged in maritime employment. The definition specifically includes any longshoreman or other person engaged in longshoreing [sic] operations, and any harborworker, including a ship repairman, shipbuilder and shipbreaker. It does not exclude other employees traditionally covered but retains that part of 2(3) which excludes from the definition of 'employee' masters, crew members or persons engaged by the master to unload, load or repair vessels of less than eighteen tons net." S Rep at 16.

See also HR Rep 14.

And in the section describing the shoreward extension, the Committee Reports state:

"The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel." S Rep 13; HR Rep 10.

27. "The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e., a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters." S Rep 13; HR Rep 10–11.

28. That the example is not exhaustive is clear. Some types of cargo, for example, are never brought to a "holding or storage area" but are placed directly on a truck or railroad car for immediate inland movement. See Brief

ticular, it is silent on the question of coverage for those people, such as Caputo and Blundo, who are injured while on the situs, *see* Part IV, infra, and engaged in the handling of cargo as it moves between sea and land transportation after its immediate unloading.[29]

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[5] Nevertheless, we are not without guidance in resolving that question. The language of the 1972 Amendments is broad and suggests that we should take an expansive view of the extended coverage. Indeed, such a construction is appropriate for this remedial legislation. The Act "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." Voris v Eikel, 346 US 328, 333, 98 L Ed 5, 74 S Ct 88 (1953). Consideration of the purposes behind the broadened coverage reveals a clear intent to reach persons such as Blundo and Caputo.

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[6] One of the primary motivations for Congress' decision to extend the coverage shoreward was the recognition that "the advent of modern cargo-handling techniques" had moved

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much of the longshoreman's work off the vessel and onto land. S Rep 13; HR Rep 10. Noted specifically was the impact of containerization. Unlike traditional break-bulk cargo handling, in which each item of cargo must be handled separately and stored individually in the hold of the ship as it waits in port, containerization permits the time-consuming work of stowage and unstowage to be performed on land in the absence of the vessel. The use of containerized ships has reduced the costly time the vessel must be in port and the amount of manpower required to get the cargo onto the vessel. In effect, the operation of loading and unloading has been moved shoreward; the container is a modern substitute for the hold of the vessel. As Judge Friendly observed below, "[S]tripping a container . . . is the functional equivalent of sorting cargo discharged from a ship; stuffing a container is part of the loading of the ship even though it is performed on

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shore and not in the ship's cargo holds." Pittston Stevedoring Corp. v Dellaventura, 544 F2d 35, 53 (CA2 1976). Congress' intent to adapt the LHWCA to modern cargo handling techniques clearly indicates that these tasks, heretofore done on board ship, are included in the category of "longshoring operations."

[2b] It is therefore apparent that respondent Blundo was a statutory "employee" when he slipped on the ice. His job was to check and mark items of cargo as they were unloaded from a container. This task is clearly an integral part of the unloading process as altered by the advent of containerization and was intended to be reached by the Amendments. Indeed, the Committee Reports explicitly state: "[C]heckers, for example, who are directly involved in the loading or unloading functions are

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for Petitioner in No. 76-454, p 38 n 46; Tr of Oral Arg 44. And, while all would agree that persons bringing such cargo directly from a ship to a truck are engaged in maritime employment, see infra, at 274-275, 53 L Ed 2d 339-340, the example does not mention such activity. In addition, while it is incontrovertible that workers engaged in the process of loading a ship and performing steps analogous to those mentioned in the example—that is, moving cargo from storage and placing it immediately on the ship—are covered, the fact is that the example also does not mention these steps. See also discussion, n 38, infra.

29. Accord, Pittston Stevedoring Corp. v Dellaventura, 544 F2d, at 54; Jacksonville Shipyards, Inc. v Perdue, 539 F2d, at 540. The First Circuit in fact accused Congress of "seemingly [going] out of its way to avoid taking any express stance on the status of those engaged in stuffing and stripping containers as part of the loading and unloading process just as it is silent on the status of other terminal employees engaged in moving, storing and culling cargo on the pier." Stockman v John T. Clark & Son of Boston, Inc. 539 F2d, at 274.

covered by the new amendment." S Rep 13; HR Rep 11. We thus have no doubt that Blundo satisfied the status test.[33]

The congressional desire to accommodate the Act to modern technological changes is not relevant to Caputo's case, since

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he was injured in the old-fashioned process of putting goods already unloaded from a ship or container into a delivery truck. Another dominant theme underlying the 1972 Amendments, however, assists us in analyzing Caputo's status. Congress wanted a "uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." S Rep 13; HR Rep 10-11. It wanted a system that did not depend on the "fortuitous circumstance of whether the injury [to the longshoreman] occurred on land or over water." S Rep 13; HR Rep 10. It therefore extended the situs to encompass the waterfront areas where the overall loading and unloading process occurs. It is the view of the respondent Director of the OWCP that a uniform system must reach "all physical cargo handling activity anywhere within an area meeting the situs [test]." Brief for Federal Respondent 20. "[M]aritime employment," in his view, "include[s] all physical tasks performed on the waterfront, and particularly those tasks necessary to transfer cargo between land and water transportation." Id., at 25. Under this theory, it is clear that the Act would cover someone who, like Caputo, was engaged in the final steps of moving cargo from maritime to land transportation: putting it in the consignee's truck.

We need not decide, however, whether the congressional desire for uniformity supports the Director's view[34] and entitles

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everyone performing a task such as Caputo's to benefits under the Act. It is clear, at a minimum, that when someone like Caputo performs such a task, he is to be covered. The Act focuses primarily on occupations—longshoreman, harbor worker, ship repairman, shipbuilder, shipbreaker. Both the text and the history demonstrate a desire to provide continuous coverage throughout their employment to these amphibious workers who, without the 1972 Amendments, would be covered only for part of their activity. It seems clear, therefore, that when Congress said it wanted to cover "longshoremen," it had in mind persons whose employment is such that they spend at least some of their time in indisputably longshoring operations and who, without the

33. [2c] We find no significance in the fact that the container Blundo was stripping had been taken off a vessel at another pier and then moved to the site of the injury. Until the container was stripped, the unloading process was clearly incomplete. The only geographical concern Congress exhibited was that the operation take place at a covered situs. See Part IV, infra. It was precisely Congress' intent to accommodate the mobility of containers and the ability to transport and strip them at locations removed from the ship.

34. While the Director identifies this as the BRB's position as well as his own, Brief for Federal Respondent 20, it appears to us that the BRB has gone further than this position suggests. For example, the BRB found that a clerk, who worked in an office processing the paperwork for the delivery of cargo to truckmen for removal from the terminal, was a covered "employee." It reasoned that this function, although clerical in nature, was "essential to the removal of cargo from the terminal and was an integral part of longshoring operations." Farrell v Maher Terminals, Inc. 3 BRBS 42, 45 (1975). Contrary to the view expressed by the Director, the Board showed no concern with the fact that the employee did not handle cargo. Citing the Committee Reports, see n 27, supra, the Third Circuit has rejected this conclusion and granted a petition for review. Maher Terminals, Inc. v Farrell, 548 F2d 476, 478 (1977).

Regardless of whether the view advanced by the Director is the position of the BRB, we agree with Judge Friendly that it would be useful for the BRB to engage in an extensive study of the structure of work on the various piers of the country. While the record before us contains sufficient information to enable us to decide the present cases, such a study will be helpful for future cases.

1972 Amendments, would be covered for only part of their activity.

[1b] That Caputo is such a person is readily apparent. As a member of a regular stevedoring gang, he participated on either the pier or the ship in the stowage and unloading of cargo. On the day of his injury he had been hired by petitioner northeast as a terminal laborer. In that capacity, he could have been assigned to any one of a number of tasks necessary to the transfer of cargo between land and maritime transportation, including stuffing and stripping containers, loading and discharging lighters and barges,[35] and loading and unloading

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trucks. App 8. Not only did he have no idea when he set out in the morning which of these tasks he might be assigned, but in fact his assignment could have changed during the day. Thus, had Caputo avoided injury and completed loading the consignee's truck on the day of the accident, he then could have been assigned to unload a lighter. Id., at 24. Since it is clear that he would have been covered while unloading such a vessel, to exclude him from the Act's coverage in the morning but include him in the afternoon would be to revitalize the shifting and fortuitous coverage that Congress intended to eliminate.

Petitioners and the NAS seek to avoid these results by proposing a so-called "point of rest" theory. The

35. Lighters and barges are part of the modern technological advancements to which Congress referred when it mentioned "LASH-type vessels." The term LASH is an acronym for "lighter aboard ship." The National Association of Stevedores (NAS) describes the system as follows:

"[C]argo is placed in special uniform size 'lighters,' or barges, which are called LASH barges to differentiate them from river barges. The LASH barges are towed from the loading port to the location of the LASH vessel, which is sometimes called the mother ship. The barges are mechanically loaded by a crane on the mother ship and are stacked in specially constructed holds in the mother ship. The actual stowage or unstowage of the barges with their contents in the mother ship requires substantially fewer longshoremen than does the loading of cargo into a breakbulk type ship. A very similar type of operation called SEABEE differs from the LASH operation described only in the size of the barge and the mechanical means for loading or unloading the barge onto or from the mother SEABEE ship.

"The actual loading of the barges is performed by longshoremen in precisely the same manner traditionally employed in the loading or unloading of a breakbulk ship. However, in most instances the size of the longshore gang involved in LASH and SEABEE operations is smaller than the regular ship's gang primarily because of the smaller size of the barge. The barges are in fact vessels and ply the navigable waters of the United States and may be loaded or unloaded at any inland or coastal waterfront facility." Brief for NAS as Amicus Curiae 27–28.

term "point of rest" is claimed to be a term of art in the

[432 US 275]

industry that denotes the point where the stevedoring operation ends (or, in the case of loading, begins) and the terminal operation function begins (or ends, in the case of loading). Brief for Petitioner in No. 76-454, p 9. See n 4, supra. Petitioners contend that the "maritime employment of longshoremen" includes only "the stevedoring activity of the longshore gang (and those directly involved with the gang) which, in the case of unloading, takes cargo out of the hold of the vessel, moves it away from the ship's side, and carries it to its point of rest on the pier or in a terminal shed." Brief for Petitioner in No. 76-454, p 9. Since Caputo and Blundo were handling cargo that had already reached its first point of rest, petitioners argue they are not to be covered.

[7] This contention that Congress intended to use the point of rest as the decisive factor in the "status" determination has several fatal weaknesses. First, the term "point of rest" nowhere appears in the Act or in the legislative history. It is difficult to understand why, if Congress intended to stop coverage at this point, it never used the term. The absence of a term that is claimed to be so well known in the industry is both conspicuous and telling.

But it is not simply the term's unexplained absence that undermines petitioners' theory. More fundamentally, the

[432 US 276]

theory is simply too restrictive, failing to accomodate either the language or the intent of the 1972 Amendments. The operations petitioners would cover clearly are "longshoring operations" and are appropriately covered by the Act. But petitioners fail to give effect to the obvious desire to cover longshoremen whether or not their particular task at the moment of injury is clearly a "longshoring operation." The theory does not comport with the Act's focus on occupations and its desire for uniformity. As the First Circuit noted: "[T]he evil of the old Act was that it bifurcated coverage for essentially the same employment. The point-of-rest approach would seem to result in the same sort of bifurcation, since the same employee engaged in an activity beyond the point of rest would cease to be covered." Stockman v John T. Clark & Son of Boston, Inc. 539 F2d 264, 275 (1976). In addition, the theory fails to accommodate the intent to cover those longshoring operations that modern technology had moved onto the land. Coverage that stops at the point of rest excludes those engaged in loading and unloading the modern functional equivalents of the hold of the ship. As we have indicated, Congress clearly intended to cover such operations.[38]

38. Moreover, we are not convinced that the point-of-rest theory provides the workable definition that petitioners claim for it. The "point" varies from port to port and with different types of cargo. See, the Stevedore and Marine Terminal Industry of the United States unpublished survey (1974-1975); n 28, supra. The point can be moved seaward or landward at the whim of the employer. Such characteristics make it inconsistent with the uniform system Congress sought to design. As Judge Craven observed, when a panel of the Fourth Circuit adopted the point-of-rest theory and refused to cover persons holding jobs similar to Caputo's and Blundo's:

"[Respondents] will, I think, be surprised to learn that they are not longshoremen, and astonished to discover that they are not engaged in maritime employment of any kind. If they are not, as my brothers hold, then the Congress has labored prodigiously only to have accomplished nothing at all in its effort to simplify the problems of maritime workers'

[432 US 277]

The only support petitioners can find for their theory is the fact that it is consistent with the "typical example" given in the Committee Reports. See n 27, supra. But as we have already indicated, supra, at 266-267, 53 L Ed 2d 334-335, the example is equally consistent with a broader view of coverage. Consistency with an illustrative example is clearly not enough to overcome the overwhelming evidence against the theory.

In view of all this, it is not surprising that the "point of rest" limitation has been rejected by all but one of the Circuits that have considered it and by virtually all the commentators.

[432 US 278]

We too reject it. A theory that nowhere appears in the Act, that was never mentioned by Congress during the legislative process, that does not comport with

[432 US 279]

Congress' intent, and that restricts the coverage of a remedial Act designed to extend coverage is incapable of defeating our conclusion that Blundo and Caputo are "employees."

IV

Having established that respondents Blundo and Caputo satisfied the "status" test for coverage under the Act, we consider now whether their injuries occurred on a covered "situs"—"the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel)."

[3b] There is no dispute with respect to Caputo. The truck he was helping to load was parked inside the terminal area. As petitioner Northeast correctly concedes, this situs "unquestionably met the requirements of § 3(a) of the Act, . . . because the terminal adjoins navigable waters of the United States and parts of the terminal are used in loading and unloading ships." Brief for Petitioners in No. 76-444, p 3 n 1.

[4b] Blundo's injury was sustained while he was checking a container being stripped on a pier located within a facility known as the 21st Street Pier. The fenced-in facility was located on the water and ran between 19th and 21st Streets. It included

[432 US 280]

two "finger-piers." The pier on the 21st Street end was used to berth ships for purposes of loading and unloading them. The one on the 19th Street end was used only for stripping and stuffing containers and storage. See the Administrative Law Judge's decision in Pet for Cert App in No. 76-454, pp 52a-53a. Blundo was working on this latter pier.

Petitioner ITO argues that Blundo was not on a covered situs because the 19th Street Pier was not "customarily used by an employer for loading [or] unloading . . . a vessel." The Court of Appeals labeled this argument "halfhearted" and dismissed it in a footnote. 544 F2d, at 51 n 19. We agree that the argument does not merit extended discussion.

First, we agree with the court below that it is not at all clear that

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compensation. . . . Henceforth, injured employees and their counsel must comb the waterfronts of this circuit, probing hopelessly, like Diogenes with his lantern, for that elusive 'point of rest' upon which coverage depends." I.T.O. Corp. of Baltimore v BRB, 529 F2d 1080, 1089 (CA4 1975) (dissenting opinion), modified en banc, 542 F2d 903 (1976).

the phrase "customarily used" was intended to modify more than the immediately preceding phrase "other areas." We note that the sponsor of the bill in the House, Representative Daniels, described this section as "expand[ing] the coverage which was limited to the ship in the present law, to the piers, wharves, and terminals." 118 Cong Rec 36381 (1972). There was little concern with respect to how these facilities were used.

[432 US 281]

Second, even if we assume that the phrase should be read to modify the preceding terms, we agree with the BRB and the Court of Appeals that Blundo satisfied the situs test in the same way that Caputo did—by working in an "adjoining . . . terminal . . . customarily used . . . in loading [and] unloading." The entire terminal facility adjoined the water and one of its two finger-piers clearly was used for loading and unloading vessels.

Accordingly, we conclude that when Congress sought to expand the situs to avoid anomalies inherent in a system that drew lines at the water's edge, it intended to include an area such as the one at issue here. Accord, Stockman v John T. Clark & Son of Boston, Inc. 539 F2d, at 271–272; I.T.O. Corp. of Baltimore v BRB, 529 F2d 1080, 1083–1084 (CA 1975), modified en banc, 542 F2d 903 (1976).

Since we find that both Caputo and Blundo satisfied the status and the situs tests, we affirm.

It is so ordered.

[459 US 297]

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Petitioner

v.

PERINI NORTH RIVER ASSOCIATES et al.

459 US 297, 74 L Ed 2d 465, 103 S Ct 634

[No. 81-897]

Argued October 4, 1982. Decided January 11, 1983.

OPINION OF THE COURT

[459 US 299]

Justice O'Connor delivered the opinion of the Court.

We granted certiorari in this case, 455 US 937, 71 L Ed 2d 647, 102 S Ct 1425 (1982), to consider whether a marine construction worker, who was injured while performing his job upon actual navigable waters, and who would have been covered by the Act before 1972, is "engaged in maritime employment" and thus covered by the amended Act.[3] We hold that the worker is "engaged in maritime employment" for purposes of

[459 US 300]

coverage under the amended LHWCA. Accordingly, we reverse the decision below.

I

The facts are not in dispute. Respondent Perini North River Associates (Perini) contracted to build the foundation of a sewage treatment plant that extends approximately 700 feet over the Hudson River between 135th and 145th Streets in Manhattan. The project required that Perini place large, hollow circular pipes called caissons in the river, down to embedded rock, fill the caissons with concrete, connect the caissons together above the water with concrete beams, and place precast concrete slabs on the beams. The caissons were delivered by rail to the shore, where they were loaded onto supply barges and towed across the river to await unloading and installation.

The injured worker, Raymond Churchill, was an employee of Perini in charge of all work performed on a cargo barge used to unload caissons and other materials from the supply barges and to set caissons in position for insertion into the embedded rock. Churchill was on the deck of the cargo barge giving directions to a crane operator engaged in unloading a caisson from a supply barge when a line used to keep the caissons in position snapped and struck Churchill. He sustained injuries to his head, leg, and thumb.[4]

Churchill filed a claim for compensation under the LHWCA. Perini denied that Churchill was covered by the Act, and after a formal hearing pursuant to § 19 of the Act, 33

3. In Northeast Marine Terminal Co. v. Caputo, 432 US 249, 153 L Ed 2d 320, 97 S Ct 2348 (1977), we examined the scope of the § 2(3) *status* requirement as it applied to injuries that occurred on the newly covered landward *situs*. In that case, we expressly declined to speculate whether congressional addition of the *status* requirement meant that "Congress excluded people who would have been covered before the 1972 Amendments; that is, workers who are injured on the navigable waters as previously defined." Id., at 265, n 25, 53 L Ed 2d 320, 97 S Ct 2348.

4. At the time Churchill was injured, he was working on a barge in actual navigable waters. There is no claim that he was standing on the foundation of the sewage treatment plant.

USC § 919 (1976 ed and Supp V) [33 USCS § 919], an Administrative Law Judge determined that Churchill was not "engaged in maritime employment" under § 2(3) of the Act because his job lacked "some relationship to navigation and commerce on navigable waters." App to Pet for Cert 31a. Churchill and the Director, Office of Workers' Compensation Programs

[459 US 301]

(Director), appealed to the Benefits Review Board, pursuant to § 21(b)(3) of the Act, 33 USC § 921(b)(3) [33 USCS § 921(b)(3)]. The Board affirmed the Administrative Law Judge's denial of coverage, on the theory that marine construction workers involved in building facilities not ultimately used in navigation or commerce upon navigable waters are not engaged in "maritime employment." 12 BRBS 929, 933 (1980).[5] One Board Member dissented, arguing that "all injuries sustained in the course of employment by employees over 'navigable waters' as that term was defined prior to the 1972 Amendments, are covered under the [amended] Act." Id., at 935.[6]

Churchill then sought review of the Board's decision in the Court of Appeals for the Second Circuit, under § 21(c) of the Act, 33 USC § 921(c) [33 USCS § 921(c)].[7] The Director participated as respondent, and filed a brief in support of Churchill's position. The Second Circuit denied Churchill's petition, relying on its decision in Fusco v Perini North River Associates, 622 F2d 1111 (1980), cert denied, 449 US 1131, 67 L Ed 2d 119, 101 S Ct 953 (1981). According to the Second Circuit, Churchill was not in "maritime employment" because his employment lacked a " 'significant relationship to navigation or to commerce on navigable waters.' " Churchill v Perini North River Associates, 652 F2d 255, 256, n 1 (1981). The Director now seeks review of the Second Circuit denial of Churchill's petition. The Director agrees with the position taken by the dissenting member of the Benefits Review Board: the LHWCA does not require

[459 US 302]

that an employee show that his employment possesses a "significant relationship to navigation or to commerce," where, as here, the employee is injured while working upon the actual navigable waters in the course of his employment, and would have been covered under the pre-1972 LHWCA.[8]

5. The Board also determined that Churchill's duties did not make him a "person engaged in longshoring operations" under § 2(3) of the LHWCA.

6. The dissenting Board member also relied on this Court's decision in Sun Ship, Inc. v Pennsylvania, 447 US 715, 65 L Ed 2d 458, 100 S Ct 2432 (1980), to support his position.

7. Title 33 USC 921(c) provides in pertinent part:

"(c) Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. . . ."

8. The Ninth Circuit is in agreement with the Second Circuit position. See Weyerhaeuser Co. v Gilmore, 528 F2d 957 (1975), cert denied, 429 US 868, 50 L Ed 2d 148, 97 S Ct 179 (1976). The Fifth Circuit takes a position contrary to that of the Second Circuit and Ninth Circuit. See Boudreaux v American Workover, Inc. 680 F2d 1034 (1982) (en banc) (Tate, J.).

III

[1b] The question of Churchill's coverage is an issue of statutory construction and legislative intent. For reasons that we explain below, there is no doubt that Churchill, as a marine construction worker injured upon actual navigable waters in the course of his employment upon those waters, would have been covered by the LHWCA before Congress amended it in 1972. In deciding whether Congress intended to restrict the scope of coverage by adding the § 2(3) status requirement, we must consider the scope of coverage under the pre-1972 Act and our cases construing the relevant portions of that Act. We must then focus on the legislative history and purposes of the 1972 Amendments to the LHWCA to determine their effect on pre-existing coverage.

[459 US 306]

A

Beginning with our decision in Southern Pacific Co. v Jensen, 244 US 205, 61 L Ed 1086, 37 S Ct 524 (1917), we held that there were certain circumstances in which States could not, consistently with Art III, § 2, of the Constitution, provide compensation to injured maritime workers.[14] If the employment of an injured worker was determined to have no "direct relation" to navigation or commerce, and "the application of local law [would not] materially affect" the uniformity of maritime law, then the employment would be characterized as "maritime but local," and the State could provide a compensation remedy. Grant Smith-Porter v Rohde, 257 US 469, 477, 66 L Ed 321, 42 S Ct 157, 25 ALR 1008 (1922). See also Western Fuel Co. v Garcia, 257 US 233, 242, 66 L Ed 210, 42 S Ct 89 (1921). If the employment could not be characterized as "maritime but local," then the injured employee would be left without a compensation remedy.

After several unsuccessful attempts to permit state compensation remedies to apply to injured maritime workers whose employment was not local,[15] Congress passed the LHWCA in 1927, 44 Stat (part 2) 1424. Under the original statutory scheme, a worker had to satisfy five primary conditions in order to be covered under the Act. First, the worker had to satisfy the "negative" definition of "employee" contained in § 2(3) of the 1927 Act in that he could not be a "master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." Id., at 1425.[16] Second, the

[459 US 307]

worker had to suffer an "injury" defined by § 2(2) as "accidental injury or death arising out of and in the course of employment . . . ." Ibid. Third, the worker had to be employed by a statutory "employer," defined by § 2(4) as "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)." Ibid.[17] Fourth, the worker had to meet a "situs" requirement contained in § 3(a) of the Act that limited coverage to workers

14. Article III, § 2, extends the federal power "to all Cases of admiralty and maritime Jurisdiction." In Jensen, we held that state compensation Acts could not cover longshoremen injured seaward of the water's edge. The line of demarcation between land and water became known as the "Jensen line."

15. See Knickerbocker Ice Co. v Stewart, 253 US 149, 64 L Ed 834, 40 S Ct 438, 11 ALR 1145 (1920); Washington v W. C. Dawson & Co. 264 US 219, 68 L Ed 646, 44 S Ct 302 (1924).

16. Section 3(a), 44 Stat (part 2) 1426, also excluded from coverage "[a]n officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof."

17. The 1927 Act did not contain any provision that an injured employee must be "engaged in maritime employment" at the time of injury in order to be covered. Rather, the Act employed the expression "maritime employment" only as part of the definition of a statutory "employer."

whose "disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock)." Id., at 1426. Fifth, § 3(a) precluded federal compensation unless "recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." Ibid.

Federal compensation under the LHWCA did not initially extend to all maritime employees injured on the navigable waters in the course of their employment. As mentioned, § 3(a) of the 1927 Act permitted federal compensation only if compensation "may not validly be provided by State law." Ibid. This language was interpreted to exclude from LHWCA coverage those employees whose employment was "maritime but local." See, e.g., Crowell v Benson, 285, US 22, 76 L Ed 598, 52 S Ct 285 (1932). Application of the "maritime but local" doctrine required case-by-case determinations, and a worker was often required to make a perilous jurisdictional "guess" as to which of two mutually exclusive compensation schemes was applicable to cover his injury. Employers faced uncertainty as to whether their contributions to a state insurance fund would be sufficient to protect them from liability.

In Davis v Department of Labor, 317 US 249, 87 L Ed 246, 63 S Ct 225 (1942), this Court recognized that despite its many cases involving the

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"maritime but local" doctrine, it had "been unable to give any guiding, definite rule to determine the extent of state power in advance of litigation . . . ." Id., at 253, 87 L Ed 246, 63 S Ct 225. Employees and employers alike were thrust on "[t]he horns of [a] jurisdictional dilemma." Id., at 255, 87 L Ed 246, 63 S Ct 225.[18] Davis involved an employee

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who was injured while dis-

18. In Davis, our concern for the employer's dilemma was related to the fact that because the employer did not know with any certainty whether his employee would be covered under the LHWCA, "[t]he employer's contribution to a state insurance fund may therefore wholly fail to protect him against the liabilities for which it was specifically planned." 317 US, at 255, 87 L Ed 246, 63 S Ct 225. We resolved that dilemma in Calbeck v Travelers Insurance Co., 370 US 114, 8 L Ed 2d 368, 82 S Ct 1196 (1962), by making it clear to employers that if they required their employees to work upon actual navigable waters, those employees would be covered by the LHWCA. The dissent takes this certainty in favor of LHWCA coverage to mean that in 1972 Congress wanted to ensure that employers like Perini would have only to pay for *state* compensation benefits, and would not have to obtain more costly LHWCA protection.

The dissent's concern about duplicative insurance seems exaggerated for two reasons. First, even under the dissent's view of coverage, both state and federal remedies are available to injured workers, and employers with employees working on the shore would have to contribute to state compensation funds in the event that an employee covered by the LHWCA's shoreside extension sought state compensation, or an employee was deemed for whatever reason not to be eligible for LHWCA relief. "[T]he 1972 extension of federal jurisdiction supplements, rather than supplants, state compensation law." Sun Ship, Inc. v Pennsylvania, 447 US, at 720, 65 L Ed 2d 458, 100 S Ct 2432.

We also note that the dissent argues that before 1972, the financial burden of duplicative coverage was not heavy because LHWCA benefits were lower than they now are, and insurance carriers would cover LHWCA operations for a nominal addition to state compensation program premiums. There is nothing in the record in this case, in the legislative history, or, for that matter, in the dissent, concerning whether the relative spread between state and federal insurance premiums is higher now than before 1972.

Second, the dissent's view clearly does not result in any certainty whatsoever for employers like Perini with respect to whether those employers have to pay for LHWCA coverage. If any Perini employee (including Churchill) were to engage in loading, unloading, or repairing of the barge on which Churchill was working, the employee would be covered. Indeed, if Churchill himself had to make some minor mechanical adjustment on the barge and was injured while doing so, he would be covered under the dissent's view.

mantling a bridge from a standing position on a barge. We upheld the application of the state compensation law in Davis not because the employee was engaged in "maritime but local" employment, but because we viewed the case as in a "twilight zone" of concurrent jurisdiction where LHWCA coverage was available and where the applicability of state law was difficult to determine. We held that doubt concerning the applicability of state compensation Acts was to be resolved in favor of the constitutionality of the state remedy. Relying in part on Davis, the Court in Calbeck v Travelers Insurance Co., 370 US 114, 8 L Ed 2d 368, 82 S Ct 1196 (1962), created further overlap between federal and state coverage for injured maritime workers. In Calbeck, we held that the LHWCA was "designed to ensure that a compensation remedy existed for all injuries sustained by employees [of statutory employers] on navigable waters, and to avoid uncertainty as to the source, state or federal, of that remedy." Id., at 124, 8 L Ed 2d 368, 82 S Ct 1196. Our examination in Calbeck of the "complete legislative history" of the 1927 LHWCA revealed that Congress did not intend to incorporate the "maritime but local" doctrine in the Act. Id., at 120, 8 L Ed 2d 368, 82 S Ct 1196. "Congress used the phrase 'if recovery . . . may not validly be provided by State law' in a sense consistent with the delineation of coverage as reaching injuries occurring on navigable waters." Id., at 126, 8 L Ed 2d 368, 82 S Ct 1196.[19]

Before 1972, there was little litigation concerning whether an employee was "in maritime employment" for purposes of being the employee of a statutory employer: "Workers who

[459 US 318]

are not seamen but who nevertheless suffer injury on navigable waters are no doubt (or so the courts have been willing to assume) engaged in 'maritime employment.'" G. Gilmore & C. Black, Law of Admiralty 428 (2d ed 1975) (Gilmore & Black). One case in which we did discuss the maritime employment requirement was Parker v Motor Boat Sales, Inc. 314 US 244, 86 L Ed 184, 62 S Ct 221 (1941). In Parker, the injured worker, hired as a janitor, was drowned while riding in one of his employer's motorboats keeping lookout for hidden objects under the water. When the employee's beneficiary sought LHWCA compensation, the employer argued that the employment was "'so local in character'" that the State could validly have provided a remedy, and the § 3(a) language ("if recovery . . . may not validly be provided by State law") precluded federal relief. Id., at 246, 65 L Ed 2d 458, 100 S Ct 2432. A unanimous Court rejected the employer's argument, and held that the employee was engaged in maritime employment and that LHWCA coverage extended to an employee injured on the navigable waters in the course of his employment, without any further inquiry whether the injured worker's employment had a direct relation to navigation or commerce.[20] In abolishing the "jurisdictional dilemma" created by the "maritime but local" doctrine, Calbeck relied heavily on Parker, see

19. We noted in Sun Ship, Inc. v Pennsylvania, supra, that in extending LHWCA coverage into the "maritime but local" zone, Calbeck did not overturn Davis "by treating the federal statute as exclusive." 447 US, at 718–719, 65 L Ed 2d 458, 100 S Ct 2432. Rather, Calbeck eliminated the "jurisdictional dilemma" that resulted from the existence of two spheres of exclusive jurisdiction, by making injuries within the "maritime but local" sphere compensable under either state or federal law.

20. The majority opinion in Davis assumed that if the claimant in that case sought federal relief, and such relief was awarded at the administrative stage of the proceedings, the Court would have sustained the award under Parker. In his dissent in Davis, Chief Justice Stone argued that the federal Act applied to give exclusive relief in that case: "after our decision in Parker v Motor Boat Sales, . . . [the Davis claimant's] right of recovery under the federal act can hardly be doubted." 317 US, at 260, 87 L Ed 246, 63 S Ct 225.

Professor Robertson has noted that "Parker should have meant the abolition of the 'maritime but local' exception," but that Davis indicated that the doctrine had continued vitality. D. Robertson, Admiralty and Federalism 210 (1970). Professor Robertson also states that if the claimant in Davis had sought federal, rather than state, compensation, "the Parker case would certainly have said that [the claimant] could get it." Id., at 211.

370 US, at 127–128, 8 L Ed 2d 368, 82 S Ct 1196.

[459 US 311]

[1c] It becomes clear from this discussion that the 1927 Act, as interpreted by Parker, Davis, and Calbeck, provided coverage to those employees of statutory "employers," injured while working upon navigable waters in the course of their employment. Indeed, the consistent interpretation given to the LHWCA before 1972 by the Director, the Deputy Commissioners, the courts, and the commentators was that (except for those workers specifically excepted in the statute), *any* worker injured upon navigable waters in the course of employment was "covered . . . without any inquiry into what he was doing (or supposed to be doing) at the time of his injury." Gilmore & Black, at 429–430.[21]

21. The dissent attempts to carve a new "maritime but local" area in which the exclusive remedy is state compensation. The dissent argues that Congress meant to exclude from LHWCA coverage all employees who are not longshoremen or harbor workers, and that only longshoremen and harbor workers possess the "direct link to maritime commerce" necessary for LHWCA coverage. According to the dissent, the pre-1972 case law, with the exception of Parker, supports its position. The dissent's view rests on a misreading of our decisions in Davis and Calbeck, and a failure to consider the impact of Parker, Davis, and Calbeck on the scope of pre-1972 coverage.

The dissent points out that Davis involved an employee who sought state compensation, and it concludes that Davis says nothing about LHWCA coverage. The employee in Davis was standing on a barge and assisting in the dismantling of a bridge, an activity that would clearly not have the "direct link to maritime commerce" that the dissent suggests is required. Although the Davis employee sought state compensation, both the Davis majority and the Davis dissent assumed that *if* the Davis employee sought LHWCA coverage, Parker would require that he get it. In Calbeck, the claimants were welders performing work on vessels, but our holding in Calbeck was clearly predicated on Parker and Davis, and cannot properly be characterized as a case where LHWCA coverage was predicated on the existence of some "direct link to maritime commerce" or "traditional" LHWCA employment. The dissent claims that since Churchill could be covered by a state compensation remedy, it is consistent with Calbeck to deny LHWCA coverage. This, of course, neglects the fact that Calbeck made clear that "Congress brought under the coverage of the Act all such injuries [suffered by employees working on the navigable waters] whether or not a particular one was also within the constitutional reach of a state workmen's compensation law." 370 US, at 126–127, 8 L Ed 2d 368, 82 S Ct 1196.

Parker, Davis, and Calbeck were read by the lower federal and state courts not to limit LHWCA coverage only to "traditional" maritime activities, but to cover injuries that occurred on the navigable waters in the course of employment. See, e.g., Nalco Chemical Corp. v Shea, 419 F2d 572 (CA5 1969) (a pilot salesman traveling to offshore platform); Interlake S.S. Co. v Nielsen, 338 F2d 879 (CA6 1964) (watchman), cert denied, 381 US 934, 14 L Ed 2d 699, 85 S Ct 1765 (1965); Radcliff Gravel Co. v Henderson, 138 F2d 549 (CA5 1943) (workers who trimmed sand and gravel loaded on barges after being dredged from water bed), cert denied, 321 US 782, 88 L Ed 1074, 64 S Ct 638 (1944); Rex Investigative and Patrol Agency, Inc. v Collura, 329 F Supp 696 (EDNY 1971) (land-based employee sent temporarily onto vessel to act as watchman); Standard Dredging Corp. v Henderson, 57 F Supp 770 (Ala 1944) (employee engaged in dredging bed of intracoastal canal); Ford v Parker, 52 F Supp 98 (Md 1943) (night watchman); Perry v Baltimore Contractors, Inc. 202 So 2d 694 (La App 1967) (worker injured while diving in order to assist in construction of a tunnel under intracoastal canal) cert denied, 390 US 1028, 20 L Ed 2d 285, 88 S Ct 1419 (1968). This list is by no means exhaustive, and does not include various administrative decisions.

In another case, Pennsylvania R. Co. v O'Rourke, 344 US 334, 97 L Ed 367, 73 S Ct 302 (1953), we held that a statutory "employer" existed as long as the employer had *any* employee engaged in "maritime employment," and that it was not necessary that the injured employee be the *one* employee that made his employer a statutory "employer." However, we also held in that case that the injured employee was, in fact, engaged in maritime employment when he was working as a railway brakeman, removing railroad cars from a car float by the use of an ordinary switch engine. Id., at 340, 97 L Ed 367, 73 S Ct 302. Although Pennsylvania R. Co. in-

As a marine construction
[459 US 312]
worker required to work upon navigable waters, and injured while performing his duties on navigable waters, there can be no doubt that Churchill would have been covered under the 1927 LHWCA.

[459 US 313]
B

In its "first significant effort to reform the 1927 Act and the judicial gloss that had been attached to it," Congress amended the LHWCA in 1972. Northeast Marine Terminal Co. v Caputo, 432 US 249, 261, 53 L Ed 2d 320, 97 S Ct 2348 (1977). The purposes of the 1972 Amendments were to raise the amount of compensation available under the LHWCA, to extend coverage of the Act to include certain contiguous land areas, to eliminate the longshoremen's strict-liability seaworthiness remedy against shipowners, to eliminate shipowner's claims for indemnification from stevedores, and to promulgpe certain administrative reforms. See S Rep No. 92-1125, p 1 (1972) (hereinafter S Rep); H R Rep No. 92-1441 (1972) (hereinafter H R Rep).

For purposes of the present inquiry, the important changes effected by the 1972 Amendments concerned the definition of "employee" in § 2(3), 33 USC § 902(3) [33 USCS § 902(3)], and the description of coverage in § 3(a), 33 USC § 903(a) [33 USCS § 903(a)]. These amended sections provide:

"The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." § 2(3), 33 USC § 902(3) [33 USCS § 902(3)].

"Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading,
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repairing, or building a vessel) . . . ." § 3(a), as set forth in 33 USC § 903(a) [33 USCS § 903(a)].[22]

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volved a question as to which of two federal statutes applied to cover the employee's injury (the LHWCA or the Federal Employers' Liability Act), and did not involve an application of the "maritime but local" doctrine, the Deputy Commissioners had interpreted Pennsylvania Railroad Co. to mean "that injury over the water means, without much more inquiry, that they ought to grant [LHWCA] awards." Robertson, supra n 20, at 220. In the two cases that came to us in Calbeck, the Deputy Commissioners had granted LHWCA awards on the basis of Pennsylvania R. Co. See Robertson, supra n 20, at 219–220.

22. We note that the new coverage section still provides that no compensation shall be paid to "[a]n officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof." § 3(a)(2), 33 USC § 903(a)(2) [33 USCS § 903(a)(2)].

"The 1972 Amendments thus changed what had been essentially only a 'situs' test of eligibility for compensation to one looking to both the 'situs' of the injury and the 'status' of the injured." Northeast Marine Terminal Co., supra, at 264-265, 53 L Ed 2d 320, 97 S Ct 2348. In expanding the covered situs in § 3(a), Congress also removed the requirement, present in § 3(a) of the 1927 Act, that federal compensation would be available only if recovery "may not validly be provided by State law." The definition of "injury" remained the same,[23] and the definition of "employer" was changed to reflect the new definition of "employee" in § 2(3).[24]

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The Director and Churchill claim that when Congress added the status requirement in § 3(a), providing that a covered employee must be "engaged in maritime employment," it intended to restrict or define the scope of the increased coverage provided by the expanded situs provision in § 3(a), but that Congress had no intention to exclude from coverage workers, like Churchill, who were injured upon actual navigable waters, i.e., navigable waters as previously defined, in the course of their employment upon those waters.

According to Perini, Congress intended to overrule legislatively this Court's decision in Calbeck, and the status requirement was added to ensure that both the landward coverage *and* seaward coverage would depend on the nature of the employee's duties at the time he was injured. Perini's theory, adopted by the court below, is that all coverage under the amended LHWCA requires employment having a "significant relationship to navigation or to commerce on navigable waters."[25] Perini argues further that Churchill cannot meet the status test because

23. "Injury" is defined in § 2(2), 33 USC § 902(2) [33 USCS § 902(2)], as "accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment."

24. "Employer" is defined in § 2(4), 33 USC § 902(4) [33 USCS § 902(4)] as "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."

The Reports also add: "[T]he Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i. e., a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters." S Rep, at 13; HR Rep, at 11.

We note that there is an apparent inconsistency between the actual wording of § 2(4) and the expression in the legislative history. Section 2(4) defines an "employer" to be the employer of any employee engaged in maritime employment on the "navigable waters" as defined by the 1972 Amendments to include the expanded landward situs. The legislative history, however, appears to contemplate that a statutory employer must have at least one employee working over the *actual* navigable waters before any employee injured on the new land situs can be covered.

25. We see no real distinction between the "direct relationship" test used to articulate the "maritime but local" doctrine, and the "significant relationship" test urged by Perini. In support of the use of this test, Perini relies on the "maritime but local" cases.

he was injured while working on the construction of a foundation for a sewage treatment plant—an activity not typically associated with navigation or commerce on navigable waters.

[1d, 4] We agree with the Director and Churchill. We are unable to find any congressional intent to withdraw coverage of the LHWCA from those workers injured on navigable waters in the course of their employment, and who would have been covered by the Act before 1972. As we have long held, "[t]his Act must be liberally construed in conformance with

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its purpose, and in a way which avoids harsh and incongruous results." Voris v Eikel, 346 US 328, 333, 98 L Ed 5, 74 S Ct 88 (1953). See also Baltimore & Philadelphia Steamboat Co. v Norton, 284 US 408, 414, 76 L Ed 366, 52 S Ct 187 (1932); Northeast Marine Terminal Co., 432 US, at 268, 53 L Ed 2d 320, 97 S Ct 2348.

It is necessary to consider the context in which the 1972 Amendments were passed, especially as that context relates directly to the coverage changes that were effected. Despite the fact that Calbeck extended protection of the LHWCA to all employees injured upon navigable waters in the course of their employment, LHWCA coverage still stopped at the water's edge—a line of demarcation established by Jensen. In Nacirema Operating Co. v Johnson, 396 US 212, 24 L Ed 2d 371, 90 S Ct 347 (1969), we held that the LHWCA did not extend to longshoremen whose injuries occurred on the pier attached to the land. We recognized that there was much to be said for the uniform treatment of longshoremen irrespective of whether they were performing their duties upon the navigable waters (in which case they would be covered under Calbeck), or whether they were performing those same duties on a pier. We concluded, however, that although Congress could exercise its authority to cover land-based maritime activity, "[t]he invitation to move that [Jensen] line landward must be addressed to Congress, not to this Court." 396 US, at 224, 24 L Ed 2d 371, 90 S Ct 347. See Victory Carriers, Inc. v Law, 404 US 202, 216, 30 L Ed 2d 383, 92 S Ct 418 (1971).

"Congress responded with the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972." P.C. Pfeiffer Co. v Ford, 444 US 69, 73, 62 L Ed 2d 225, 100 S Ct 328 (1979). The 1972 Amendments were enacted after Committees in both the House and Senate prepared full Reports that summarized the general purposes of the legislation and contained an analysis of the changes proposed for each section. See S Rep, supra; HR Rep, supra. These legislative Reports indicate clearly that Congress intended to "*extend* coverage to protect *additional* workers." S Rep, at 1 (emphasis

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added).[26] Although the leg-

26. The reasons for the extended landward coverage in Report sections labeled "Extension of Coverage to Shoreside Areas":

"The present [1927] Act, insofar as longshoremen and ship builders and repairmen are concerned, covers only injuries which occur 'upon the navigable waters of the United States.' Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs.

"To make matters worse, most State Workislative history surrounding the addition of the status requirement is not as clear as that concerning the reasons for the extended situs, it is clear that "with the definition of 'navigable waters' expanded by the 1972 Amendments to include such a large geographical area, it became necessary to describe affirmatively the class of workers Congress desired to compensate." Northeast Marine Terminal Co., supra, at 264, 53 L Ed 2d 320, 97 S Ct 2348. This necessity gave rise to the status requirement: "The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity." S Rep, at 13; HR Rep, at 11. This comment

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indicates that Congress intended the status requirement to define the scope of the extended landward coverage.[27]

[5] There is nothing in these comments, or anywhere else in the legislative Reports, to suggest, as Perini claims, that Congress intended the

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men's Compensation laws provide benefits which are inadequate. . . .

. . . .

"The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

"The inent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. . . ." S Rep, at 12–13; HR Rep, at 10–11.

27. Perini argues that Congress' intent to eliminate the problem associated with movement from covered to noncovered areas will be frustrated by our holding because some employees may be deemed to satisfy the status test while working upon the navigable waters, but be deemed not to satisfy the status test when performing the same activity on land.

We have had two opportunities to examine the scope of landward coverage under the 1972 Amendments. See Northeast Marine Terminal Co. v Caputo, 432 US 249, 53 L Ed 2d 320, 97 S Ct 2348 (1977) and P. C. Pfeiffer Co. v Ford, 444 US 69, 62 L Ed 2d 225, 100 S Ct 328 (1979). In neither case did we interpret the "maritime employment" status provision to require an examination into whether the employment had a "direct" or "significant relationship to navigation or commerce." Rather, in both cases, we decided that the employees were covered because they were "engaged in longshoring operations," and thus fit one of the categories explicitly enumerated by Congress as part of "maritime employment." See 432 US, at 271, 273, 53 L Ed 2d 320, 97 S Ct 2348; 444 US, at 82, 62 L Ed 2d 225, 100 S Ct 328.

We have had no occasion as yet to determine other possible applications of the status test to activities performed on the expanded landward situs. Although we do not maintain that landward coverage could never be determined by reference to anything but the explicitly enumerated categories of activities in the § 2(3) definition of "employee," we note that our cases to date have focused on these explicit categories because the legislative history indicates that Congress intended to extend landward coverage to those specifically included occupations. See S Rep, at 13; HR Rep, at 10–11. See also Northeast Marine Terminal Co., supra, at 273, 53 L Ed 2d 320, 97 S Ct 2348. Regardless of the potential difficulties that may arise in the future in applying the status test to land-based injuries, it is clear that in extending coverage landward, Congress sought to make available LHWCA compensation to those who, before the 1972 Amendments, regularly *did* move from covered to noncovered areas, but did not intend to withdraw coverage from those employees, traditionally covered by the Act, who were injured in the course of their employment on navigable waters as previously defined.

status language to require that an employee injured upon the navigable waters in the course of his employment had to show that his employment possessed a direct (or substantial) relation to navigation or commerce in

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order to be covered. Congress was concerned with injuries on land, and assumed that injuries occurring on the actual navigable waters were covered, and would remain covered.[28] In discussing the added status requirement, the Senate Report states explicitly that the "maritime employment" requirement in § 3(a) was not meant to "exclude other employees traditionally covered." S Rep, at 16. We may presume "that our elected representatives, like other citizens, know the law," Cannon v University of Chicago, 441 US 677, 696–697, 60 L Ed 2d 560, 99 S Ct 1946 (1979), and that their use of "employees traditionally

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covered" was intended to refer to those employees included in the scope of coverage under Parker, Davis, and Calbeck.[29]

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28. Ignoring the references in the Committee Reports to the fact that in 1972 Congress merely sought to extend benefits landward, the dissent focuses instead on passages in the legislative history which indicate that Congress wanted to extend benefits to certain employees who regularly *did* (in Congress' view) walk in and out of coverage, and who performed the same tasks on land as they performed over the actual navigable waters. The dissent concludes from this that Congress sought to withdraw coverage from those employees injured over the actual navigable waters in the course of employment who would have been covered before 1972 and who we now hold are "engaged in maritime employment" for purposes of the amended LHWCA. The fact that Congress desired to extend coverage landward for a certain group of employees does not tend to prove that Congress sought to withdraw coverage from another group of employees who were customarily covered before the 1972 Amendments. The dissent's view would relegate a number of employees to state compensation remedies in the face of express and extensive congressional findings that "most State Workmen's Compensation laws provide benefits which are inadequate." S Rep, at 12–13; HR Rep, at 10.

The dissent claims that it "cannot find a single word" in the legislative history to support LHWCA coverage of any employee who is not a longshoreman or harbor worker. Post, at 330, 74 L Ed 2d, at 488–489. The word that the dissent overlooks is "maritime" in § 2(3) of the Act. Before 1972, employees such as Churchill were considered to be engaged in "maritime" employment. In order to withdraw coverage from employees, such as Churchill, who are maritime employees injured in the course of their employment upon the actual navigable waters, Congress would have had to ignore the consistent interpretation given the Act before 1972, by the Director, the Deputy Commissioners, the courts, and the commentators. See n 21, supra.

29. Perini cites our decision in Executive Jet Aviation, Inc. v City of Cleveland, 409 US 249, 34 L Ed 2d 454, 93 S Ct 493 (1972), and argues that the LHWCA is premised upon admiralty jurisdiction, which requires a connection between an employee and traditional maritime activity. Perini's reliance on Executive Jet is misplaced. In that case, the only issue before the Court was whether federal admiralty jurisdiction extended to tort claims arising out of the crash of an airplane into navigable waters on a flight "within the continental United States, which [is] principally over land." Id., at 266, 34 L Ed 2d 454, 93 S Ct 493. Jurisdiction in Executive Jet was predicated on 28 USC § 1333(1) [28 USCS § 1333(1)], which provides that the federal district courts have original and exclusive jurisdiction of "[a]ny civil case of admiralty or maritime jurisdiction."

The explicit language of Executive Jet makes it clear that our discussion was occasioned by "the problems involved in applying a locality-alone test of admiralty tort jurisdiction to the crashes of aircraft" in a situation where "the fact that an aircraft happens to fall in navigable waters, rather than on land, is wholly fortuitous." 409 US, at 265, 266, 34 L Ed 2d 454, 93 S Ct 493. Although the term "maritime" occurs both in 28 USC § 1333(1) [28 USCS § 1333(1)] and in § 2(3) of the Act, these are two different statutes "each with different legislative histories and jurisprudential interpretations over the course of decades." Boudreaux v American Workover, Inc., 680 F2d 1034, 1050 (CA5 1982) (footnote omitted). In addition, Churchill, as a marine

Other aspects of the statutory scheme support our understanding of the "maritime employment" status requirement. Congress removed from § 3(a) the requirement that, as a prerequisite to federal coverage, there can be no valid recovery under state law.[30] As we noted in our discussion in Part

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III-A, supra, the continued use of the "maritime but local" doctrine occurred after passage of the 1927 Act because the original coverage section contained this requirement that Congress explicitly deleted in 1972. Surely, if Congress wished to repeal Calbeck and other cases legislatively, it would do so by clear language and not by removing from the statute the exact phrase that Calbeck found was responsible for continued emphasis on the "maritime but local" doctrine.[31]

Congressional intent to adhere to Calbeck is also indicated by the fact that the legislative Reports clearly identified those decisions that Congress wished to overrule by the 1972 Amendments. As mentioned above, the 1972 Amendments had other purposes apart from an expansion of coverage to shoreside areas. Two other purposes involved the elimination of a strict-liability unseaworthiness remedy against a vessel owner afforded to longshoremen by Seas Shipping Co. v Sieracki, 328 US 85, 90 L Ed 1099, 66 S Ct 872 (1946), and an indemnity claim against the stevedore by the vessel owner afforded by Ryan

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Stevedoring Co. v Pan-Atlantic S.S. Corp. 350 US 124, 100 L Ed 133, 76 S Ct 232 (1956). The legislative Reports explicitly identified these decisions as intended to be overruled legislatively by the 1972 Amendments. See S Rep, at 8–12; HR Rep, at 4–8. It is, therefore, highly unlikely that Congress would have intended to return to the "jurisdictional monstrosity" that Calbeck sought to lay to rest without at least some indication of its intent to do so.

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construction worker, was by no means "fortuitously" on the water when he was injured.

30. The dissent argues that it is "now perfectly clear" that Churchill (or any other "shore-based worker" injured upon actual navigable waters) could have received a state compensation award, and there should be no concern about such an employee being left without a remedy. This position is by no means "perfectly clear." See, e.g., Holcomb v Robert W. Kirk and Associates, Inc., 655 F2d 589 (CA5 1981) (watchman injured while working on vessel sought compensation under state scheme, and was denied recovery because injury was covered under LHWCA—Court of Appeals granted LHWCA compensation, holding when Congress passed the 1972 Amendments, it took for granted that injuries occurring on the actual navigable waters were covered under Parker, Davis, Pennsylvania R. Co., Calbeck, and the myriad lower court cases applying our decisions); Rex Investigative and Patrol Agency, 329 F Supp, at 698 (the court found that the injured watchman's state compensation claim had been dismissed because the "claim properly belonged before a federal, rather than a [New York] state, agency").

31. Certain comments made in the debates preceding passage of the 1972 Amendments in the House indicate support for our view that Congress intended to extend protection in 1972, and not to withdraw protection. For example, Representative Steiger posed the following question and answer to explain the coverage provision:

"Q. *The present law covers employees working on navigable waters. Do the amendments change the scope of coverage?*

"A. Yes. The present law's coverage is limited to employees working on navigable waters, including those working on dry docks. The amendments will extend coverage to wharfs, terminals, marine railways and other adjoining areas . . . ." 118 Cong Rec 36385 (1972) (emphasis in original).

See also id., at 36270–36271 (remarks of Sen. Williams); id., at 36381–36382 (remarks of Rep. Daniels).

In considering the scope of the status test as applied to land-based employees in Northeast Marine Terminal Co., we rejected the "point of rest" theory proposed by the employer, under which landward coverage under the 1972 Amendments would include only the portion of the unloading process that takes place before longshoremen place the cargo onto the dock. We reasoned that the "point of rest" concept is "[a] theory that nowhere appears in the Act, that was never mentioned by Congress during the legislative process, that does not comport with Congress' intent, and that restricts the coverage of a remedial Act designed to extend coverage . . . ." The absence of the concept, "claimed to be so well known in the industry, is both conspicuous and telling." 432 US, at 278-279, 275, 53 L Ed 2d 320, 97 S Ct 2348. In the same sense, the absence of even the slightest congressional allusion to the "maritime but local" doctrine, a concept that plagued maritime compensation law for over 40 years and that would have the effect of restricting coverage in the face of congressional intent not to "exclude other employees traditionally covered," is equally conspicuous and telling.

Finally, we note that our conclusion concerning the continued coverage of employees injured on actual navigable waters in the course of their employment is consistent with, and supported by, our recent decision in Sun Ship, Inc. v Pennsylvania, 447 US 715, 65 L Ed 2d 458, 100 S Ct 2432 (1980). In Sun Ship, the issue before the Court was whether extended shoreside coverage under the 1972 Amendments had the effect of displacing concurrent

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state remedies for landward injuries. After a review of the development of the "maritime but local" doctrine, and review of certain portions of the legislative history of the 1972 Amendments, we concluded that those Amendments were not intended to resurrect the dilemma, created by mutually exclusive spheres of jurisdiction, that Calbeck and Davis eliminated. Our reasoning was based, in part, on the removal by Congress of the language in the 1927 Act that made federal compensation available if recovery could not validly be provided by state law: "[T]he deletion of that language in 1972—if it indicates anything—may logically only imply acquiescence in Calbec[k] . . . ." 447 US, at 721, 65 L Ed 2d 458, 100 S Ct 2432.

Sun Ship held that with respect to land-based injuries, "the . . . extension of federal jurisdiction supplements, rather than supplants, state compensation law." Id., at 720, 65 L Ed 2d 458, 100 S Ct 2432. If we were to hold that the addition of the status requirement was meant to exclude from coverage some employees injured on the actual navigable waters in the course of their employment, a most peculiar result would follow. Concurrent jurisdiction will exist with respect to the class of employees to whom Congress extended protection in 1972, while employees "traditionally covered" before 1972 would be faced with a hazardous pre-Davis choice of two exclusive jurisdictions from which to seek compensation. Such an anomalous result could not have been intended by Congress. We also note that a return to exclusive spheres of jurisdiction for workers injured upon the actual navigable waters would be inconsistent with express congressional desire to extend LHWCA jurisdiction landward in light of the inadequacy of most state compensation systems. See S Rep, at 12; HR Rep, at 10.

[1e, 6a] In holding that we can find no congressional intent to affect adversely the pre-1972 coverage afforded to workers injured upon the actual navigable waters in the course of their employment, we emphasize that we in no way hold that Congress

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meant for such employees to receive LHWCA coverage merely by meeting the situs test, and without any regard to the "maritime employment" language.[32] We hold only that when a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status requirement in § 2(3), and is covered under the LHWCA, providing, of course, that he is the employee of a statutory "employer," and is not excluded by any other provision of the Act.[33] We consider these employees to be "engaged in maritime employment" not simply because they are injured in a historically maritime locale, but because they are required to perform their employment duties upon navigable waters.[34]

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IV

[1f] In conclusion, we are unable to find anything in the legislative history or in the 1972 Amendments themselves that indicate that Congress intended to withdraw coverage from employees injured on the navigable waters in the course of their employment as that coverage existed before the 1972 Amendments. On the contrary, the legislative history indicates that Congress did not intend to "exclude other employees traditionally covered." Moreover, Congress explicitly deleted the language from § 3(a) that we found in Calbeck to be responsible for the "jurisdictional dilemma" caused by two mutually exclusive spheres of jurisdiction over maritime injuries. Accordingly, the decision of the Court of Appeals is hereby reversed, and the case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

STOP

32. In both Northeast Marine Terminal Co., 432 US, at 263–264, 53 L Ed 2d 320, 97 S Ct 2348, and in P. C. Pfeiffer Co., 444 US, at 78–79, 62 L Ed 2d 225, 100 S Ct 328, we recognized that the status requirement is occupational and the situs test is geographic.

33. See also, e. g., 1A E. Benedict, Admiralty §§ 17, 19 (7th rev ed 1982); Gilmore & Black, at 428–430; Robertson, Injuries to Maritime Petroleum Workers: A Plea for Radical Simplification, 55 Texas L Rev 973, 986–987 (1977); Comment, Broadened Coverage under the LHWCA, 33 La L Rev 683, 694 (1973); Note, 54 N C L Rev 925, 940 (1976). But see 4 A. Larson, Law of Workmen's Compensation §§ 89.27, 89.41 (1982); Tucker, Coverage and Procedure under the Longshoremen's and Harbor Workers' Compensation Act Subsequent to the 1972 Amendments, 55 Tulane L Rev 1056, 1062 (1981).

34. [6b] Our holding, of course, extends only to those persons "traditionally covered" before the 1972 Amendments. We express no opinion whether such coverage extends to a worker injured while transiently or fortuitously upon actual navigable waters, or to a land-based worker injured on land who then falls into actual navigable waters. Our decision today should not be read as exempting water-based workers from the new status test. Rather, our holding is simply a recognition that a worker's performance of his duties upon actual navigable waters is necessarily a very important factor in determining whether he is engaged in "maritime employment."

Contrary to the suggestion by the dissent, post, at 342–343, n 26, 74 L Ed 2d, at 496–497, there is no inconsistency in our failing to decide the question of coverage as to these employees, and our reliance on Parker. In Parker, we held that the injured employee was engaged in "maritime employment" in a situation where we did not discuss whether the employer was a statutory "employer."

OPINION OF THE COURT

Justice Kennedy delivered the opinion of the Court.

[1a] The Longshore and Harbor Workers' Compensation Act (LHWCA), 44 Stat 1424, as amended, 33 USC § 901 et seq. [33 USCS §§ 901 et seq.], creates a comprehensive federal scheme to compensate workers injured or killed while employed upon the navigable waters of the United States. The Act allows injured workers, without forgoing compensation under the Act, to pursue claims against third parties for their injuries. But § 33(g) of the LHWCA, 33 USC § 933(g) [33 USCS § 933(g)], provides that under certain circumstances if a third-party claim is settled without the written approval of the worker's employer, all future benefits including medical benefits are forfeited. The question we must decide today is whether the forfeiture provision applies to a worker whose employer, at the time the worker settles with a third party, is neither paying compensation to the worker nor is yet subject to an order to pay under the Act.

I

The injured worker in this case was Floyd Cowart, and his estate is now the petitioner. Cowart suffered an injury to his hand on July 20, 1983, while working on an oil drilling platform owned by Transco Exploration Company (Transco). The platform was located on the Outer Continental Shelf, an area subject to the Act. 43 USC § 1333(b) [43 USCS § 1333(b)]. Cowart was an employee of the Nicklos Drilling Company (Nicklos), who along with its insurer Compass Insurance Co. (Compass) are respondents before us. Nicklos and Compass paid Cowart temporary disability payments for 10 months following his injury. At that point Cowart's treating physician released him to return to work, though he found Cowart had a 40% permanent partial disability. App 75. The Department of Labor notified Compass that Cowart was owed permanent disability payments in the total amount of $35,592.77, plus penalties and interest. This was an informal notice which did not constitute an award. No payments were made.

Cowart, meanwhile, had filed an action against Transco alleging that Transco's negligence caused his injury. On July 1, 1985, Cowart settled the action for $45,000, of which he received $29,350.60 after attorney's fees and expenses. Nicklos funded the entire settlement under an indemnification agreement with Transco, and it had prior notice of the settlement amount. But Cowart made a mistake: he did not secure from Nicklos a formal, prior, written approval of the Transco settlement.

After settling, Cowart filed an administrative claim with the Department of Labor seeking disability payments from Nicklos. Nicklos denied liability on the grounds that under the terms of § 33(g)(2) of the LHWCA, Cowart had forfeited his benefits by failing to secure approval from Nicklos and Compass of his settlement with Transco, in the manner required by § 33(g)(1).

Section 33(g) provides in pertinent part:

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"(g) Compromise obtained by person entitled to compensation

"(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

"(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter." 33 USC § 933(g) [33 USCS § 933(g)].

The Administrative Law Judge rejected Nicklos' argument on the basis of prior interpretations of § 33(g) by the Benefits Review Board (Board or BRB). In the first of those decisions, O'Leary v Southeast Stevedoring Co., 7 BRBS 144 (1977), aff'd mem, 622 F2d 595 (CA9 1980), the Board held that in an earlier version of § 33(g) the words "person entitled to compensation" referred only to injured employees whose employers were making compensation payments, whether voluntary or pursuant to an award. The O'Leary decision held that a person not yet receiving benefits was not a "person entitled to compensation," even though the person had a valid claim for benefits.

The statute was amended to its present form, the form we have quoted, in 1984. In that year Congress redesignated then subsection (g) to what is now (g)(1) and modified its language somewhat, but did not change the phrase "person entitled to compensation." Congress also added the current subsection (g)(2), as well as other provisions. Following the 1984 amendments the Board decided Dorsey v Cooper Stevedoring Co., 18 BRBS 25 (1986), app dism'd 826 F2d 1011 (CA11 1987). The Board reaffirmed its interpretation in O'Leary of the phrase "person entitled to compensation," saying that because the 1984 amendments had not changed the specific language, Congress was presumed to have adopted the Board's previous interpretation. It noted that nothing in the 1984 legislative history disclosed an intent to overrule the Board's interpretations. The Board decided that the forfeiture provisions of subsection (g)(2), including the final phrase providing that forfeiture occurs "regardless of whether the employer . . . has made payments or acknowledged entitlement to benefits," was a "separate provisio[n] applicable to separate situations." 18 BRBS, at 29.

The ALJ in this case held that under the reasoning of O'Leary and Dorsey, Cowart was not a person entitled to compensation because he was not receiving payments at the time of the Transco settlement. Thus, the written-approval provision did not apply and Cowart was entitled to benefits. Cowart's total disability award was for $35,592.77, less Cowart's net recovery from Transco of $29,350.60, for a net award of $6242.17. In addition, Cowart was awarded interest, attorney's fees, and future medical benefits, the last constituting, we think, a matter of great potential consequence. The Board affirmed in reliance on Dorsey. 23 BRBS 42 (1989) (per curiam).

On review, a panel of the Court of Appeals for the Fifth Circuit reversed. 907 F2d 1552 (1990). Without addressing the Board's specific statutory interpretation, it held that § 33(g) contains no exceptions to its written-approval requirement. Because this holding, and a decision by a panel in a different case, Petroleum Helicopters, Inc. v Barger, 910 F2d 276 (CA5 1990), conflicted with a previous unpublished decision in the same Circuit, Kahny v O.W.C.P., 729 F2d 777 (CA5 1984), the Court of Appeals granted rehearing en banc. The Director of the Office of Workers' Compensation Programs (OWCP), a part of the Department of Labor, 20 CFR § 701.201 (1991), appeared as a respondent before the full Court of Appeals to defend the interpretation and decision of the Board.

In a per curiam opinion, the en banc Court of Appeals confirmed the panel's decision reversing the BRB in its Cowart case. 927 F2d 828 (CA5 1991). The Court of Appeals' majority held that § 33(g) is unambiguous in providing for forfeiture whenever an LHWCA claimant fails to get written approval from his employer of a third-party settlement. The majority acknowledged the well-established principle requiring judicial deference to reasonable interpretations by an agency of the statute it administers, but concluded that the plain language of § 33(g) leaves no room for interpretation. Judge Politz, joined by Judges King and Johnson, dissented on the ground that the OWCP's was a reasonable agency interpretation of the phrase "person entitled to compensation," to which the Court of Appeals should have deferred.

We granted certiorari because of the large number of LHWCA claimants who might be affected by the Court of Appeals' decision. 502 US ——, 116 L Ed 2d 653, 112 S Ct 635 (1991). We now affirm.

II

[1b, 2a] In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished. Demarest v Manspeaker, 498 US ——, ——, 112 L Ed 2d 608, 111 S Ct 599 (1991). The question is whether Cowart, at the time of the Transco settlement, was a "person entitled to compensation" under the terms of § 33(g)(1) of the LHWCA. Cowart concedes that he did not comply with the written-approval requirements of the statute, while Nicklos and Compass do not claim that they lacked notice of the Trans-

co settlement. By the terms of § 33(g)(2), Cowart would have forfeited his LHWCA benefits if, and only if, he was subject to the written-approval provisions of § 33(g)(1). Cowart claims that he is not subject to the approval requirement because in his view the phrase "person entitled to compensation," as long interpreted by both the BRB and the OWCP, limits the reach of § 33(g)(1) to injured workers who are either already receiving compensation payments from their employer, or in whose favor an award of compensation has been entered. Nicklos and Compass, supported by the United States, defend the holding of the Court of Appeals that § 33(g) cannot support that reading. We agree with these respondents and hold that under the plain language of § 33(g), Cowart forfeited his right to further LHWCA benefits by failing to obtain the written approval of Nicklos and Compass prior to settling with Transco.

[2b, 3] The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written. The principle can at times come into some tension with another fundamental principle of our law, one requiring judicial deference to a reasonable statutory interpretation by an administering agency. Director of the OWCP and the Department of Labor have altered their position regarding the best interpretation of § 33(g). The Director appears as a respondent before us, arguing in favor of the Court of Appeals' statutory interpretation, and contrary to his previous position. See Brief for Federal Respondent 8, n 6. Instead, the federal respondent argues that the Court of Appeals was correct in saying the language § 33(g) is plain and cannot support the interpretation given it by the Board. Because we agree with the federal respondent and the Court of Appeals, and because Cowart concedes that the position of the BRB is not entitled to any special deference, see Brief for Petitioner 25; see also Potomac Electric Power Co. v Director, Office of Workers' Compensation Programs, 449 US 268, 278, n 18, 66 L Ed 2d 446, 101 S Ct 509 (1980); Martin v Occupational Safety and Health Review Comm'n, supra, we need not resolve the difficult issues regarding deference which would be lurking in other circumstances.

[1c] As a preliminary matter, the natural reading of the statute supports the Court of Appeals' conclusion that a person entitled to compensation need not be receiving compensation or have had an adjudication in his favor.

If the language of § 33(g)(1), in isolation, left any doubt, the structure of the statute would remove all ambiguity. First, and perhaps most important, when Congress amended § 33(g) in 1984, it added the explicit forfeiture features of § 33(g)(2), which specify that forfeiture occurs "regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter." We read that phrase to modify the entirety of subsection (g)(2), including the beginning part discussing the written-approval requirement of paragraph (1). The BRB did not find this amendment controlling because the quoted language is not an explicit modification of subsection (1). This is a strained reading of what Congress intended. Subsection (g)(2) leaves little doubt that the contemplated forfeiture will occur whether or not the employer has made payments or acknowledged liability.

The addition of subsection (g)(2) in 1984 also precludes the primary argument made by the BRB in favor of its decisions in Dorsey and this case, and repeated by Cowart to us: That Congress in 1984, by reenacting the phrase "person entitled to compensation," adopted the Board's reading of that language in O'Leary. The argument might have had some force if § 33(g) had been reenacted without changes, but that was not the case. In 1984 Congress did more than reenact § 33(g); it added new provisions and new language which on their face appear to have the specific purpose of overruling the prior administrative interpretation. In light of the clear import of § 33(g)(2), the Board erred in relying on the purported lack of legislative history showing an explicit intent to reject the O'Leary decision. Even were it relevant, the Board's reading of the legislative history is suspect because as the federal respondent demonstrates, the legislative history of predecessor bills to the eventual 1984 enactment do indicate an intent to overturn O'Leary.

[1d, 4] Our interpretation of § 33(g) is reinforced by the fact that the phrase "person entitled to compensation" appears elsewhere in the statute in contexts in which it cannot bear the meaning placed on it by Cowart. For example, § 14(h) of the LHWCA, 33 USC § 914(h) [33 USCS § 914(h)], requires an official to conduct an investigation upon the request of a person entitled to compensation when, inter alia, the claim is controverted and payments are not being made. For that provision, the interpretation championed by Cowart would be nonsensical. Another difficulty would be presented for the provision preceding § 33(g), § 33(f). It mandates that an employer's liability be reduced by the net amount a person entitled to compensation recovers from a third party. Under Cowart's reading, the reduction would not be available to employers who had not yet begun payment at the time of the thirdparty recovery. That result makes no sense under the LHWCA structure. Indeed, when a litigant before the BRB made this argument, the Board rejected it, acknowledging in so doing that it had adopted differing interpretations of the identical language in sections 33(f) and 33(g). Force v Kaiser Aluminum and Chemical Corp., 23 BRBS 1, 4-5 (1989). This result is contrary to the basic canon of statutory construction that identical terms within an Act bear the same meaning. Sullivan v Stroop, 496 US 478, 484, 110 L Ed 2d 438, 110 S Ct 2499 (1990); Sorenson v Secretary of Treasury, 475 US 851, 860, 89 L Ed 2d 855, 106 S Ct 1600 (1986). The Board's willingness to adopt such a forced and unconventional approach does not convince us we should do the same. And we owe no deference to the BRB, see supra, at ——, 120 L Ed 2d, at ——.

[1e] Yet another reason why we are not convinced by the Board's position is that the Board's interpretation of "person entitled to compensation" has not been altogether consistent; and Cowart's interpretation may not be the same as the Board's in precise respects. At times the Board has said this language refers to an employee whose "employer is actually paying compensation either pursuant to an award or voluntarily when claimant enters into a third party settlement." Dorsey, 18 BRBS, at 28; 23 BRBS, at 44 (case below). At other times, sometimes within the same opinion, the Board has spoken in terms of the employer either making payments or acknowledging liability. O'Leary, 7 BRBS, at 147-149; Dorsey, 18 BRBS, at 29; see also In re Wilson, 17 BRBS 471, 480 (ALJ 1985). Cowart, on the other hand, would include within the phrase both employees receiving compensation benefits and employees who have a judicial award of compensation but are not receiving benefits. Brief for Petitioner 6. This distinction is an important part of Cowart's response to the position of the United States. Reply Brief for Petitioner 8. It may be that the gap between the Board's and Cowart's positions can be explained by the Board's inconsistency; but that in itself weakens any argument that the Board's interpretation is entitled to some weight.

Cowart's strongest argument to the Court of Appeals was that any ambiguity in the statute favors him because of the deference due the OWCP Director's statutory construction, a deference which Nicklos and Compass concede is appropriate. Brief for Respondents 7. As we have said, we are not faced with this difficult issue because the views of the Director, OWCP, have changed since we granted certiorari. Supra, at ——, 120 L Ed 2d, at ——. It seems apparent to us that it would be quite inappropriate to defer to an interpretation which has been abandoned by the policymaking agency itself.

We also reject Cowart's argument that our interpretation of § 33(g) leaves the notification requirements of § 33(g)(2) without meaning. An employee is required to provide notification to his employer, but is not required to obtain written approval, in two instances: (1) Where the employee obtains a judgment, rather than a settlement, against a third party; and (2) Where the employee settles for an amount greater than or equal to the employer's total liability. Under our construction the written approval requirement of § 33(g)(1) is inapplicable in those instances, but the notification requirement of § 33(g)(2) remains in force. That is why subsection (g)(2) mandates that an employer be notified of "any settlement."

This view comports with the purposes and structure of § 33. Section 33(f) provides that the net amount of damages recovered from any third party for the injuries sustained reduces the compensation owed by the employer. So the employer is a real party in interest with respect to any settlement that might reduce but not extinguish the employer's liability. The written-approval requirement of § 33(g) "protects the employer against his employee's accepting too little for his cause of action against a third party." Banks v Chicago Grain Trimmers, 390 US 459, 467, 20 L Ed 2d 30, 88 S Ct 1140 (1968). In cases where a judgment is entered, however, the employee does not determine the amount of his recovery, and employer approval, even if somehow feasible, would serve no purpose. And in cases where the employee settles for greater than the employer's liability, the employer is protected regardless of the precise amount of the settlement because his liability for compensation is wiped out. Notification provides full protection to the employer in these situations because it ensures against fraudulent double recovery by the employee.

We need not today decide the retroactive effect of our decision, nor the relevance of res judicata principles for other LHWCA beneficiaries who may be affected by our decision. Compare Pittston Coal Group v Sebben, 488 US 105, 121-123, 102 L Ed 2d 408, 109 S Ct 414 (1988). We do recognize the stark and troubling possibility that significant numbers of injured workers or their families may be stripped of their LHWCA benefits by this statute, and that its forfeiture penalty creates a trap for the unwary. It also provides a powerful tool to employers who resist liability under the Act. Counsel for respondents stated during oral argument that he had used the Transco settlement as a means of avoiding Nicklos' liability under the LHWCA. Tr of Oral Arg 23-26. These harsh effects of § 33(g) may be exacerbated by the inconsistent course followed over the years by the federal agencies charged with enforcing the Act. But Congress has spoken with great clarity to the precise question raised by this case. It is the duty of the courts to enforce the judgment of the Legislature, however much we might question its wisdom or fairness. Often we have urged the Congress to speak with greater clarity, and in this statute it has done so. If the effects of the law are to be alleviated, that is within the province of the Legislature. It is Congress that has the authority to change the statute, not the courts.

For the reasons stated, the judgment of the Court of Appeals is affirmed.

SEPARATE OPINION

Justice Blackmun, with whom Justice Stevens and Justice O'Connor join, dissenting.

LEXSEE 451 US 156

SCINDIA STEAM NAVIGATION CO., LTD. v. DE LOS SANTOS ET AL.

No. 79-512

SUPREME COURT OF THE UNITED STATES

451 U.S. 156; 101 S. Ct. 1614; 68 L. Ed. 2d 1; 1981 U.S. LEXIS 20; 49 U.S.L.W. 4405

December 1, 1980, Argued
April 21, 1981, Decided

DISPOSITION:

598 F.2d 480, affirmed and remanded.

LexisNexis (TM) HEADNOTES - Core Concepts:

Vessel's duty of care under *33 USCS 905*(b), held not to require shipowner to inspect or supervise stevedoring operation but to require, in some circumstances, that shipowner take action where danger to longshoremen arises from malfunctioning of ship's gear.

COUNSEL:

Graydon S. Staring argued the cause for petitioner. With him on the briefs was Robert H. Madden.

James A. Grutz argued the cause for respondents and filed a brief for respondent De Los Santos.*

* Harry M. Philo, Arthur Roth, and Nathan Baker filed a brief for the Association of Trial Lawyers of America as amicus curiae urging affirmance.

E. D. Vickery filed a brief for Apex Marine Corp. et al. as amici curiae.

JUDGES:

WHITE, J., delivered the opinion of the Court, in which all other Members joined except BURGER, C. J., who took no part in the decision of the case. BRENNAN, J., filed a concurring opinion, in which MARSHALL and BLACKMUN, JJ., joined, post, p. 179. POWELL, J., filed a concurring opinion, in which REHNQUIST, J., joined, post, p. 180.

OPINIONBY:

WHITE

OPINION:

[*158] [***7] [**1617] JUSTICE WHITE delivered the opinion of the Court.

[***HR1A] [***HR2A] Respondent Santos, a longshoreman and an employee of respondent Seattle Stevedore Co., was injured while he was helping load the M/S *Jalaratna*, a vessel owned by petitioner Scindia Steam Navigation Co., Ltd. He later brought an action against Scindia pursuant to § 5 (b) of the Longshoremen's and Harbor Workers' Compensation Act (Act), as amended in 1972, n1 which, as set forth in *33 U. S. C. § 905* (b), provides in relevant part as follows:

"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 [*159] shall be void. . . . The liability of the vessel under this subsection shall not be [**1618] 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." n2

The District Court granted petitioner's motion for summary judgment; n3 the Court of Appeals, disagreeing with the District Court on both the facts and the law, reversed and remanded for further proceedings. *598 F.2d 480 (CA9 1979)*. We granted certiorari, *446 U.S. 934*, because the Courts of Appeals are in considerable disagreement as to the meaning and application of § 905 (b). n4

n1 Pub. L. 92-576, 86 Stat. 1251, amending *33 U. S. C. § § 901-950*.

n2 Section 933, referred to in § 905 (b), among other things provides that an injured longshoreman need not elect between compensation and suing a third party. It also specifies the relative rights of the longshoreman and his employer where the longshoreman accepts compensation and sues a third party or fails to do so within a specified time. Because its compensation payments to Santos gave it an interest in Santos' recovery, Seattle Stevedore Co. intervened and is a respondent here.

n3 The District Court's opinion is reported at *1976 A. M. C. 2583* and is Appendix A to the petition for certiorari.

n4 See n. 9, *infra*.

I

For present purposes, we take the facts from the opinion of the Court of Appeals, which properly viewed the case in the light most favorable to Santos, against whom summary judgment had been granted.

On December 10, 1972, Seattle Stevedore Co., pursuant to its undertaking with Scindia, was engaged in loading a cargo of wheat into a hold [***8] of the M/S *Jalarätna*. A winch, part of the ship's gear, was being used to lower wooden pallets, each containing seventy 50-pound sacks of wheat, into the hold. Because of the location of the winch controls, the longshoreman operator relied on the hatch tender, another longshoreman, [*160] to signal him when to start and stop the winch while lowering a pallet of sacks into the hold. Santos and three other longshoremen were in the hold. Their task was to remove sacks of wheat from the pallet and properly stow them.

On the day of the accident, as it had for the two previous days, the braking mechanism of the winch was malfunctioning in that it would not quickly stop the descent of a loaded pallet, which would continue to drop for several feet before coming to a stop. At the time important here, while a pallet was being lowered, the hatch tender signaled the winch operator to stop the descent of the load. The brake was applied, but the pallet did not stop before striking a pallet jack n5 with some force and spilling about half the sacks of wheat from the pallet. The hatch tender signaled the operator to raise the pallet about 15 feet and, believing that the remaining sacks on the pallet were secure enough not to fall, permitted Santos and the other men to clear away the spilled sacks then lying below in the hold. Some minutes later, however, more sacks fell from the pallet, striking and injuring Santos. There was dispute as to whether the additional sacks fell because the suspended pallet was swinging back and forth or because while the pallet was suspended the braking mechanism slipped on three or four occasions, each time requiring the operator to raise it again, thus working loose the additional sacks that fell on Santos.

n5 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. Record 77.

Relying on the legislative history of the 1972 Amendments to the Act, the District Court held that the negligence standards governing the longshoreman's action against a shipowner under § 905 (b) are best expressed in Restatement (Second) of Torts § § 343 and 343A (1965), which purport to [*161] state the prevailing or preferred rules governing the liability of a possessor of land to [**1619] an invitee. n6 Under these land-based negligence [***9] standards, the District Court thought

"a shipowner is not liable for dangerous conditions created by the stevedore's negligence while the stevedore [is] in exclusive control over the manner and 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 te expected to discover them." *1976 A. M. C. 2583, 2585.*

Based on the admissions of the parties and the depositions available to the court, the District Court concluded (1) that there was nodispute that the premises were in the exclusive control of Seattle during the loading operation and (2) that [*162] even if Scindia knew or should have known of the defective winch, n7 the condition of the winch "was open and obvious to the plaintiff" and "the fact that plaintiff undertook his actions free from any direction by the defendant while recognizing that the circumstances were so dangerous, is such that the defendant cannot be held liable as a matter of law." *Id., at 2586-2587.* In addition, the District Court found that "the alleged defective condition of the winch had only a remote cause-of-fact relationship to plaintiff's accident and could not have been the proximate cause thereof as a matter of law." *Id., at 2587.* Hence, summary judgment was granted. n8

n6 Restatement (Second) of Torts § 343 provides:

"§ 343. Dangerous Conditions Known to or Discoverable by Possessor

"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."

Restatement (Second) of Torts § 343A provides:

"§ 343A. Known or Obvious Dangers

"(1) 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 to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

"(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated."

n7 The District Court stated, *1976 A. M. C., at 2586,* that "[plaintiff] does not controvert defendant's claim that no one from the ship's crew was ever informed of the winch's condition prior to the accident" and further stated that if the winch was defective, it was a "condition [about] which the Court finds the shipowner did not know nor should it reasonably have been expected to know, given the exclusive control of the gear by the stevedores during the relevant time period." *Ibid.* Scindia contended in any event that the winch was not defective but concedes that for present purposes the case should be judged on the assumption that it was.

n8 Federal Rule of Civil Procedure 56 (c) provides that judgment shall be entered in favor of the moving party "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Reversing, the Court of Appeals disagreed with the District Court and with other Courts of Appeals with respect to the applicable law. Sections 343 and 343A of the Restatement were improper measures of the shipowner's liability for negligence under § 905 (b) n9 because those [***10] sections in [**1620] effect [*163] incorporated notions of contributory negligence and assumption of risk that were inapplicable under the maritime law. Instead, the Court of Appeals declared the controlling standard under § 905 (b) to be the following:

"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." *598 F.2d, at 485.*

Under this standard, Scindia's duty to inspect did not end even if the vessel was turned over to the stevedore in safe condition. If conditions dangerous to the longshoremen subsequently developed, in light of the vessel's practical opportunities to discover the dangers and remedy them, failure to do so could be negligence on its part. n10

n9 The Court of Appeals acknowledged that the Courts of Appeals for the Second, Fourth, and Fifth Circuits had relied on these sections in § 905 (b) suits. See, e. g., *Canizzo v. Farrell Lines, Inc., 579 F.2d 682 (CA2 1978); Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1233 (CA5 1977); Anuszewski v. Dynamic Mariners Corp., Panama, 540 F.2d 757 (CA4 1976); Napoli v. Hellenic Lines, Ltd., 536 F.2d 505 (CA2 1986).* The Court of Appeals for the Second Circuit has recently reaffirmed its position. *Evans v. S.S. "Campeche," 639 F.2d 848 (1981).* On the other hand, the First and Third Circuits, like the Ninth Circuit, have held that these sections should not apply in § 905 (b) suits since they might bar a longshoreman from recovery because he was contributorily negligent or because he voluntarily encountered a known or obvious risk. See *Sarauw v. Oceanic Navigation Corp., 622 F.2d 1168 (CA3 1980); Johnson v. A/S Ivarans Rederi, 613 F.2d 334 (CA1 1980); Griffith v. Wheeling Pittsburgh Steel Corp., 610 F.2d 116 (CA3 1979); Lawson v. United States, 605 F.2d 448 (CA9 1979); Bachtel v. Mammoth Bulk Carriers, Ltd., 605 F.2d 438* (CA(1979); *598 F.2d 480 (CA9 1979)* (case below).

n10 The Court of Appeals referred to its standard as being a "reasonable care under the circumstances" approach. *Id., at 486.* It found support for this formulation in *Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959).* In that case, a visitor paying a social call on a member of the ship's crew was injured when he fell on a defective stairway. The jury found the shipowner negligent and returned a verdict, which was set aside on appeal because the visitor had been a licensee rather than an invitee. This Court reversed, preferring to adopt a single duty of "exercising reasonable care under the circumstances of each case," rather than to incorporate in the maritime law the complexities of the common law of invitee and licensee. *Id., at 632.* The *Kermarec* standard was reaffirmed in *Marine Terminals v. Burnside Shipping Co., 394 U.S. 404 (1969),* a case involving a suit by a stevedore against the shipowner. We have no quarrel with this standard. Inevitably, however, the rule will undergo refinement as it is applied to various categories of cases. Thus, in considering the reasonableness of Scindia's conduct under this standard, the Court of Appeals found it appropriate to inquire whether the shipowner had a continuing duty to inspect and held that it did. As will become evident, we have a different view: the shipowner's duty of reasonable care under the circumstances does not impose a continuing duty to inspect the cargo operations once the stevedore begins its work.

[*164] Under the Court of Appeals' view of the law there were several material facts in dispute that were for a jury to resolve: whether 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. Accordingly, the Court of Appeals set aside the judgment of the District Court and remanded for further proceedings.

II

Initially, we must briefly revisit the 1972 Amendments to the Act. Prior to 1972, a longshoreman injured while loading or unloading a ship could receive compensation payments and also have judgment [***11] against the shipowner if the injury was caused by the ship's unseaworthiness or negligence. *Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).* Proof of unseaworthiness required no proof of fault on the part of the shipowner other than an unsafe, injury-causing condition on the vessel. This was true even though the condition was [*165] caused, created, or brought into [**1621] play by the stevedore or its employees. n11 In the latter event, the shipowner could recover over against a stevedore for breach of express or implied warranty to handle the cargo in a reasonably safe manner. *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956).* n12

n11 *Alaska S.S. Co. v. Petterson, 347 U.S. 396 (1954); Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563 (1958); Crumady v. The J. H. Fisser, 358 U.S. 423 (1959); Waterman S.S. Corp. v. Dugan & McNamara, Inc., 364 U.S. 421 (1960); Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315 (1964).*

In *Usner v. Luckenbach Overseas Corp., 400 U.S. 494 (1971)*, however, we ruled that a single act of operational negligence by the stevedore did not render the vessel unseaworthy or subject the vessel to liability.

n12 See also the cases cited in n. 11, *supra*.

The 1972 Amendments, particularly by adding § 905 (b), radically changed this scheme of things. The compensation payments due the longshoreman from the stevedore for injuries incurred in the course of his employment were substantially increased; the longshoreman's right to recover for unseaworthiness was abolished; his right to recover from the shipowner for negligence was preserved in § 905 (b), which provided a statutory negligence action against the ship; and the stevedore's obligation to indemnify the shipowner if the latter was held liable to the longshoreman was abolished.

Section 905 (b) did not specify the acts or omissions of the vessel that would constitute negligence. In light of the differences among the lower federal courts as to the construction and application of § 905 (b), neither can it be said that the legislative history, which has been analyzed and reanalyzed in the course of these cases, furnishes sure guidance for construing § 905 (b). n13 Much was [***12] left to be resolved through [*166] the "application of accepted principles of tort law and the ordinary process of litigation." Rep., p. 11.

n13 Section 905 (b) itself negates the vessel's liability for unseaworthiness, and the Committee Reports state that the purpose of eliminating this remedy was to place the injured longshoreman "in the same position he would be if he were injured in non-maritime employment ashore . . . and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as 'unseaworthiness', 'non-delegable duty', or the like." S. Rep. No. 92-1125, p. 10 (1972) (hereafter Rep.). (H. R. Rep. No. 92-1441 (1972) is in all relevant respects identical to the Senate Report.) The vessel was not to be liable on the theory of unseaworthiness for the acts or omissions of stevedores, or of the employees of stevedores, for the manner in which the stevedore performed its work, or for its defective gear or equipment. Rep., p. 10. Its liability was to be "based on its own negligence" and could be proved only if it was shown "to have acted or have 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 11.

At the same time, the Committees observed that the statutory cause of action for negligence would "meet the objective of encouraging safety because the vessel would still be required to exercise the same care as a land-based person in providing a safe place to work." *Id.*, at 10. Nothing was intended "to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition" as long as the vessel was not "chargeable with the negligence of the stevedore or employees of the stevedore." *Id.*, at 10, 11.

The Committees also anticipated that in § 905 (b) cases, as in other admiralty cases, the rule of comparative negligence would apply and the defense of assumption of risk would be barred. Furthermore, the Reports emphasized that the amendments were not intended to relieve any person from his duties and obligations under the Occupational Safety and Health Act of 1970.

Otherwise, the definition of the vessel's negligence and its resulting liability were left to 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." Rep., p. 11. It was anticipated, however, that questions arising in § 905 (b) cases "shall be determined as a matter of Federal law." Rep., p. 12.

III

[**1622]

[***HR1B] [***HR3] We held in *Marine Terminals v. Burnside Shipping Co., 394 U.S. 404, 415 (1969)*, that the vessel owes to the stevedore and his longshoremen employees the duty of exercising due care "under the circumstances." This duty extends at [*167] least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work. *Id., at 416, n. 18.* The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools, and work space to be used in the stevedoring operations; and if he fails at least to warn the stevedore of hidden danger which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to a longshoreman. Petitioner concedes as much. Brief for Petitioner 20-21. It is also accepted that the vessel may be liable 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.

[***HR4A] The parties, however, like the District Court and the Court of Appeals, are in sharp disagreement as to the vessel's duty under § 905 (b) once the stevedore's cargo operations have begun. Scindia contends that the shipowner has no duty to supervise or inspect the stevedore's cargo operations or to take reasonable care to discover dangerous conditions that develop or come to light during the loading or unloading. Scindia also submits that even if the vessel learns of the hazard, it has no duty to correct it and is entitled as a matter of law to rely on the stevedore to protect his employees [***13] from injury. This is true, Scindia argues, even though the hazard is an obviously [*168] defective ship's winch being used by the stevedore and his longshoremen employees, n14 and even if the winch was defective when the stevedore came aboard and the vessel is charged with knowledge of the condition. Respondents, on the other hand, defend the view of the Court of Appeals that the vessel is subject to a continuing duty to use reasonable care to discover dangerous conditions exposing longshoremen to unreasonable risk of harm and to exercise reasonable care under the circumstances to protect them. We are unable to agree wholly with either of these submissions.

[***HR4B]

n14 Because the legislative history suggests that theshipowner's liability is to be judged by land-based standards, see n. 13, *supra*, it is urged that the District Court properly turned to and applied § § 343 and 343A of the Restatement (Second) of Torts. But the legislative history does not refer to the Restatement and also states that land-based principles of assumption of risk and contributory negligence are not to be applied in § 905 (b) cases. This strongly suggests, as *Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959)*, indicated, that maritime negligence actions are not necessarily to be governed by principles applicable in nonmaritime contexts. Furthermore, since the lower courts are in disagreement not only as to the applicability of § § 343 and 343A but also as to their import and meaning when applied in the maritime context, those sections, while not irrelevant, do not furnish sure guidance in cases such as this.

Considering first the position of the Court of Appeals, we cannot agree that the vessel's duty to the longshoreman requires the shipowner to inspect or supervise the stevedoring operation. Congress intended to make the vessel answerable for its own negligence and to terminate its automatic, faultless responsibility for conditions caused [**1623] by the negligence or other defaults of the stevedore. Cases holding the vessel liable on the ground that it owed nondelegable duties to protect the longshoremen from injury were rejected. n15 It would [*169] be inconsistent with the Act to hold, nevertheless, that the shipowner has a continuing duty to take reasonable steps to discover and correct dangerous conditions that develop during the loading or unloading process. Such an approach would repeatedly result in holding the shipowner solely liable for conditions that are attributable to the stevedore, rather than the ship. True, the liability would be cast in terms of negligence rather than unseaworthiness, but the result would be much the same. "[Creation] of a shipowner's duty to oversee the stevedore's activity and insure the safety of longshoreman would . . . saddle the shipowner with precisely the sort of nondelegable duty that [***14] Congress sought to eliminate by amending section 905 (b)." *Hurst v. Triad Shipping Co., 554 F.2d 1237, 1249-1250, n. 35 (CA3 1977); Evans v. S.S. "Campeche," 639 F.2d 848, 856 (CA2 1981).* n16

n15 "Thus a vessel shall not be liable in damages for acts or omissions of stevedores or employees of stevedores subject to this Act. *Crumedy vs. The J. H. Fisser, 358 U.S. 423, Albanese vs. Matts, 382 U.S. 283, Skibinski* vs. *Waterman SS Corp.*, [360] F.2d 539; for the manner or method in which stevedores or employees of stevedores subject to this Act perform their work, *A. N. G. Stevedores vs. Ellerman Lines, 369 U.S. 355, Blassingill vs. Waterman SS Corp., 336 F.2d 367;* for gear or equipment of stevedores or employees of stevedores subject to this Act whether used aboard ship, or ashore, *Alaska SS Co.* vs. *Peterson, 347 U.S. 396, Italia Societa vs. Oregon*

Stevedoring Co., *376 U.S. 315*, or for other categories of unseaworthiness which have been judicially established. This listing of cases is not intended to reflect a judgment as to whether recovery on a particular actual setting could be predicated on the vessel's negligence." Rep., p. 10.

n16 Much is made of the Committees' statement that nothing in the bill "is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition." *Ibid.* But the statement did not explain what the vessel's "responsibility" is and what "appropriate" action might be, or when it "should have known" of the condition. The Committees did offer an example:

"So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover, he must establish that: 1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances." *Id.*, at 10-11.

However, when the failure to remove the oil spill would be "willful" or "negligent" or what the exercise of reasonable care under the circumstances would require was not explicated except to say that the "vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore." *Id.*, at 11.

[*170]

[***HR5] [***HR6] As a general matter, the shipowner may rely on the stevedore to avoid exposing the longshoremen to unreasonable hazards. Section 41 of the Act, *33 U. S. C. § 941*, requires the stevedore, the longshoremen's employer, to provide a "reasonably safe" place to work and to take such safeguards with respect to equipment and working conditions as the Secretary of Labor may determine to be necessary to avoid injury to longshoremen. n17 The ship is not the common employer of the longshoremen n18 and owes no such statutory duty to [**1624] them. Furthermore, as our cases indicate, the stevedore normally warrants to discharge his duties in a workmanlike manner; and although the 1972 Amendments relieved the stevedore of his duty to indemnify the shipowner for damages paid to longshoremen for injuries caused by the stevedore's breach of warranty, they did not otherwise disturb the contractual undertaking of the stevedore nor the rightful expectation of the vessel that the stevedore would perform his task properly without supervision by the ship.

n17 Title *33 U. S. C. § 941* provides in relevant part as follows:

"(a) . . . 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 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."

n18 The Committees rejected the proposal that the vessel and the stevedore be considered joint employers of longshoremen. Rep., p. 8.

[*171] The approach of the indemnity cases in this Court, beginning with *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, *350 U.S. 124 (1956)*, was that the stevedore was in the best position to avoid accidents during cargo operations and that the shipowner could rely on the stevedore's warranty to perform competently. In *Italia Societa v. Oregon Stevedoring Co.*, *376 U.S. 315 (1964)*, for example, the vessel was found liable for injuries to a [***15] longshoreman caused by an unseaworthy condition arising when the stevedore, without negligence, supplied defective equipment used in handling the cargo. We held the vessel entitled to recover over against the stevedore, saying:

"Oregon, a specialist in stevedoring, was hired to load and unload the petitioner's vessels and to supply the ordinary equipment necessary for these operations. The defective rope which created the condition of unseaworthiness on the vessel and rendered the shipowner liable to the stevedore's employee was supplied by Oregon, and the stevedoring operations in the course of which the longshoreman was injured were in the hands of the employees of Oregon. Not only did the agreement between the shipowner place control of the operations on the stevedore company, but Oregon was also charged under the contract with the supervision of these operations. Although none of these factors affect the shipowner's primary liability to the injured employee of Oregon, since its duty to supply a seaworthy vessel is strict and nondelegable, and extends to those who perform the unloading and loading portion of the ship's work, *Seas Shipping Co.* v. *Sieracki, 328 U.S. 85,* cf. *Pope & Talbot v. Hawn, 346 U.S. 406,* they demonstrate that Oregon was in a far better position than the shipowner to avoid the accident. The shipowner defers to the qualification of the stevedoring contractor in the [*172] selection and use of equipment and relies on the competency of the stevedore company." *Id.*, at 322-323. n19

The 1972 Amendments foreclosed indemnity of the shipowner by the stevedore in § 905 (b) cases; but they also rejected the notion of a nondelegable duty on the shipowner to provide a safe place to work and did not undermine the justifiable expectations of the vessel that the stevedore would perform with reasonable competence and see to the safety of the cargo operations.

n19 See also the cases cited in n. 11, *supra.* Of course, in the situation presented in the *Italia* case, the faultless liability of the shipowner would no longer obtain under § 905 (b).

We are of the view that absent contract provision, positive law, or custom to the contrary -- none of which has been cited to us in this case -- the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore. The necessary consequence is that the shipowner is not liable to the longshoremen for injuries caused by dangers unknown to the owner and about which he had no duty to inform himself. This conclusion is plainly consistent with the congressional intent to foreclose the faultless liability of the shipowner based on a theory of unseaworthiness or nondelegable duty. The shipowner, within limits, *is* entitled to rely on the stevedore, and owes no duty to the longshoremen to inspect or supervise the cargo [**1625] operations. To the extent that the judgment of the Court of Appeals rested on a contrary view, we disagree.

[***16] IV

[***HR2B] We arrive at the more difficult and recurring issue involved in this case: What are the shipowner's duties when he learns that an apparently dangerous condition exists or has developed in the cargo operation, which is known to the stevedore [*173] and which may cause injury to the longshoreman? Must the owner take some action? Scindia and the District Court would have it that the vessel is entitled to rely on the expertise and responsibility of the stevedore and is not liable for injuries caused by dangers known by or obvious to the stevedore, who, if he fails to take proper precautions, is necessarily the sole and proximate cause of the injury. There is arguable support for this position in our cases.

In *Crumady v. The J. H. Fisser, 358 U.S. 423 (1959),* a ship's winch had been set by ship's officers to shut off the current at twice the safe working load of the unloading gear. The gear parted when subjected to undue strain because of the negligence of the stevedore. The Court held the ship unseaworthy. Consistent with past cases, the Court declared that the longshoremen's protection against unseaworthiness "imposes a duty which the owner of the vessel cannot delegate," a duty which, as to appliances, "does not end with supplying them; he must keep them in order." The shipowner "is not relieved of these responsibilities by turning control of the loading or unloading of the ship over to a stevedoring company." *Id., at 427.* The Court, nevertheless, permitted the ship to recover over from the stevedore "since the negligence of the stevedores . . . brought the unseaworthiness of the vessel into play . . . ." *Id., at 429.* n20

n20 Justice Harlan, joined by Justices Frankfurter and Whittaker, dissented, being of the view that the ship was not unseaworthy and that if it was, the ship was not entitled to indemnity if the stevedore merely brought into play the unseaworthy condition of the ship's own equipment. *Crumady* was reaffirmed in *Waterman S.S. Co.* v. *Dugan & McNamara, Inc., 364 U.S., at 423.*

In *Crumady*, the Court declared that "those acting for the vessel owner" had adjusted the winch "in a way that made it unsafe and dangerous for the work at hand." *Id., at 427.* It thus appeared that the vessel had at least been negligent, yet it was entitled to shift its entire liability to the stevedore [*174] because it was entitled to rely on the stevedore's undertaking to perform in a workmanlike manner. Arguably, Scindia should likewise be justified in expecting Seattle to perform its undertaking and should therefore have no duty or responsibility with respect to the ship's winch, which, if defective, was obviously so and which the stevedore continued to use.

The court below rejected this position, holding that if the vessel should realize that the condition presents an unreasonable risk of harm, it is liable if it "fails to exercise reasonable care under the circumstances" to protect the longshoremen. The court did not suggest how to recognize an "unreasonable risk" of harm from an obvious danger or suggest what reasonable care under the circumstances might be.

[***17] The Court of Appeals for the Second Circuit, while disagreeing with the duty-to-inspect thesis of the Court of Appeals in the present case, has also rejected this position, ruling that although the shipowner is normally entitled to rely on the stevedore to guard against hazards to its employees, "there may be circumstances in which it would not be reasonable for the shipowner to assume that the stevedore will correct the problem." *Evans v. S.S. "Campeche," 639 F.2d, at 856.* n21 As that court sees it, [**1626] mere knowledge of the [*175] danger would not be sufficient in itself to fasten such a duty on the shipowner, but if the shipowner should anticipate that the stevedore will not or cannot correct the danger and that the longshoremen cannot avoid it, then the shipowner's duty is triggered to take steps, reasonable in the circumstances, to eliminate or neutralize the hazard. 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 longshoremen arises from the malfunctioning of the ship's gear being used in the cargo operations.

n21 The panel was divided. Judge Meskill wrote the principal opinion joined for the most part by Judge Friendly, who also wrote a concurring opinion. District Judge Bonsal, sitting by designation, dissented. The majority could not accept the notion that the shipowner had a continuing duty to inspect the cargo operations since "to so require would 'saddle the shipowner with precisely the sort of nondelegable duty that Congress sought to eliminate by amending section 905 (b).' *Hurst v. Triad Shipping Co., supra, 554 F.2d at 1249 n. 35.*" *639 F.2d, at 856.* The majority also rejected the so-called "control test" which the court thought would, inconsistently with the statute, entirely relieve the shipowner from any liability for accidents occurring in the course of operations under the control of the stevedore. The majority's approach, which is considered consistent with § 343A of the Restatement and which it called the "reasonable anticipation standard," would place a duty of care on the vessel when it would be unreasonable to assume the stevedore will deal with an apparent hazard -- for example, "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 where the ship affirmatively joins in the decision to continue despite the hazard." *639 F.2d, at 856.* The court should endeavor "to reach a realistic conclusion concerning the shipowner's reasonable anticipation." *Id., at 856-857.*

On the facts posited here, for two days prior to the accident, it had been apparent to those working with the winch that this equipment was malfunctioning. Even so, whether it could be safely used or whether it posed an unreasonable risk of harm to Santos or other longshoremen was a matter of judgment committed to the stevedore in the first instance. The malfunctioning being obvious and Seattle having continued to use it, Scindia submits that if it was aware of the condition or was charged with knowledge of it, it was nevertheless entitled to assume that Seattle, the specialist in loading and unloading, considered the equipment reasonably safe and was entitled to rely on that judgment.

[***HR7A] Yet it is quite possible, it seems to us, that Seattle's judgment in this respect was so obviously improvident that Scindia, if it knew of the defect and that Seattle was continuing to use it, should have realized the winch presented [*176] an unreasonable risk of harm to the longshoremen, n22 [***18] and that in such circumstances it had a duty to intervene and repair the ship's winch. The same would be true if the defect existed from the outset and Scindia must be deemed to have been aware of its condition.

[***HR7B]

n22 We agree with the Court of Appeals that theshipowner may not defend on the ground that Santos should have refused to continue working in face of an obviously dangerous winch which his 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. See also *Napoli v. Hellenic Lines, Ltd., 536 F.2d, at 509.*

As we have indicated, the legal duties placed on the stevedore and the vessel's justifiable expectations that those duties will be performed are relevant in determining whether the shipowner has breached its duty. The trial court, and where appropriate the jury, should thus be made aware of the scope of the stevedore's duty under the positive law. But an equally necessary inquiry is whether the pertinent statutes, regulations, or custom place or assume a continuing duty on the vessel to repair defective ship's gear being used by the stevedore in the cargo operation. n23

n23 It may also be that the contract between the stevedore and the shipowner will have provisions specifically bearing on the dispute. The contract between Scindia and Seattle is not part of the record in this case.

The statutory duty of the stevedore under § 941 to provide a safe place to work has been implemented by the Safety and [**1627] Health Regulations for Longshoring. *29 CFR § 1918.1 et seq.* (1980). Subpart F of these regulations, § 1918.51 *et seq.*, deals with the use of the ship's gear by the stevedore. Section 1918.51 (b) provides that "[any] component of cargo handling gear . . . which is visibly unsafe shall not be used until made safe." In addition, § 1918.53, dealing with cargo winches, provides that "[any] defect or malfunction of winches shall be reported immediately to the officer in charge of the vessel," § 1918.53 (a)(5); that in the case of electrical winches "[when] the electromagnetic or other service brake is unable to hold the load, the winch shall not be used," [*177] § 1918.53 (c)(1); and that "[employees] shall not be permitted to tamper with or adjust electric control circuits," § 1918.53 (c)(2). n24 Even in the absence of other statutory or regulatory law placing on the shipowner the obligation to repair a defective winch, n25 a possible inference from [***19] the [*178] provisions already described is that when a defective winch is discovered, it should not be repaired by the stevedore but should be reported to and repaired by the shipowner. If this is the case, the situation comes down to this: If Scindia was aware that the winch was malfunctioning to some degree, and if there was a jury issue as to whether it was so unsafe that the stevedore should have ceased using it, could the jury also have found that the winch was so clearly unsafe that Scindia should have intervened and stopped the loading operation until the winch was serviceable?

n24 Petitioner acknowledged in its brief that only the shipowner could have repaired the defective winch, Brief for Petitioner 24, but argued that even if notified of the defect, it would merely have had the opportunity, but not the duty, to repair. Tr. of Oral Arg. 10.

n25 The United States Coast Guard has issued regulations with respect to the gear and equipment of cargo ships. 46 CFR Ch. 1, Subchapter 1, Cargo and Miscellaneous Vessels (1980). For ships to which the regulations are applicable, the shipowner must obtain a certificate of inspection at stated intervals. There are detailed requirements for the testing of winches. There is provision for accepting the certificate of private testing organizations recognized by the Coast Guard, such as the International Cargo Gear Bureau, Inc., which has its own manual specifying necessary testing procedures. The regulations, however, do not appear to specify the respective duties of the vessel and the stevedore in situations such as we now have before us. Scindia asserts that the Coast Guard regulations place no continuing duty on the shipowner to inspect the ship's equipment during cargo operations. Tr. of Oral Arg. 14. Also, the M/S *Jalaratna* appears to be an Indian ship and may not be covered by the regulations, which do not apply to "[any] vessel of a foreign nation signatory to the International Convention for Safety of Life at Sea, 1960, and which has on board a current, valid safety equipment certificate." *46 CFR § 90.05-1* (1980).

We note with some interest that in affirming a jury verdict for a longshoreman in *Irizarry* v. *Compania Maritime Navegacion Netumar, S. A.*, No. 79-7876 (CA2, May 22, 1980), cert. pending, No. 80-94, the Court of Appeals for the Second Circuit relied on the Joint Maritime Safety Code issued by the New York Shipping Association, Inc., the International Longshoremen's Association, and the Port of New York Joint Safety Committee. The Code was prepared pursuant to the terms of the labor agreement between the shipping association and the longshoremen's union and contains what is described as "the commonly agreed on practices for working together safely." The provision of the Code relied on by the Court of Appeals states that "[the] owner, master and officers of the vessel shall supply and maintain in safe condition for use all ship's gear equipment, tools and work spaces which are to be used in stevedoring operations."

[***HR8A] We raise these questions but do not answer them, since they are for the trial court in the first instance and since neither the trial nor appellate courts need deal with them unless there is sufficient evidence to submit to the jury either that the shipowner was aware of sufficient facts to conclude that the winch was not in proper order, or that the winch was defective when cargo operations began and that Scindia was chargeable with knowledge of its condition. The District Court concluded that there was no triable issue of fact as to whether the shipowner knew or should have known of the alleged condition of the winch. The Court of Appeals read the record quite differently, ruling that there was a disputed material fact, which the District Court [**1628] should not itself have resolved, with respect to the shipowner's actual or constructive knowledge of the condition of the winch. To the extent that this conclusion was based on the Court of Appeals' erroneous view that the vessel should have known the facts because of its duty to inspect the stevedore's cargo handling operation, it was infirm. But as we understand the opinion below, the Court of Appeals held that there was a triable issue as to whether the shipowner had actual knowledge of the failure in the winch's braking mechanism or was chargeable with knowledge because the winch was defective from the outset. Based on our own examination of the record, we agree with the Court of Appeals in this respect and with its conclusion that the District Court erred in granting [*179] summary judgment. The case should be returned to the District Court and, if necessary, tried to a jury under appropriate instructions. n26

[***HR8B]

n26 Of course, it has not been determined whether thewinch was defective or if it was, when it became defective and whether the defect contributed to the accident. If the effective cause was a simple act of operational negligence by the crane operator or the hatch tender, the vessel would not be liable in any event. Cf. *Usner v. Luckenbach Overseas Corp., 400 U.S. 494, (1971).* The District Court apparently thought this conclusion was necessitated by the fact that the stevedore was in operational control and was necessarily the sole cause of the accident.

[***20] Accordingly, we affirm the judgment of the Court of Appeals and remand the case to that court for further proceedings consistent with this opinion.

So ordered.

THE CHIEF JUSTICE took no part in the decision of this case.

CONCURBY:

BRENNAN; POWELL

CONCUR:

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, concurring.

My views are that under the 1972 Amendments: (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 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.

[*180] Since I read the Court's opinion to be consistent with these views, I join the Court's opinion.

JUSTICE POWELL, with whom JUSTICE REHNQUIST joins, concurring.

I join the Court's opinion because I agree with its basic thrust -- placing the primary burden on the stevedore for avoiding injuries caused by obvious hazards. I write only to emphasize the distinction between this approach and the general "reasonableness" standard adopted by the Ninth Circuit in this case.

Under the Court's opinion, "the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore." *Ante*, at 172. In addition, the opinion makes clear that the shipowner has only a limited duty with respect to obvious hazards of which it *is* aware. Although the shipowner cannot rely in all cases on the judgment and primary responsibility of the stevedore concerning what conditions allow safe work to continue, safety is a "matter of judgment committed to the stevedore in the first instance." *Ante*, at 175. Only where the judgment of the stevedore is "obviously improvident," *ibid.*, and this poor judgment either is known to the shipowner or reasonably should be anticipated under the circumstances, does the shipowner have [**1629] a duty to intervene. n1 As the [***21] opinion points out, the customs and regulations allocating responsibility for particular repairs are highly relevant to this inquiry.

n1 In my view, the Restatement standard adopted by the Second, Fourth, and Fifth Circuits, see *ante*, at 162, n. 9, and discussed most recently in *Evans v. S.S. "Campeche," 639 F.2d 848 (CA2 1981)*, 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.

[*181] The difficulty with a more general reasonableness standard like that adopted by the court below is that it fails to deal with the problems of allocating responsibility between the stevedore and the shipowner. It may be that it is "reasonable" for a shipowner to rely on the stevedore to discover and avoid most obvious hazards. But when, in a suit by a longshoreman, a jury is presented with the single question whether it was "reasonable" for the shipowner to fail to take action concerning a particular obvious hazard, the jury will be quite likely to find liability. If such an outcome were to become the norm, negligent stevedores would be receiving windfall recoveries in the form of reimbursement for the statutory benefit payments made to the injured longshoremen. n2 This would decrease significantly the incentives toward safety of the party in the best position to prevent injuries, and undercut the primary responsibility of that party for ensuring safety.

n2 Under *33 U. S. C. § 905* (b), the shipowner is liable in damages to the longshoreman if it was negligent, and it may not seek to recover any part of this liability from the stevedore. The longshoreman's recovery is not reduced to reflect the negligence of the stevedore. *Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979)*. Under *33 U. S. C. § 933*, the stevedore -- even if concurrently negligent -- receives reimbursement for its statutory benefit payments to the longshoreman, up to the full amount of those payments. See also *Bloomer v. Liberty Mutual Ins. Co., 445 U.S. 74 (1980)* (stevedore's lien is not reduced by its proportional share of the costs of litigating the negligence suit). As a result of this automatic reimbursement, there is a danger that "concurrently negligent stevedores will be insulated from the obligation to pay statutory workmen's compensation benefits, and thus will have inadequate incentives to provide a safe working environment for their employees." *Edmonds, supra, at 274* (BLACKMUN, J., dissenting). In cases involving obvious and avoidable hazards, this danger will be realized unless the shipowner's liability is limited to the unusual case in which it should be anticipated that the stevedore will fail to act reasonably. Any more stringent, or less defined, rule of shipowner liability will skew the statutory scheme in a way Congress could not have intended. Cf. *Canizzo v. Farrell Lines, Inc., 579 F.2d 682, 687-688 (CA2 1978)* (Friendly, J., dissenting).

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Annotation References:

What standard of negligence applies in action for injuries by longshoreman or other worker against shipowner under *33 USCS 905*(b) of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972. *50 ALR Fed 278.*

Longshoreman's strict liability claim against vessel owner as barred by 1972 amendment of 5 of Longshoremen's and Harbor Workers' Compensation Act (*33 USCS 905*(b)). *29 ALR Fed 784.*

Shipowner's liability for injury caused to seaman or longshoreman by cargo or its stowage. *90 ALR 2d 710.*

Custom as to loading, unloading, or stowage of cargo as standard of care in action for personal injury or death of seaman of longshoreman. *85 ALR2d 1196.*

ALBERT HOWLETT, PETITIONER *v.* BIRKDALE SHIPPING CO., S. A.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 93-670. Argued April 20, 1994—Decided June 13, 1994

JUSTICE KENNEDY delivered the opinion of the Court.

Under §5(b) of the Longshore and Harbor Workers' Compensation Act, 33 U. S. C. §905(b), a shipowner must exercise ordinary care to maintain the ship and its equipment in a condition so that an expert and experienced stevedore can load and unload cargo with reasonable safety. As a corollary to this duty, the shipowner must warn the stevedore of latent hazards, as the term is defined in maritime law, that are known or should be known to the shipowner. This case requires us to define the circumstances under which a shipowner must warn of latent hazards in the cargo stow or cargo area.

I

The case arrives after a grant of summary judgment to respondent Birkdale Shipping Co., S. A., so we consider the facts in the light most favorable to petitioner Albert Howlett. Howlett, a longshoreman employed in the Port of Philadelphia by stevedore Northern Shipping Co., was injured while discharging bags of cocoa beans from a cargo hold on the M/V Presidente Ibanez, a ship owned and operated by Birkdale. During the unloading operation, Howlett and three other longshoremen hooked up a draft, or load, of bags stowed on the tween deck of the hold. When the ship's boom lifted the draft out of the hold, an 8-square-foot area of the tween deck was exposed. Howlett, who was standing on surrounding bags, jumped down about three feet to the deck, where he slipped and fell on a sheet of clear plastic that had been placed under the cargo. As a result of his fall, Howlett sustained serious injuries that have disabled him from returning to work as a longshoreman.

Howlett brought suit against Birkdale under §5(b) of the Act. Both parties agreed that it is customary to lay paper and plywood on a steel deck to protect a stow of cocoa beans against condensation damage. They also agreed that, for purposes of protecting the beans, it was improper to use plastic, which tends to aggravate condensation damage rather than prevent it. Evidence adduced during pretrial proceedings suggested that the independent stevedore engaged by Birkdale to load the beans in Guayaquil, Ecuador, had placed the plastic on the tween deck. Further evidence showed that the vessel had supplied the Guayaquil stevedore with the plastic, along with other material used in stowing cargo, including paper, plywood and dunnage. Howlett claimed that before jumping to the deck he did not see the plastic, which was covered by dirt and debris. He charged that Birkdale was negligent in failing to warn Northern and its longshoremen-employees of this dangerous condition.

The United States District Court for the Eastern District of Pennsylvania granted summary judgment in favor of Birkdale. Relying upon *Derr* v. *Kawasaki Kisen K. K.*, 835 F. 2d 490 (CA3 1987), cert. denied, 486 U. S. 1007 (1988), the court held that Howlett, to prevail on his failure-to-warn claim, had to demonstrate that Birkdale had actual knowledge of the hazardous condition, and that the condition was not open and obvious. After reviewing the record, the court concluded that Howlett had failed to present evidence sufficient to sustain his claim. The court declined to infer that Birkdale had actual knowledge of the condition from the fact that it had supplied the Guayaquil stevedore with the plastic, reasoning that "being the supplier of equipment does not necessarily imply knowledge of its intended purpose." App. to Pet. for Cert. 4a. The court further declined to infer actual knowledge from the fact that the members of the vessel's crew were present on the top deck during the loading operation. And even if the Guayaquil stevedore's improper use of plastic had been apparent to the crew, the court continued, "then it readily transpires that this was an open and obvious condition" for which Howlett could not recover. *Ibid.* The Court of Appeals affirmed without opinion, judgt. order reported at 998 F. 2d 1003 (CA3 1993).

We granted certiorari, 510 U. S. ___ (1994), to resolve a conflict among the Circuits regarding the scope of the shipowners' duty to warn of latent hazards in the cargo stow, an inquiry that depends in large part upon the nature of the shipowners' duty to inspect for such defects. Compare *Derr* v. *Kawasaki Kisen K. K.*, *supra* (vessel need not inspect or supervise the loading stevedore's cargo operations for the benefit of longshoremen in later ports), with *Turner* v. *Japan Lines, Ltd.*, 651 F. 2d 1300 (CA9 1981) (vessel must supervise a foreign stevedore's loading operations), cert. denied, 459 U. S. 967 (1982).

II

The Longshore and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U. S. C. §901 *et seq.*, establishes a comprehensive federal workers' compensation program that provides longshoremen and their families with medical, disability, and survivor benefits for work-related injuries and death.

The question whether Howlett produced evidence sufficient to hold Birkdale liable for his injuries turns on the meaning of the term "negligence" in §5(b). Because Congress did not "specify the acts or omissions of the vessel that would constitute negligence," the contours of a vessel's duty to longshoremen are "left to be resolved through the 'application of accepted principles of tort law and the ordinary process of litigation.'" *Id.*, at 165–166.

The starting point in this regard must be our decision in *Scindia Steam*, which outlined the three general duties shipowners owe to longshoremen. The first, which courts have come to call the "turnover duty," relates to the condition of the ship upon the commencement of stevedoring operations. See *id.*, at 167. The second duty, applicable once stevedoring operations have begun, provides that a shipowner must exercise reasonable care to prevent injuries to longshoremen in areas that remain under the "active control of the vessel." *Ibid.* The third duty, called the "duty to intervene," concerns the vessel's obligations with regard to cargo operations in areas under the principal control of the independent stevedore. See *id.*, at 167–178.

The allegations of Howlett's complaint, and the facts adduced during pretrial proceedings, implicate only the vessel's turnover duty. We provided a brief statement of the turnover duty in *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co.*, 394 U. S. 404 (1969): A vessel must "exercise ordinary care under the circumstances" to turn over the ship and its equipment and appliances "in such condition that an expert and experienced stevedoring contractor, mindful of the dangers he should expect to encounter, arising from the hazards of the ship's service or otherwise, will be able by the exercise of ordinary care" to carry on cargo operations "with reasonable safety to persons and property." *Id.*, at 416–417, n. 18 (internal quotation marks omitted); see also *Scindia Steam*, 451 U. S., at 167. A corollary to the turnover duty requires the vessel to warn the stevedore "of any hazards on the ship or with respect to its equipment," so long as the hazards "are known to the vessel or should be known to it in the exercise of reasonable care," and "would likely be encountered by the stevedore in the course of his cargo operations[,] are not known by the stevedore[,] and would not be obvious to or anticipated by him if reasonably competent in the performance of his work." *Ibid.*, citing *Marine Terminals, supra*, at 416, n. 18. Although both components of the turnover duty are related in various respects, Howlett confines his case to an allegation that Birkdale failed to warn that the tween deck was covered with plastic rather than (as is ordinarily the case) paper and plywood.

Most turnover cases brought under §5(b) concern the condition of the ship itself or of equipment on the ship used in stevedoring operations.

The turnover duty to warn, however, may extend to certain latent hazards in the cargo stow. This is so because an improper stow can cause injuries to longshoremen, see, *e.g.*, *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U. S. 355 (1962); *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124 (1956); *Clay* v. *Lykes Bros. S. S. Co.*, 525 F. Supp. 306 (ED La. 1981); *The Etna*, 43 F. Supp. 303 (ED Pa. 1942), and thus is among the "hazards on the ship" to which the duty to warn attaches. *Scindia Steam*, 451 U. S., at 167.

The precise contours of the duty to warn of latent hazards in the cargo stow must be defined with due regard to the concurrent duties of the stevedore and to the statutory scheme as a whole. It bears repeating that the duty attaches only to latent hazards, defined in this context as hazards that would be neither obvious to nor anticipated by a competent stevedore in the ordinary course of cargo operations. In addition, the vessel's duty to warn is confined to latent hazards that "are known to the vessel or should be known to it in the exercise of reasonable care." *Ibid.* Absent actual knowledge of a hazard, then, the duty to warn may attach only if the exercise of reasonable care would place upon the shipowner an obligation to inspect for or discover the hazard's existence. See *Kirsch* v. *Plovidba*, 971 F. 2d 1026, 1029 (CA3 1992) ("[T]he shipowner's duty to warn the stevedore of hidden dangers necessarily implies a duty to inspect to discover those dangers").

Howlett, relying upon the Restatement (Second) of Torts §412 (1965), maintains that a vessel's obligations in this regard are broad. Section 412 provides that an owner of land or chattels who hires an independent contractor must take reasonable steps to "ascertain whether the land or chattel is in reasonably safe condition after the contractor's work is completed." In light of this provision, Howlett argues that "a shipowner, who has hired an independent contractor stevedore to perform the work of loading cargo aboard its ship, has a duty to make 'reasonable' (not continuous) inspections," during and after cargo operations to discover dangerous conditions in the stow. Brief for Petitioner 27.

We decline to adopt Howlett's proposal. As an initial matter, we repeat our caveat that the Restatement's land-based principles, "while not irrelevant, do not furnish sure guidance" in maritime cases brought under §5(b). *Scindia Steam*, 451 U. S., at 168, n. 14. On a more fundamental level, Howlett's contention that a vessel must make reasonable inspections, both during and after stevedoring operations, to discover defects in the stow contradicts the principles underlying our decision in *Scindia Steam*. The plaintiff longshoreman in *Scindia Steam*, injured by cargo that fell from a defective winch, alleged that the shipowner should have intervened in the stevedoring operations and repaired the winch before permitting operations to continue. The case thus turned not upon the turnover duty but upon the scope of the vessel's duty to intervene once cargo operations have begun. We held that the duty to intervene, in the event the vessel has no knowledge of the hazardous condition, is limited: "[A]bsent contract provision, positive law, or custom to the contrary," a vessel "has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore." *Id.*, at 172.

The rule relieving vessels from this general duty rests upon "the justifiable expectations of the vessel that the stevedore would perform with reasonable competence and see to the safety of the cargo operations." *Ibid.*; see also *Hugev* v. *Dampskisaktieselskabet Int'l*, 170 F. Supp. 601, 609–610 (SD Cal. 1959), aff'd *sub nom. Metropolitan Stevedore Co.* v. *Dampskisaktieselskabet Int'l*, 274 F. 2d 875 (CA9), cert. denied, 363 U. S. 803 (1960). These expectations derive in part from §41 of the Act, 33 U. S. C. §941, which requires the stevedore, as the longshoreman's employer, to provide a "reasonably safe" place to work and to take safeguards necessary to avoid injuries. *Scindia Steam*, 451 U. S., at 170. The expectations also derive from indemnity cases decided prior to the 1972 Act, which teach that "the stevedore [is] in the best position to avoid accidents during cargo operations" and that "the shipowner [can] rely on the stevedore's warranty to perform competently." *Id.*, at 171, citing *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U. S. 315 (1964); see also 451 U. S., at 175 (safety is "a matter of judgment committed to the stevedore in the first instance"). The stevedore's obligations in this regard may not be diminished by transferring them to the vessel.

Given the legal and practical realities of the maritime trade, we concluded in *Scindia Steam* that imposing a duty upon vessels to supervise and inspect cargo operations for the benefit of longshoremen then on board would undermine Congress' intent in §5(b) to terminate the vessel's "automatic, faultless responsibility for conditions caused by the negligence or other defaults of the stevedore," *id.*, at 168, and to foreclose liability "based on a theory of unseaworthiness or nondelegable duty." *Id.*, at 172. Agreeing with the Court, Justice Powell further observed that imposing such a duty—in light of the stevedore-employer's right to receive reimbursement for its payment of statutory compensation if a longshoreman prevails in a §5(b) action against a vessel, see *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U. S., at 269–270—would "decrease significantly the incentives toward safety of the party in the best position to prevent injuries." *Scindia Steam*, 451 U. S., at 181 (concurring opinion); see also *Edmonds, supra*, at 274 (BLACKMUN, J., dissenting). It is also worth noting that an injured longshoreman's acceptance of statutory compensation operates as an assignment to the stevedore-employer of the longshoreman's right to bring suit against the vessel, so long as the longshoreman does not sue within six months of accepting compensation. 33 U. S. C. §933(b). Were we to have accepted the longshoreman's contentions in *Scindia Steam*, we would have run the risk of promoting the kind of collateral litigation between stevedores and vessels (albeit in a different guise) that had consumed an intolerable amount of litigation costs prior to the 1972 Amendments. See Gilmore & Black, *supra*, §6–46, p. 411.

The foregoing principles, while taken from *Scindia Steam*'s examination of the vessel's duty to intervene, bear as well on the nature of the vessel's turnover duty, and hence on the case before us. We consider first Howlett's view that a vessel must make reasonable inspections during stevedoring operations to ensure a proper stow and to detect any hazards or defects before they become hidden. The beneficiaries of this proposed duty would be longshoremen who unload or otherwise deal with the cargo at later ports. But if, as we held in *Scindia Steam*, a vessel need not supervise or inspect ongoing cargo operations for the benefit of longshoremen then on board, it would make little sense to impose the same obligation for the benefit of longshoremen at subsequent ports. In practical effect, then, adopting Howlett's proposal would impose inconsistent standards upon shipowners as to different sets of longshoremen, and would render much of our holding in *Scindia Steam* an empty gesture.

These concerns are mitigated somewhat when a longshoreman, such as Howlett, works on cargo stowed in a foreign port and undisturbed by longshoremen in a prior American port of call. Foreign longshoremen are not covered by the Act, so requiring vessels to supervise and inspect a foreign stevedore's ongoing operations would not be inconsistent with the precise rule laid down in *Scindia Steam*. This consideration, however, does not support imposing broader duties upon vessels to inspect cargo loading operations in foreign ports. It is settled maritime custom and practice that the stevedore exercises primary control over the details of a cargo operation, see *Oregon Stevedoring*, *supra*, at 322–323, and we are given no reason to believe that this is any less true in foreign ports than in domestic ports.

That is not to say, of course, that the vessel and its crew remain detached from cargo operations altogether. Most vessels take responsibility, for instance, for preparing a stowage plan, which governs where each cargo will be stowed on the ship. See generally C. Sauerbier & R. Meurn, Marine Cargo Operations 217–239 (2d ed. 1985). But it is the stevedore, an independent contractor hired for its expertise in the stowage and handling of cargo, that is charged with actual implementation of the plan. To impose a duty upon vessels to exercise scrutiny over a cargo loading operation to discover defects that may become hidden when the stow is complete would require vessels to inject themselves into matters beyond their ordinary province. See Williams, Shipowner Liability for Improperly Stowed Cargo: Federal Courts at Sea on the Standard of Care Owed to Off-Loading Longshoremen, 17 Tul. Mar. L. J. 185, 198–199 (1993); contra *Turner* v. *Japan Lines, Ltd.*, 651 F. 2d, at 1304 (vessel "can ensure safety by choosing a reliable foreign stevedore [and] supervising its work when necessary"). The proposed rule would undermine Congress' intent in §5(b) to eliminate the vessel's nondelegable duty to protect longshoremen from the negligence of others. See *Scindia Steam*, 451 U. S., at 168–169.

We next consider Howlett's view that a vessel must make reasonable inspections after the completion of stevedoring operations to discover hazards in the stow. There is good reason to doubt that adopting this rule would have much practical import. Any hazard uncovered by a shipowner who inspects a completed stow would, as a matter of course, be discovered in a subsequent port by a stevedore "reasonably competent in the performance of his work." *Id.*, at 167.

In sum, the vessel's turnover duty to warn of latent defects in the cargo stow and cargo area is a narrow one. The duty attaches only to latent hazards, defined as hazards that are not known to the stevedore and that would be neither obvious to nor anticipated by a skilled stevedore in the competent performance of its work. *Scindia Steam*, 451 U. S., at 167. Furthermore, the duty encompasses only those hazards that "are known to the vessel or should be known to it in the exercise of reasonable care." *Ibid.* Contrary to Howlett's submission, however, the exercise of reasonable care does not require the shipowner to supervise the ongoing operations of the loading stevedore (or other stevedores who handle the cargo before its arrival in port) or to inspect the completed stow.

III

We turn to the proper disposition of this case. As the Court of Appeals did not issue an opinion, we have before us only the District Court's statement of its reasons for granting summary judgment in favor of Birkdale. The vessel having been under no obligation to supervise and inspect the cargo loading operations, and no other theory for charging the vessel with constructive knowledge having been advanced, the District Court was correct to inquire whether the vessel had actual knowledge of the tween deck's condition. The District Court found it undisputed that there was no actual knowledge. At this stage of the proceedings, however, we cannot conclude that summary judgment can rest on this ground. There is sufficient evidence in the record to support a permissible inference that, during the loading process, some crew members, who might have held positions such that their knowledge should be attributed to the vessel, did in fact observe the plastic on the tween deck. And the District Court's alternate theory that even if some crew members were aware of the condition during loading operations, then the condition also would have been open and obvious to a stevedore during unloading operations, may prove faulty as well, being premised on the state of affairs when the vessel took on cargo, not during discharge at the port where Howlett was injured.

All this does not mean that the vessel is not entitled to summary judgment. Howlett's own witnesses stated that the plastic was visible, even from the top deck, during unloading operations. Howlett must overcome these submissions, for even assuming the vessel had knowledge of the tween deck's condition, he must further demonstrate that the alleged hazard would have been neither obvious to nor anticipated by a skilled and competent stevedore at the discharge port. This contention, however, was not addressed by the District Court and was not explored in detail here. We think it the better course to remand the case to the Court of Appeals so that it, or the District Court, can address in the first instance these and other relevant points upon a review of the entire record made in support of the vessel's motion for summary judgment.

For these reasons, the judgment of the Court of Appeals is vacated and the case remanded for further proceedings consistent with this opinion.

It is so ordered.

Cite as 111 F.3d 1239 (5th Cir. 1997)

C.K. GREENWOOD, Plaintiff-Appellee,

National Union Fire, Intervenor-Plaintiff-Appellee,

v.

SOCIETE FRANCAISE DE, et al., Defendants,

Societe Francaise De, and Indian Ocean Boat Carriers, Defendants-Appellants.

No. 92-7224.

United States Court of Appeals, Fifth Circuit.

April 28, 1997.

Appeal from the United States District Court for the Southern District of Texas.

Before JOHNSON, GARWOOD and JONES, Circuit Judges.

GARWOOD, Circuit Judge:

Plaintiff-appellee C.K. Greenwood (Greenwood) brought this suit against defendants-appellants Indian Ocean Bulk Carriers and Societe Francaise de Transportes Maritime (collectively, the Shipowners), pursuant to section 5(b) of the Longshore & Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 905(b), for injuries Greenwood received while unloading the Shipowners' vessel. The jury found in Greenwood's favor, and the magistrate judge conducting the trial rendered judgment for Greenwood. The Shipowners now timely appeal, alleging, *inter alia*, that there was insufficient evidence to sustain the jury's verdict. We agree and accordingly reverse the judgment in favor of Greenwood and render judgment for the Shipowners.

Facts and Proceedings Below

On April 1, 1986, in Corpus Christi, Texas, the Shipowners turned over their vessel, M/V PENAVAL, to a stevedore which employed longshoremen to discharge the ship's cargo for that day and for the next three days. During that first day of operations, Greenwood worked as a member of a gang of longshoremen who were assigned to unload a cargo of pipe from a hatch on the deck of the vessel onto third-party trucks located on the dock. The longshoremen commenced their cargo operations around 7:00 a.m., and they used the ship's crane number four (as well as other of its cranes) to assist in discharging the pipe. The longshoremen had attached the stevedore's cargo discharging gear to the crane's hook. This gear consisted of a spreader bar that had cables on each end equipped with cargo hooks. The longshoremen attached the cargo hooks to each end of a joint of pipe. Since there were three cables and hooks on each end of the spreader bar, the longshoremen could transport three joints of pipe at a time. The spreader bar also had tag lines, which consisted of lengths of rope that were used for guiding the joints of pipe to the waiting truck beds. The longshoremen's utilization of the cranes in the unloading operation was carried out without any supervision or intervention by the ship's crew.

During the morning of April 1, the number four crane was operated by longshoremen Kenneth Logue (Logue) and Wayne O'Neal (O'Neal), who worked alternating one-hour shifts. Concerning the time relevant to this case, Logue worked the first shift from 7:00 a.m. to 8:00 a.m., and he worked the shift from 9:00 a.m. to 10:00 a.m.; O'Neal worked the 8:00 a.m. to 9:00 a.m. shift. A few minutes after 9:00 a.m., Logue had just unloaded three joints of pipe onto a truck bed and was swinging the crane's boom back over the ship for another load when one of the tag lines got hung up on something, apparently the truck. Logue testified that he attempted to halt the horizontal movement of the crane with the crane's slewing brake in order to ease the tension in the tag line. He further testified that the slewing brake—which controls the crane's horizontal movement—malfunctioned and the crane continued to move in a horizontal direction. The tag line then broke, causing the spreader bar and cargo hooks to swing outward. Greenwood was struck in the face with one of the swinging cargo hooks. No report was made to the ship about the accident, and the crane continued to be used without interruption by the two operators. Then, at approximately 11:30 a.m., the crane's boom brake—which controls the vertical movement of the crane—began to malfunction. The ship's log indicates that this malfunction was due to a break in the boom brake's socket lining that occurred while the crane was in operation, but it was "[c]aught right in time" and the crane was immediately shut down for repairs. The longshoremen crew received full compensation during the half hour of their work schedule that the crane was shut down. After the ship repaired the crane's boom brake, it continued to be used without incident that afternoon and for the remainder of the unloading operations.

Greenwood subsequently brought this suit against the Shipowners for the injuries he suffered as a result of being struck by the swinging cargo hook. At trial, the evidence revealed that all of the cranes' brakes were inspected on March 20, 1986. A report from that inspection showed that one of the slewing brakes on crane number four had been replaced with a part that was "not recommended." The operating condition of the crane's other slewing brake was described as being in "slight doubt."[1] The Shipowners did not inform the stevedore that anything might be wrong with the number four crane when they relinquished control of the vessel.

Logue, who was Greenwood's first witness, testified on direct examination that at the time of the accident he had been a longshoreman for thirty-two years and had operated cranes for twenty-five or twenty-six years. He stated that when he first started operating the crane at 7:00 a.m., he immediately realized that as to the horizontal or slewing motion it was "a little jerky" and "when you did start slewing, you put it back in neutral, it would continuously kept slewing for a little ways."[2] He explained, "If it keeps slewing, then you have got to try to adjust for it," and, "If it's not functioning properly then you try to allow yourself for that—for whatever might be wrong with it." He agreed that a crane operator, in his experience, can operate a crane even though it has a defect unless "it is too rough, if it's too bad ... then you're going to get off of that crane. I know I'm going to do it." Logue testified that at 8:00 a.m. he reported the slewing-brake defect to his gang foreman, Quincy V. Guilford (Guilford), but made no other report concerning the crane. There is no evidence to suggest that the Shipowners were ever notified about the problem with the slewing brake's operation.[3] After the accident, Logue continued to use the crane although the slewing brake was not then or thereafter repaired.

At the close of Greenwood's case, the Shipowners made a motion for directed verdict on the basis, among others, that they had no duty to warn of dangers with regard to the slewing brake, because the stevedore and longshoremen tested the ship's crane before using it in unloading and knew of the slewing brake's defect, and there was no evidence the Shipowners had actual knowledge that the crane was malfunctioning to such an extent that the stevedore's decision to continue using it was obviously improvident. The magistrate judge denied the Shipowners' motion for a directed verdict.

The Shipowners then presented their evidence, and Greenwood offered his rebuttal evidence. The Shipowners did not renew their motion for directed verdict at the close of all the evidence. They did, however, timely object to the proposed jury charge based on the same grounds of insufficient evidence. This objection was also overruled.[4] Subse-

1. Greenwood also presented the Shipowners' journal entries describing the poor condition of the crane's roller electric cable, and the fact that "[f]rom beginning of work of cranes in Corpus Christi the socket of boom brake on crane 4 was not functioning properly." There is no evidence that any of these defects were related to the allegedly malfunctioning slewing brake which is claimed to have caused Greenwood's injuries. Logue testified there was no problem with the boom brake during the period of his operation described in his testimony.

2. George Polinard (Polinard) corroborated this testimony. Polinard, another longshoreman who had frequently served as a crane operator, testified that he "observed that all of the cranes were not smooth at all, very jerky in their motions."

3. This view is supported by Guilford who testified that he did not remember Logue informing him about the defective slewing brake (or any defect in the crane). He stated that he did not know about the defective slewing brake and did not inform his superior (the walking foreman) or the Shipowners about it.

4. Specifically, after the magistrate judge had completed preparation of the proposed charge, and before it was read to the jury, the following colloquy occurred between Mr. Meyer (the Shipowners' attorney) and the court:

> "Mr. Meyer: ... I feel compelled, because I have raised a motion to dismiss and a motion for a directed verdict, I must also ask the Court to not submit the issues asking whether there was a reasonably dangerous condition, Issue No. 1. Whether the plaintiffs knew or should have discovered that the crane was unreasonably dangerous, Issue 2. Issue No. 3 as the Court has set it out. And Issue No. 4, negligence as to the defendants. On the grounds that there is no evidence or insufficient evidence to justify submission of those issues to the jury.
>
> The Court: All right. Anything else?
>
> Mr. Meyer: I would also—no, Your Honor.
>
> The Court: Very Well. The defendant's objections are overruled and request for additional instructions denied."

Issues One and Two inquired whether the crane was unreasonably dangerous when the Shipowners turned it over to the stevedore, and whether the Shipowners knew or should have known that. Issue Three asked if the hazard was one which was likely to be encountered by the stevequently, the jury returned its verdict finding the Shipowners were negligent and $3,234,-984 in damages. The magistrate judge ultimately remitted $144,891 of this amount, resulting in a final judgment of $3,090,093. Following the verdict, the Shipowners filed a motion for judgment notwithstanding the verdict (JNOV),[5] raising the same arguments as they had presented in their motion for directed verdict that there was insufficient evidence that they had breached their duties of care to Greenwood. The magistrate judge denied this motion as well. The Shipowners now timely appeal, arguing, *inter alia*, that the magistrate judge erred in not granting their motions based on the insufficiency of the evidence.

Discussion

I. Motion for Directed Verdict

Greenwood argues that although the Shipowners made a motion for directed verdict—which was denied—at the close of the plaintiff's case, they failed to reurge the motion at the close of all of the evidence. Therefore, he contends that under Federal Rule of Civil Procedure 50(b), the Shipowners' insufficient-evidence claims cannot be reviewed on appeal.

[1-3] "It is well-established law that the sufficiency of the evidence is *not reviewable on appeal* unless a motion for directed verdict was made in the trial court at the conclusion of all the evidence." *McCann v. Texas City Refining, Inc.*, 984 F.2d 667, 671 (5th Cir.1993) (citing *Hall v. Crown Zellerbach*, 715 F.2d 983, 986 (5th Cir.1983)). "Where this prerequisite has not been satisfied, a party cannot later challenge the sufficiency of the evidence either through a j.n.o.v. motion or on appeal." *Bohrer v. Hanes Corp.*, 715 F.2d 213, 216 (5th Cir.1983), *cert. denied*, 465 U.S. 1026, 104 S.Ct. 1284, 79 L.Ed.2d 687 (1984).[6]

[4, 5] However, this Court has not required strict compliance with Rule 50(b) and has excused technical noncompliance where the purposes of the requirement have been satisfied. *See, e.g., Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc.*, 735 F.2d 884, 888 n. 3 (5th Cir.1984), *cert. denied*, 469 U.S. 1160, 105 S.Ct. 910, 83 L.Ed.2d 924 (1985); *Villanueva v. McInnis*, 723 F.2d 414, 417-18 (5th Cir.1984); *Bohrer*, 715 F.2d at 216-17; *Quinn v. Southwest Wood Products, Inc.*, 597 F.2d 1018, 1025 (5th Cir.1979); *Jack Cole Co. v. Hudson*, 409 F.2d 188, 191 (5th Cir.1969); *Roberts v. Pierce*, 398 F.2d 954, 956 (5th Cir.1968). As noted in *Bohrer*:

> "It is certainly the better and safer practice to renew the motion for directed verdict at the close of all the evidence, [however,] the application of Rule 50(b) should be examined in the light of the accomplishment of its particular purposes as well as in the general context of securing a fair trial for all concerned in the quest for truth.'" 715 F.2d at 217 (alterations in original omitted) (quoting *Bonner v. Coughlin*, 657 F.2d 931, 939 (7th Cir. 1981)).

These purposes are met when the court and the plaintiff are alerted to the grounds on which the defendant contends the evidence is insufficient prior to the submission of the

dore. Issue Four inquired whether the Shipowners' negligence, if any, proximately caused Greenwood's injuries. These were the only liability issues; all were answered favorably to Greenwood.

5. Effective December 1, 1991, Rule 50 of the Federal Rules of Civil Procedure was amended. Under the thus amended Rule 50, the "motion for directed verdict" and "motion for JNOV" are called "motions for judgment as a matter of law." The trial in this case took place before the effective date of that amendment.

6. This requirement serves two purposes: (1) "to ensure that the trial court is invited to reexamine only the question raised by the motion for a direct verdict—whether the evidence is sufficient as a matter of law—and not to reexamine the facts properly found by the jury"; and (2) "to avoid making a trap of the judgment n.o.v. when the defendant's nonrenewal [of its directed verdict motion] is designed to avoid pointing out the defects in the plaintiff's proof, especially defects exposed by the defendant's case-in-chief, which the plaintiff might cure before the case is submitted to the jury." *Miller v. Rowan Cos.*, 815 F.2d 1021, 1025 (5th Cir.1987); *see also Seidman v. American Airlines, Inc.*, 923 F.2d 1134, 1137 (5th Cir.1991); *Merwine v. Board of Trustees*, 754 F.2d 631, 634 (5th Cir.), *cert. denied*, 474 U.S. 823, 106 S.Ct. 76, 88 L.Ed.2d 62 (1985); *Bohrer*, 715 F.2d at 217.

case to the jury. *See Miller,* 815 F.2d at 1025; *Merwine,* 754 F.2d at 635.[7]

[6, 7] Our cases stand for the proposition that where a defendant has made a motion for directed verdict at the close of the plaintiff's case for insufficient evidence on specified grounds, and objects on those same grounds to the jury charge, this suffices to support a JNOV motion based on those same grounds.[8] Therefore, we hold that the Shipowners' objections to the charge "were a sufficient approximation of a renewed motion for directed verdict to support [their] later motion for judgment notwithstanding the verdict. To deny entertainment of [their] motion would be to 'succumb to a nominalism and a rigid trial scenario as equally at variance as ambush with the spirit of our rules.'" *Villanueva,* 723 F.2d at 418 (quoting *Quinn,* 597 F.2d at 1025).

II. The Shipowners' Duties

[8, 9] The Shipowners' argument hinges on *Scindia Steam Navigation Co. v. De Los Santos,* 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981). The *Scindia* court articulated the scope of a vessel's duty under section 5(b). "The basic principle which emerges from *Scindia* is that the primary responsibility for the safety of the longshoremen rests upon the stevedore." *Randolph v. Laeisz,* 896 F.2d 964, 970 (5th Cir. 1990). However, vessel liability may still arise in three instances:

> "1) if the vessel owner *fails to warn* on turning over the ship *of hidden defects* of which he should have known.
>
> 2) for injury caused by hazards under the control of the ship.
>
> 3) if the vessel owner fails to intervene in the stevedore's operations when he has *actual* knowledge both of the hazard and that the stevedore, in the exercise of 'obviously improvident' judgment, means to work on in the face of it and therefore cannot be relied on to remedy it." *Pimental v. LTD Canadian Pacific Bul,* 965 F.2d 13, 15 (5th Cir.1992) (citing *Masinter v. Tenneco Oil Co.,* 867 F.2d 892, 897 (5th Cir.1989)) (emphasis added).

The Shipowners contend that the magistrate judge erred in denying their motions for directed verdict and JNOV because Greenwood did not present sufficient evidence from which a reasonable jury could find the Shipowners liable under *Scindia.*

[10–12] In reviewing the sufficiency of the evidence, we "consider all of the evidence—not just that evidence which supports the nonmovant's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion." *Maxey v. Freightliner Corp.,* 665 F.2d 1367, 1371

7. Although we will allow an objection or combination of objections to the charge to serve as the functional equivalent of a formal motion for directed verdict, *see Wells v. Hico ISD,* 736 F.2d 243, 251–52 (5th Cir.1984), *cert. dismissed,* 473 U.S. 901, 106 S.Ct. 11, 87 L.Ed.2d 672 (1985), that functional equivalent must still satisfy our requirement that "a party may not base a motion for judgment n.o.v. on a ground that was not included in a prior motion for directed verdict." *Jones v. Benefit Trust Life Ins. Co.,* 800 F.2d 1397, 1401 (5th Cir.1986) (citing *Sulmeyer v. Coca Cola Co.,* 515 F.2d 835 (5th Cir.1975), *cert. denied,* 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 341 (1976)). Therefore, the grounds that a defendant urges in its JNOV motion and on appeal as a basis for its contention that it is entitled to judgment as matter of law must be presented in the defendant's functional equivalent of a motion for directed verdict. *See Hinojosa v. City of Terrell,* 834 F.2d 1223, 1228 (5th Cir.1988), *cert. denied,* 493 U.S. 822, 110 S.Ct. 80, 107 L.Ed.2d 46 (1989). The issues concerning duty of care which were raised in the Shipowners' directed-verdict motion were also raised in their objections to the jury interrogatories, and in their JNOV motion.

8. We do not suggest that this is the only procedure that will serve as the functional equivalent of a proper motion for directed verdict. Other procedures may also be acceptable as long as they fulfill the purposes behind Rule 50(b). *See, e.g., Wells v. Hico ISD,* 736 F.2d 243, 251–52 (5th Cir.1984), *cert. dismissed,* 473 U.S. 901, 106 S.Ct. 11, 87 L.Ed.2d 672 (1985) (reviewing insufficiency of the evidence where defendant only objected to the submission of the interrogatory as not supported by the evidence, but made no motion for directed verdict); *Villanueva,* 723 F.2d at 418. However, one essential aspect of any procedure is that at some time prior to the submission of the jury charge and the start of the jury's deliberations, the opposing party and the court are adequately notified of the objections of the party who subsequently challenges the verdict. *See McCann,* 984 F.2d at 672; *Seidman,* 923 F.2d at 1137–38.

(5th Cir.1982) (en banc). The jury's verdict must be upheld unless "the facts and inferences point so strongly and overwhelmingly in favor of" the movant for directed verdict "that the Court believes that reasonable men could not arrive" at a verdict against the movant. *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir.1969) (en banc). "A mere scintilla of evidence is insufficient to present a question for the jury." *Id.* However, "If there is substantial evidence ... of such quality and weight that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions" then a directed verdict is not proper. *Maccey*, 665 F.2d at 1371.

[13, 14] The Shipowners argue, among other things, that there is insufficient evidence to support the jury's verdict that the defect in the crane's slewing brake was hidden, thus negating their first duty under *Scindia*. The Supreme Court held that the first duty extends to:

> "[E]xercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and *that are not known by the stevedore* and would not be obvious to or anticipated by him if reasonably competent in the performance of his work. The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools, and work space to be used in the stevedoring operations; and if he fails at least to warn the stevedore of hidden dangers which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to a longshoreman." *Scindia*, 451 U.S. at 167, 101 S.Ct. at 1622 (emphasis added).

Under this duty, a plaintiff must first show that the vessel owner had actual knowledge of the defect. However, "If the condition existed from the outset, the shipowner is charged with actual knowledge of the dangerous condition." *Hernandez v. M/V Rajaan*, 841 F.2d 582, 586 (5th Cir.1988) (citing *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296, 299 (5th Cir.1984)); *see also Pimental*, 965 F.2d at 17 n. 4. Logue testified that he noticed the defect in the slewing brake as soon as he began operating the crane, and this, arguably enhanced slightly by the ship's log's listing of the slewing brake as being in "slight doubt," constituted substantial evidence that the defect in the slewing brake existed before the stevedore received custody of the ship. On this basis, it could be found that the Shipowners were charged with knowledge of the defect. However, the mere fact that the Shipowners may be chargeable with knowledge of the defect does not end our inquiry under the first duty.

[15, 16] "[T]he defendant has not breached its duty to turn over a safe vessel if the defect causing the injury is open and obvious and one that the longshoreman should have seen." *Pimental*, 965 F.2d at 16; *see also Polizzi v. M/V Zephyros II Monrovia*, 860 F.2d 147, 149 (5th Cir.1988); *Morris v. Compagnie Maritime Des Chargeurs Reunis, S.A.*, 832 F.2d 67, 71 (5th Cir.1987), *cert. denied*, 485 U.S. 1022, 108 S.Ct. 1576, 99 L.Ed.2d 891 (1988). If the longshoreman knew of the defect, then it is considered open and obvious. *Pimental*, 965 F.2d at 16 (finding that the defects were obvious based on the testimony of two crane operators who stated that the defects were immediately noticeable). *See also, e.g., Burchett v. Cargill, Inc.*, 48 F.3d 173, 179 (5th Cir.1995). Here, Logue testified on direct examination, and reiterated on cross examination, that as soon as he began operating the crane, he became aware of the defective slewing brake. Furthermore, Polinard, another longshoreman experienced in crane operation, testified that he was able to visually observe this defect in the crane's functioning. Therefore, whatever latent characteristics the alleged defect may

have had before the longshoremen began to operate [the] crane, they became open and obvious before the end of the first (7:00 to 8:00 a.m.) shift during which Logue operated the crane. *See Scindia*, 451 U.S. at 167, 101 S.Ct. at 1622 (a vessel's duty to warn extends only to defects "that are not known by the stevedore and which would not be obvious to or anticipated by him if reasonably competent in the performance of his work").[9]

The defense did indeed present evidence, in the form of testimony by O'Neal, Guilford, and others, to the effect that the crane in question did not malfunction as Logue had claimed and indicating that the accident was either due to Logue's improper operation of it or to the truck in which the tag-line was caught driving off, causing the line to break, or to some combination of these. If this defense evidence were credited, however, the Shipowners would be entitled to judgment. Conversely, Logue's testimony was essential to Greenwood's case, and without it there would be no substantial evidence that Greenwood's injury was caused by a defect in the crane existing when the vessel was turned over to the stevedore. Greenwood's counsel has consistently recognized this, and based his case on Logue's testimony.[10] There is really nothing apart from this. Greenwood's only meaningful liability witnesses were Logue and Polinard, whose testimony merely tended to corroborate Logue's.[11] There was no expert testimony that the crane's slewing brake was defective—indeed, there was expert testimony that it was not—and there was no testimony as to any examination of the crane reflecting such a defect. There are only two versions of the condition of the slewing brake and its relation to the accident: Logue's version, that the crane's slewing brake from the very beginning never functioned properly, and the version of O'Neal and the defense witnesses that the slewing brake functioned acceptably and the accident was due to operator error and/or the truck's driving off with the hung-up tag line. The record suggests no third version. Greenwood supported, and supports, Logue's ver-

9. In *Scindia*, a winch was being used to lower cargo from a pallet into the ship's hold. 451 U.S. at 159, 101 S.Ct. at 1618. The winch's braking mechanism was defective, and as a result the brakes would not quickly stop the descent of the winch. Although this defect was not visibly discernible, it was readily noticeable once the stevedore began operating the winch. *Id.* Therefore, the *Scindia* court found that the ship had "no duty or responsibility with respect to the ship's winch, which, if defective, was obviously so." *Id.* at 174, 101 S.Ct. at 1625.

10. In his opening statement to the jury, Greenwood's counsel stated Logue would testify that when he started using the crane at 7:00 a.m. on April 1, "as soon as he began moving the pipe ... the brakes on the crane didn't work" and "you'll hear from him [Logue] that this was not a condition that started after they started unloading the ship. It wasn't something that broke. It was that way right from the start of the use of this crane."

Similarly, in his opening final jury argument, Greenwood's counsel relied on Logue's testimony, stating, *inter alia:*

"What we know in this case is that, first, the best person—the person in the best position to know exactly what happened the day of this accident is Mr. Kenneth Logue.... And what we do know is that Mr. Logue was very clear and very straight in his testimony, he didn't waver at all; that this crane did not work right from the start, that it never worked right all the way up to the time of the accident, and that this crane on this ship caused this accident."

And, Greenwood's counsel ended his closing final jury argument by stating "this crane was not safe from the start, Mr. Logue told you over and over."

On appeal, Greenwood continues to rely on Logue's testimony, stating in his brief in this Court, among other things:

"Kenneth Logue, the crane operator of crane number four at the time of the accident, was a 'gold star,' which is the highest class ranking among longshoremen.... On the morning of Greenwood's accident, he began working crane number four at 7:00 a.m.... Immediately, he noticed that he crane was not functioning properly; it was 'jerky,' and when put into neutral, it would continue to slew, or drift....

When he was relieved from his first shift at 8:00 a.m., Logue informed his gang foreman, Quincy Guilford, that the crane was not functioning properly.... When he returned to work the 9:00 a.m. shift, however, he noticed no differnece in the manner in which the crane was operating....

Logue's testimony was corroborated by the testimony of George Polinard...."

11. Greenwood himself testified, but essentially had no information concerning the cause of the accident; Armistead, a rebuttal witness who was working with another gang and had never operated a crane, gave no significant testimony.

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sion, as he must.[12] But under it, the first *Scindia* duty does not apply.

[16] Greenwood argues that just because the danger is "obvious" does not necessarily offer a complete defense to a longshoreman's suit, and that the shipowner is still liable if the longshoreman's "only alternatives when facing an open and obvious hazard are unduly impracticable or time-consuming." *Pimental*, 965 F.2d at 16 (citing *Treadaway v. Societe Anonyme Louis-Dreyfus*, 894 F.2d 161, 167 (5th Cir.1990); *Teply v. Mobil Oil Corp.*, 859 F.2d 375, 378 (5th Cir.1988)). Greenwood contends that Logue had no alternative but to continue to use the crane because when machinery breaks down, as the longshoremen are normally told to "milk it along." This observation concerning cargo operations in general cannot substitute for evidence that such was the case in this particular instance. Greenwood presented no evidence that Logue was instructed to continue to use the crane despite the defect or that he would "face trouble for delaying the work." *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 535 (5th Cir.1986) (quoting *Stass v. American Commercial Lines, Inc.*, 720 F.2d 879, 882 (5th Cir.1983)). In fact, when the boom brake on the crane later began to malfunction, the crane was immediately shut down for half an hour and the longshoremen were paid for that dead time. This tends to show that when the Shipowners learned of a problem with the crane, operations would cease until the crane was repaired. Certainly, that alternative was not impracticable, and even if the repairs required some time, the longshoremen would be paid for the resulting down time. *See Teply*, 859 F.2d at 378 ("Ship owners are not liable for obvious dangers that injure contractors aboard their vessels unless the contractors, in order to avoid the danger, would be forced either to leave the job or to face penalties for causing delay"). Greenwood has failed to submit sufficient evidence to fit within the scope of this asserted exception to the general rule.

[17, 18] Finally, the Shipowners contend there is insufficient evidence that they had *actual* knowledge of the stevedore's improvident judgment to continue operating the crane, thereby negating the third *Scindia* duty.[13] The *Scindia* court held that this duty arises when the shipowner knows of the stevedore's "obviously improvident judgment" based on the fact that the shipowner "knew of the defect and that [the stevedore] was continuing to use it, [and therefore] should have realized the [defect] presented an unreasonable risk of harm to the longshoremen, and that in such circumstances it had a duty to intervene and repair the [defect]." 451 U.S. at 175, 101 S.Ct. at 1626. We have interpreted this language as determining that "a vessel has a duty to intervene when it has actual knowledge of a dangerous condition and actual knowledge that the stevedore, in the exercise of 'obviously improvident' judgment, has failed to remedy it." *Pimental*, 965 F.2d at 17 (citing *Randolph*, 896 F.2d at 970; *Woods v. Sammisa Co.*, 873 F.2d 842, 854 (5th Cir.1989), *cert. denied*, 493 U.S. 1050, 110 S.Ct. 853, 107 L.Ed.2d 847; *Helaire v. Mobil Oil Co.*, 709 F.2d 1031, 1037 (5th Cir.1983)). Therefore, in order to prevail under this third duty, the longshoreman must show not only that the shipowner had actual knowledge of the defect and of the stevedore's continuing use of the defective item, but also: "1) it had actual knowledge that the [defect] posed an unreasonable risk of harm and 2) actual knowledge that it could not rely on the stevedore to protect its employees and that if unremedied the condition posed a substantial risk of injury." *Randolph*, 896 F.2d at 971.

[19, 20] A difficulty in the above formulation is discerning what must be shown to demonstrate that a shipowner had actual

12. Indeed, Greenwood could not procure a verdict and judgment thereon on the basis of Logue's testimony and then on appeal seek to sustain that verdict and judgment by repudiating that very testimony. *See, e.g., Ergo Science, Inc. v. Martin*, 73 F.3d 595, 598 (5th Cir.1996) ("judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same ... proceeding"); *In the Matter of Double D Dredging Co.*, 467 F.2d 468 (5th Cir.1972). *See also Scott v. District of Columbia*, 101 F.3d 748 (D.C.Cir. 1996).

13. Greenwood admits that this case does not implicate the second *Scindia* duty, and we agree.

knowledge of a stevedore's "obviously improvident judgment" such that the shipowner "could not rely on the stevedore to protect its employees." The shipowner's obligation to intervene under the third *Scindia* duty "is narrow and requires 'something more' than mere shipowner knowledge of a dangerous condition." *Singleton v. Guangzhou Ocean Shipping Co.*, 79 F.3d 26, 28 (5th Cir.1996). This is because, "'The shipowner defers to the qualification of the stevedoring contractor in the selection and use of equipment and relies on the competency of the stevedore company.'" *Scindia*, 451 U.S. at 172, 101 S.Ct. at 1624 (quoting with approval *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315, 322, 84 S.Ct. 748, 753, 11 L.Ed.2d 732 (1964)); *see also Morris*, 832 F.2d at 71. Therefore, "It might well be 'reasonable' for the owner to rely on the stevedore's judgment that the condition, though dangerous, was safe enough." *Helaire*, 709 F.2d at 1039 n. 12. The question then is when should it become obvious to a shipowner that a stevedore's judgment—based on its specialized knowledge—is obviously improvident or dangerous. It seems to us that, consistent with *Scindia*'s basic thrust, in order for the expert stevedore's judgment to appear "obviously improvident," that expert stevedore must use an object with a defective condition that is so hazardous that anyone can tell that its continued use creates an unreasonable risk of harm even when the stevedore's expertise is taken into account. *Randolph*, 896 F.2d at 971; *Woods*, 873 F.2d at 847.

[21] In this case, there exists sufficient evidence that the Shipowners were charged with knowledge of the defect, and knew of the stevedore's continued use of the crane. However, there was insufficient evidence that the Shipowners had the *actual* knowledge that the operation of the crane with the doubtful slewing brake created an unreasonable risk of harm to the expert longshoremen. *See Randolph*, 896 F.2d at 971 (holding that although the defendants knew of the defect, "there was no evidence that the defendants were actually aware that an unreasonable risk of harm was thereby created"). Although one not operating the crane could see that it was "jerky," its thus observable malfunction was not so severe that the Shipowners—without any specialized knowledge and who were not operating it—would necessarily have known that it posed an unreasonable risk of harm.[14] In fact, after the accident, no report by either the stevedore, Logue, or the other longshoremen was made to the ship, and the crane continued to be used, without any slewing brake incident, for the remaining three days of unloading operations. There was simply no evidence that the fault in this slewing brake was such a serious defect that the expert stevedore's continued knowing use of it would be seen as "obviously improvident" by the Shipowners.

The evidence does not suffice to establish that the Shipowners violated any of the *Scindia* duties.[15]

Conclusion

For the reasons given, we reverse the judgment for Greenwood and render judgment for the Shipowners.

REVERSED AND RENDERED.

JOHNSON, Circuit Judge, dissenting:

This case turns on the first *Scindia* exception. *See Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981). Under that exception, a shipowner can be held liable if the shipowner

14. We have held a shipowner could properly be found to have had actual knowledge of an unreasonable risk evidencing the stevedore's "obviously improvident judgment," where the shipowner knew a defective winch was working improperly because it would temporarily repair the winch after each time that the winch "would slow down or stop unexpectedly causing pallets holding sacks of rice to swing precariously above the cargo hold." *Hernandez*, 841 F.2d at 586. However, in this case, since the Shipowners did not repair the slewing brake prior to the accident, and they were not made aware of its precise operational defects through some other form of close observation, there is no evidence that they had any actual knowledge that the erratic movement of the crane posed an unreasonable risk of harm.

15. Because of our conclusion in this respect, we do not reach the other issues raised by the Shipowners' appeal.

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"fails to warn on turning over the ship of hidden defects of which he should have know." *Pimental v. LTD Canadian Pac. Bul*, 965 F.2d 13, 15 (5th Cir. 1992). In the present case, the jury was instructed that in order for Greenwood to prevail, he must prove by a preponderance of the evidence that the defect, if any, was hidden and not obvious to a reasonably competent stevedore. When the jury returned its verdict, it found that the Shipowners were liable for Greenwood's injury. The majority reverses and renders, however, because it concludes that insufficient evidence exists to indicate that the defect was "hidden." In light of the substantial evidence in the record that a defect did exist and that such defect was unobservable and unknown to the stevedore before that time that Greenwood was injured, this conclusion is inexplicable.

In holding that insufficient evidence of a hidden defect exists, the majority relies entirely on the testimony of the crane operator at the time of the accident, Kenneth Logue. He testified that as soon as he began operating the crane he became aware that the crane was "a little jerky" and that when he put the crane in neutral, "it would continuously kept [sic] slewing for a little ways." Myopically clinging to this testimony, the majority concludes that the defect was open and obvious.[1]

Logue's testimony, however, was seriously challenged at trial. In particular, the Shipowners offered evidence that the defect in crane number four was not noticed by any other crew members. Wayne O'Neal, a highly experience crane operator with a gold star rating, operated crane number four from 8:00 a.m. to 9:00 a.m. He testified that he did not notice any problems with the crane. O'Neal's testimony was substantiated by both the gang foreman, Quincy Guilford, and the walking foreman, Butch Hinman, who testified that they were aware of no problems with the crane during the relevant time period.

Additionally, four members of Greenwood's work gang, three of whom had experience operating cranes, testified as to their observations of the number four crane. All of these individuals observed the accident and the functioning of the crane before Greenwood was hurt. Based on these observations, the witnesses all testified that they were not able to visually detect any defect in the crane. This was also the testimony of the walking foreman, the gang foreman, and the ship's chief engineer. All three of these individuals had also observed the crane after work began and before the accident.

Defense counsel further attacked Logue's testimony by contending that no defect existed. Instead, the Shipowners claimed at trial that it was the negligence of Logue that caused the accident. Accordingly, defense counsel argued that Logue's testimony was either a falsification or a rationalization on Logue's part to shift the blame away from himself.[2]

1. In an attempt to find additional evidence to support its conclusion that the defect to the crane was open and obvious, the majority looks to the testimony of George Polinard. This individual testified that he observed all of the cranes and that they were not smooth at all, but rather they were jerky in their motions. However, Polinard never operated any of the cranes, and he worked on a different crane than Greenwood. Moreover, he did not observe the cranes on the day that Greenwood was hurt. Rather, Polinard's observations were made the following day. Even so, the majority chooses to cite this testimony and glosses over the testimony of the seven other witnesses who saw the accident and observed the particular crane involved at the relevant time.

2. In the Shipowners' opening statement, counsel argued as follows:

> I think that you will see evidence from coworkers form this particular gang of stevedores, these particular longshoremen, that will demonstrate to you that no one knew of any problem associated with these cranes, no one said there was any kind of problem with the crane's operation leading up until this accident. It's only after all this took place that we began to hear from Mr. Logue, "Oh, there was a problem with the crane that caused this to happen."

Then, in closing arguments, defense counsel argued that the equipment was safe and that "what we're dealing with here is operator error, a problem on the part of Mr. Logue." Further, defense counsel stated that as he saw it, the bottom line

> in terms of whether there is a truly unreasonably dangerous condition on this crane comes down to Mr. Logue. But I don't take him in the abstract. I take him in the context of how we came to him in this case. He's the guy that's operating the crane at the time that Mr. Greenwood gets hurt. . . . Well, you know, the

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Lending support to the argument that Logue's testimony was a post hoc attempt to shift the blame is the testimony of the gang foreman, Guilford. Logue claimed that as soon as he got off the crane at 8:00 a.m., he reported the problems in the crane to Guilford. However, Guilford testified that he had no memory of any such report. Moreover, he testified that if Logue had made such a report to him, he would have immediately informed Hinman, the walking foreman. Hinman, in turn, testified that no one had reported any problems to him. From this evidence, a jury could easily conclude that no such report had been made.

The majority attempts to discredit all the evidence that contradicted Logue's testimony by claiming that the jury's verdict indicates that the jury believed Logue and no one else. The majority reaches this conclusion by contending that unless the jury believed Logue, they would have been unable to find that crane number four was defective. I disagree. Even without using Logue's testimony, the jury could have found that crane number four was defective. Greenwood presented at trial other evidence of the defect in the form of maintenance records from the ship. These records state that the slewing brake on crane four was in "doubt" or "slight doubt" and that repairs had been made to the slewing brake with parts that were not recommended and that did not belong in the crane. From this evidence alone, the jury could have clearly deduced that crane number four was defective.

All the above evidence militates toward a finding that the defect was hidden; however, the majority simply ignores it. In spite of all of the evidence and the arguments questioning Logue's testimony, the majority has chosen to believe Logue completely. What the majority has done in this case is to credit the testimony it likes from Logue and to discount all the evidence to the contrary. However, judging the credibility and believability of witnesses is the province of the jury. *See Boeing Co. v. Shipman*, 411 F.2d 365, 375 (5th Cir. 1969) (en banc), *overruled on other grounds*, *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) (en banc). We have repeatedly stated that it is not this court's job to reweigh the evidence and second-guess the jury. *See, e.g., Davis v. Odeco, Inc.*, 18 F.3d 1237, 1248 (5th Cir. 1994); *Davis v. First Nat'l Bank*, 976 F.2d 944, 950 (5th Cir. 1993). It is axiomatic that a jury is in an infinitely better position to judge the credibility of witnesses presented at trial. On appeal, we are limited to reviewing a cold and lifeless record, while a jury is able to physically observe the witnesses' demeanor and reactions as they testify. Put simply, "it is the function of the jury as the traditional finder of the facts, and not he Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses." *Boeing*, 411 F.2d at 375; *see also Hindman v. City of Paris*, 746 F.2d 1063, 1068 (5th Cir. 1984).

The role of this court in reviewing the sufficiency of the evidence is to determine whether, after reviewing all the evidence in a light most favorable to the party opposing a motion for judgment as a matter of law, substantial evidence exists in the record to support the jury's verdict such that "reasonable and fairminded persons in the exercise of impartial judgment might reach different conclusions." *Maxey v. Freightliner Corp.*,

problem I've got with Logue's testimony is—is I see him as—as carrying around a lot of guilt. I see him as being in a situation where he's got to tell the guy something. We heard him say he told the guy he was sorry. And I think what he's doing here is he's telling us, "Look, I'm really sorry, but I've got to come up with something. I can't just tell the guy that I messed up. I can't tell the guy that it's my fault. I got to blame some inanimate object. I got to blame some foreigner, someplace that, you know, can't come in and answer for himself."

On appeal, however, the Shipowners change their story and claim that Logue's testimony concerning the defect should be believed. The majority alleges that judicial estoppel precludes Greenwood from relying on Logue's testimony to receive his judgment at trial and then turning around on appeal and repudiating that very testimony in an attempt to retain the judgment. See 111 F.3d at 1248. Notably though, the Shipowners are essentially doing the same thing. At trial, the Shipowners attempted to discredit Logue's testimony at every turn. Now on appeal, the Shipowners claim that Logue's testimony is correct and ask this court to disregard all of the evidence and testimony that the Shipowners provided at trial contradicting Logue.

665 F.2d 1367, 1371 (5th Cir. 1982) (en banc). If so, the jury's verdict must be upheld. *See id.* Manifestly, the testimony of O'Neal, the crane operator, that he noticed no defects; the testimony of seven witnesses who stated that they were unable to visually detect any defects, and the testimony of the foremen who stated that no one reported any problems to them is sufficient for a reasonable jury to conclude that this defect was hidden and unknown to the stevedore. While the majority should be looking to see if substantial evidence exists to support the jury, it instead takes on the role of a fact finder. The majority in this case picks and chooses the evidence that it feels supports its theory of the case, while refusing to recognize the existence of credible evidence sufficient to uphold the jury's verdict.

CONCLUSION

There is clearly substantial evidence in the record such that a reasonable jury could conclude that the defect in crane number four was not open and obvious to the stevedore. The majority's conclusion to the contrary, based on its unwavering faith in the testimony of the crane operator to the exclusion of all other evidence, is difficult to comprehend. Accordingly, I respectfully dissent.

United States District Court,
S.D. Texas,
Galveston Division.
Kelvin Keith BIAS, Plaintiff,
v.
HANJIN SHIPPING CO., LTD., et al., Defendants.
Civil Action No. G-07-0338.

March 18, 2009.

MEMORANDUM OPINION AND ORDER

SIM LAKE, District Judge.

*1 Pending before the court is Defendant Hanjin Shipping Co. Ltd.'s ("Hanjin") Motion for Summary Judgment (Docket Entry No. 39). In response, plaintiff Kelvin Keith Bias filed Plaintiff's Response to Defendant, Hanjin Shipping Co. Ltd.'s, Motion to Dismiss and Motion for Summary Judgment (Docket Entry No. 46). Hanjin then filed Defendant's Hanjin Shipping Co. Ltd.'s Reply to Plaintiff's Response to Hanjin's Motion for Summary Judgment (Docket Entry No. 49). At the court's request, the parties have also filed Plaintiff's Supplemental Response to Defendant, Hanjin Shipping Co. Ltd.'s, Motion for Summary Judgment (Docket Entry No. 57), Plaintiff's Second Supplemental Response to Defendant, Hanjin Shipping Co. Ltd.'s, Motion for Summary Judgment (Docket Entry No. 60), and Hanjin's Brief Concerning Deposition of Crane Operator and Plaintiff's Recent Authority (Docket Entry No. 61). For the reasons stated below, Hanjin's motion for summary judgment will be granted.

I. *Background*

Kelvin Keith Bias was injured on the evening of either January 22, 2007, or January 23, 2007,[FN1] at the Port of Houston's Greensport Terminal [FN2] as he assisted in the process of unloading steel slabs [FN3] from the *M/V Hanjin Calcutta* ("*Calcutta*"),[FN4] a cargo ship owned and operated by defendant Hanjin.[FN5] Bias was employed as a longshoreman by Gulf Stream Marine, Inc. ("Gulf Stream") at the time of the incident.[FN6]

FN1. Videotaped Oral Deposition of Kelvin Keith Bias, at 163 (May 2, 2008) (included in Defendant Hanjin Shipping Co. Ltd.'s Motion for Summary Judgment, Docket Entry No. 39, at Exhibit J); Defendant Hanjin Shipping Co. Ltd.'s Motion for Summary Judgment, Docket Entry No. 39, at Exhibit F, Exhibit G; Plaintiff's Response to Defendant Hanjin Shipping Co., Ltd.'s Motion to Dismiss and Motion for Summary Judgment, Docket Entry No. 46, at Exhibit E, Exhibit H.

FN2. Videotaped Oral Deposition of Kelvin Keith Bias, at 73; Defendant Hanjin Shipping Co. Ltd.'s Motion for Summary Judgment, Docket Entry No. 39, at Exhibit F.

FN3. Videotaped Oral Deposition of Kelvin Keith Bias, at 73; Defendant Hanjin Shipping Co. Ltd.'s Motion for Summary Judgment, Docket Entry No. 39, at Exhibit F.

FN4. Oral Videotaped Deposition of Jesus Loyde, at 14-15 (Oct. 17, 2008) (included in Defendant Hanjin Shipping Co. Ltd.'s Motion for Summary Judgment, Docket Entry No. 39, at Exhibit K).

FN5. Defendant Hanjin Shipping Co. Ltd.'s Motion for Summary Judgment, Docket Entry No. 39, at 12.

FN6. Videotaped Oral Deposition of Kelvin Keith Bias, at 57; Defendant Hanjin Shipping Co. Ltd.'s Motion for Summary Judgment, Docket Entry No. 39, at Exhibit F, Exhibit G, Exhibit H.

The steel slabs were unloaded from the *Calcutta* using the ship's four cranes.[FN7] The crane involved in Bias' accident was operated by Felipe Rodriguez, another Gulf Stream employee.[FN8] The crane would lift slabs, one at a time, from the hold of the ship and then lower them to the dock below where Bias and another Gulf Stream employee, Louis Redman, waited to manhandle them onto two steel beams.[FN9] The slabs were placed onto the steel beams so that a forklift could easily pick them up and move them off of the dock.[FN10] The surface below the beams was not level, so the beams did not sit flush on the dock when a slab was not resting on them.[FN11] As a slab was lowered onto the beams, one of Bias' feet remained in the space between one of the beams and the dock.[FN12] His foot was crushed between the beam and dock when the full weight of the slab-over twenty tons [FN13]-came to rest on the beams.[FN14] Bias suffered several broken bones and other severe injuries to his foot as a result.[FN15] Bias underwent multiple surgeries, and two of his toes were amputated.[FN16]

FN7. Videotaped Oral Deposition of Kelvin Keith Bias, at 74; *see* Oral Videotaped Deposition of Jesus Loyde, at 47, 60; Oral Videotaped Deposition of Captain Hojin Park, at 20 (Oct. 23, 2008) (included in Plaintiff's Response to Defendant Hanjin Shipping Co., Ltd.'s Motion to Dismiss and Motion for Summary Judgment, Docket Entry No. 46, at Exhibit J).

FN8. Oral and Videotaped Deposition of Felipe Rodriguez, at 9, 13, 15 (Feb. 28, 2009) (included in Plaintiff's Second Supplemental Response to Defendant, Hanjin Shipping Co. Ltd.'s, Motion for Summary Judgment, Docket Entry No. 60).

FN9. Videotaped Oral Deposition of Kelvin Keith Bias, at 75-76, 86-92; Oral Videotaped Deposition of Jesus Loyde, at 29-30; Affidavit of Louis Redman (Jan. 27, 2009) (included in Plaintiff's Response to Defendant Hanjin Shipping Co., Ltd.'s Motion to Dismiss and Motion for Summary Judgment, Docket Entry No. 46, at Exhibit C).

FN10. Videotaped Oral Deposition of Kelvin Keith Bias, at 75-76, 86-92; Affidavit of Louis Redman.

FN11. Videotaped Oral Deposition of Kelvin Keith Bias, at 98-102; Oral Videotaped Deposition of Jesus Loyde, at 68-70; Defendant Hanjin Shipping Co. Ltd.'s Motion for Summary Judgment, Docket Entry No. 39, at Exhibit F.

FN12. Videotaped Oral Deposition of Kelvin Keith Bias, at 98-99, 110; Affidavit of Louis Redman; Defendant Hanjin Shipping Co. Ltd.'s Motion for Summary Judgment, Docket Entry No. 39, at Exhibit F, Exhibit G, Exhibit H.

FN13. Oral Videotaped Deposition of Jesus Loyde, at 78; Oral and Videotaped Deposition of Felipe Rodriguez, at 15 (Feb. 28, 2009) (included in Plaintiff's Second Supplemental Response to Defendant, Hanjin Shipping Co. Ltd.'s, Motion for Summary Judgment, Docket Entry No. 60).

FN14. Videotaped Oral Deposition of Kelvin Keith Bias, at 98-99, 110; Affidavit of Louis Redman; Defendant Hanjin Shipping Co. Ltd.'s Motion for Summary Judgment, Docket Entry No. 39, at Exhibit F, Exhibit G, Exhibit H.

FN15. Videotaped Oral Deposition of Kelvin Keith Bias, at 114, 122-24; Defendant Hanjin Shipping Co. Ltd.'s Motion for Summary Judgment, Docket Entry No. 39, at Exhibit F, Exhibit H.

FN16. Videotaped Oral Deposition of Kelvin Keith Bias, at 122-24.

Bias sued Hanjin alleging negligence under 33 U.S.C. § 905(b), a provision of the Longshore and Harbor Worker's Compensation Act ("LHWCA"). Hanjin now moves for summary judgment.

II. *Summary Judgment Standard*

The court may grant summary judgment if the movant establishes that there is no genuine dispute about any material fact and that it is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). An examination of substantive law determines which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Material facts are those facts that "might affect the outcome of the suit under the governing law." *Id.* A genuine issue of material fact exists if the evidence is such that a reasonable trier of fact could resolve the dispute in the nonmoving party's favor. *Id.* at 2511.

*2 The movant has the initial burden to inform the court of the basis for summary judgment. *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). To meet this initial burden the moving party need not submit affidavits or other evidence negating the nonmoving party's claim. *Id.* Instead, the movant may satisfy its burden by pointing out that the pleadings, depositions, answers to interrogatories, admissions, or affidavits on file demonstrate that the plaintiff has failed to make a showing adequate to establish the existence of a genuine issue of material fact as to an essential element of his case. *Id.* at 2552-53.

If the movant makes the required initial showings, the burden shifts to the nonmoving party to show by affidavits, depositions, answers to interrogatories, admissions, or other evidence that summary judgment is not warranted because genuine fact issues exist. *See id.* Conclusory allegations, unsubstantiated assertions, or a mere scintilla of evidence will not satisfy the nonmovant's burden. *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir.1994). If the nonmovant fails to present specific evidence showing there is a genuine issue for trial, summary judgment is appropriate. *Topalian v. Ehrman,* 954 F.2d 1125, 1132 (5th Cir.1992).

In reviewing the evidence "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods. Inc.,* 530 U.S. 133, 120 S.Ct. 2097, 2110, 147 L.Ed.2d 105 (2000). But if "critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant," summary judgment should be granted. *Armstrong v. City of Dallas,* 997 F.2d 62, 67 (5th Cir.1993). Moreover, if there is an *absence* of evidence, the court will not "assume that the nonmoving party could or would prove the necessary facts." *Little,* 37 F.3d at 1075 (citing *Lujan v. National Wildlife Fed'n,* 497 U.S. 871, 110 S.Ct. 3177, 3188, 111 L.Ed.2d 695 (1990)).

III. *Analysis*

A. Negligence Under § 905(b)

Section 905(b) of the LHWCA provides longshoremen and certain other persons a cause of action against a shipowner to recover for injuries "caused by the negligence of a vessel ...." 33 U.S.C. § 905(b). Interpreting this section, the Supreme Court has identified three limited duties owed by shipowners to longshoremen: (1) the "turnover duty," (2) the "active control" duty, and (3) the "duty to intervene." *Howlett v. Birkdale,* 512 U.S. 92, 114 S.Ct. 2057, 2063, 129 L.Ed.2d 78 (1994); *see also Scindia Steam Navigation Co. v. De los Santos,* 451 U.S. 156, 101 S.Ct. 1614, 1622-23, 68 L.Ed.2d 1 (1981). A breach of one of these duties is actionable only if it is a "legal cause" of the longshoreman's injury; that is the breach of a duty must have been a "substantial factor" in the injury. *Moore v. M/V Angela,* 353 F.3d 376, 383 (5th Cir.2003); *Donaghey v. ODECO,* 974 F.2d 646, 649 (5th Cir.1992).

*3 Bias contends that Hanjin violated all three duties, resulting in his injury. The court therefore considers whether there is sufficient evidence in the record to establish a genuine issue of material fact as to whether Hanjin breached any of the three duties, and thereby caused Bias' injury.

B. The Turnover Duty

The turnover duty requires a shipowner to exercise ordinary care to turn over the ship, its equipment, and appliances to a stevedore contractor " 'in such condition that an expert and experienced stevedoring contractor ... will be able by the exercise of ordinary care' to carry on cargo operations 'with reasonable safety to persons and property.'" *Howlett,* 114 S.Ct. at 2063 (quoting *Fed. Marine Terminals, Inc. v. Burnside Shipping Co.,* 394 U.S. 404, 89 S.Ct. 1144, 1151 n. 18, 22 L.Ed.2d 371 (1969)). The duty further requires a shipowner to warn a stevedoring contractor of any non-obvious hazard on the ship or with respect to the ship's equipment if the shipowner knows of the hazard or should know of the hazard through the exercise of reasonable care. *Id.* (citing *Scindia Steam,* 101 S.Ct. at 1622).

Bias contends that evidence in the record suggests that Hanj in violated the turnover duty by turning the ship over to Gulf Stream in an unreasonably safe condition because one of the cranes was malfunctioning and/or by failing to warn Gulf Stream of the crane malfunction. Specifically, Bias asserts that the evidence tends to show that the crane that was lowering the slab that crushed his foot was not working correctly, causing the load to come down prematurely before he could move his foot out from beneath the beam. He further asserts that had Gulf Stream been warned of the crane malfunction, it could have taken additional safety precautions that could have prevented Bias' injury. *See* Moore, 353 F.3d at 381-83 (finding that a shipowner's failure to warn a stevedore of a latent crane defect was a breach of the turnover duty and that this breach caused the plaintiff's injury, in part, because the stevedore "would have conducted its operations differently" had it been warned of the danger).

Bias testified in his deposition that his foot was crushed beneath the beam because the steel slab came down "too fast," before he was ready.FN17 He said that he had heard earlier that day from other workers that the crane involved in his accident "wasn't lifting right," and that "it was getting jammed and it wasn't ... working properly."FN18 He speculated that this crane malfunction could have been a cause of his injury, but also admitted that it was equally likely that the slab came down before he was ready because the crane operator lowered it too soon.FN19

FN17. Videotaped Oral Deposition of Kelvin Keith Bias, at 169-70, 182-83.

FN18. *Id.* at 178-81.

FN19. *Id.* at 183.

A note in the records kept by Richardson Steel Yard, another stevedoring company that was involved in unloading the *Calcutta,* suggests that on January 21, *a day or two before* Bias was injured, unloading operations on hatch number four were halted for less than an hour because the ship's crane servicing that hatch was down.FN20 The captain of the *Calcutta,* Hojin Park, confirmed this information in his deposition: Captain Park testified that the number four crane on the *Calcutta* experienced a problem on January 21.FN21 He explained that the joystick, which the operator used to control the crane, was sticking.FN22 This caused the crane to jerk, rather than move smoothly, in its slewing motion.FN23 Captain Park testified that unloading operations were temporarily halted, and that the joystick was lubricated. The lubrication of the joystick fixed the problem and the crane returned to normal operation.FN24 Captain Park further stated that no other problems with any of the *Calcutta'* s cranes were reported during the unloading operation, FN25 nor does any other evidence in the record suggest that there were any further crane problems during the course of the unloading operation. Felipe Rodriguez, who was operating the crane involved in Bias' accident at the time the accident occurred, testified that the crane was working properly on the day Bias was injured.FN26

FN20. Plaintiff's Response to Defendant Hanjin Shipping Co., Ltd.'s Motion to Dismiss and Motion for Summary Judgment, Docket Entry No. 46, at Exhibit B, p. 6.

FN21. Oral Videotaped Deposition of Captain Hojin Park, at 22.

FN22. *Id.* at 23-26.

FN23. *Id.* Captain Park described the crane's slewing motion as its left-to-right motion. *See id.*

FN24. *Id.*

FN25. *Id.* at 26.

FN26. Oral and Videotaped Deposition of Felipe Rodriguez, at 65.

*4 Jesus Loyde, who was the supervisor for Gulf Stream's stevedore crew at the time of Bias' injury, testified that he was never told that the crane had been having problems.FN27 He stated that had he been informed that the crane had been experiencing problems, he would have "looked into it." FN28

FN27. Oral Videotaped Deposition of Jesus Loyde, at 82-83. This directly contradicts Bias' testimony that Loyde was one of the people who told him about the crane problems. *See* Videotaped Oral Deposition of Kelvin Keith Bias, at 179. Viewing the evidence in the light most favorable to Bias, however, the court assumes that neither Loyde nor anyone else with Gulf Stream was warned by Hanjin about the earlier crane malfunction.

FN28. Oral Videotaped Deposition of Jesus Loyde, at 82-83.

Even assuming *arguendo* that turning the ship over to Gulf Stream with a malfunctioning crane and/or without warning Gulf Stream about the crane malfunction amounts to a violation of the turnover duty, this evidence is insufficient to create a genuine issue of material fact as to whether the crane malfunction was a "substantial factor" in Bias' injury. *Moore,* 353 F.3d at 383.

Viewing the credible evidence in the light most favorable to Bias, it establishes only that one of the *Calcutta'* s cranes experienced a problem a day or two before Bias was injured.FN29 The problem affected only the crane's slewing motion and was unrelated to the crane's lifting or descending motion. Bias' unsubstantiated and inadmissible hearsay testimony suggesting that the crane was malfunctioning on the day of his injury and that the crane's lifting functionality was affected may not be given any credence. *See Fowler v. Smith,* 68 F.3d 124, 126 (5th Cir.1995) ("Evidence on summary judgment may be considered to the extent not based on hearsay ....").

FN29. There is conflicting evidence in the record as to which hatch Bias was working to unload when he was injured. Therefore, it is not clear whether Bias was unloading a hatch serviced by the crane that had been experiencing problems. But viewing the evidence in the light most favorable to Bias, the court assumes that the crane involved in Bias' accident was the same crane.

A crane malfunction involving only the crane's slewing motion that occurred one or two days before Bias was injured could not possibly have caused the slab that actually injured Bias to come down too fast to enable him to remove his foot from beneath the beam. Bias' pure speculation that the crane may have contributed to his injury fails to create a genuine issue of fact. *See Little,* 37 F.3d at 1078-79 (holding that evidence that does not "suggest which of [several] speculative [causation] theories ... is most plausible" is insufficient to create a genuine issue of material fact).

Moreover, the evidence shows only that had Gulf Stream been told about the crane problem Loyde would have "looked into it." There is no evidence in the record suggesting how, if at all, Gulf Stream would have actually altered its unloading operations had it been informed. *See id.* at 1075 ("We do not ... in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts."). Therefore, there are no genuine fact issues for trial with regard to the turnover duty.

C. The Active Control Duty

Under the active control duty the shipowner can be held liable if it actively participates in the stevedoring operations and negligently injures a longshoreman. *Scindia Steam,* 101 S.Ct. at 1622. The active control duty also requires the shipowner 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." *Id.*

*5 Bias does not allege that Hanjin actively participated in the stevedoring operation or that he was injured in an area under the active control of the vessel. Instead, he contends that equipment under the active control of the vessel caused his injury.

Bias testified that it was dark on the dock the evening that he was injured, so he complained to Loyde, his supervisor, about the darkness.FN30 Bias stated that although he does not remember seeing Loyde going onto the ship, he believes Loyde then asked the ship's crew to provide lights.FN31 According to Bias, after he notified Loyde about the darkness, he saw the crew of the ship rigging some lights to the structure of the ship to provide light on the dock where Bias was working.FN32 He testified that these lights were inadequate and that the lighting on the dock remained poor.FN33 Bias suggested that the darkness was a cause of his injury.FN34 Based on this testimony, Bias argues that his injury was caused by a breach of the active control duty because the inadequate lights mounted on the *Calcutta* were equipment under the active control of the vessel.

FN30. Videotaped Oral Deposition of Kelvin Keith Bias, at 172-73.

FN31.*Id.* at 172-76.

FN32.*Id.* at 173-76.

FN33.*See id.* at 96, 141-42, 172-73.

FN34.*See id.* at 96, 117-18, 135.

As Hanjin points out, courts have consistently held that a vessel owner has no duty to provide adequate lighting for longshoremen. *See, e.g., Lipari v. Kawasaki Kisen Kaisha, Ltd.,* No. 89-16229, 1991 WL 3060, *2 (9th Cir. Jan.11, 1991) ("[G]enerally speaking, responsibilities for lighting the work area fall upon the stevedore and not the shipowner."); *Wright v. Gulf Coast Dockside, Inc.,* No. 97-2745, 1998 WL 334851, *3 (E.D.La. June 23, 1998) (holding that the shipowner "was entitled to rely on [the stevedore] to provide adequate lighting"); *Ryan-Walsh, Inc. v. Maritima Aragua, S.A.,* No. 92-3662, 1994 WL 247217, *3 (E.D.La. June 2, 1994) (explaining that "it is the stevedoring company's responsibility," not the shipowner's, to provide adequate lighting); *McCullough v. S/S Coppename,* No. 75-2440, 1983 AMC 2547, (E.D.La. Apr.23, 1982) ("[T]he stevedoring company that employs the longshoreman, not the shipowner, is required by statute and regulation ... to protect the longshoreman from the danger of poor lighting."(citation omitted)). This is because § 941 of the LHWCA and the regulations promulgated thereunder place this duty squarely on the stevedore who employs the longshoremen. *See*33 U.S.C. § 941(a) (providing that the "*employer* shall furnish and maintain employment and places of employment which shall be reasonably safe for his employees in all employment covered by this chapter" (emphasis added)); 29 C.F.R. § 1917.123 ("Working and walking areas shall be illuminated."); 29 C.F.R. § 1918.92 ("Walking, working, and climbing areas shall be illuminated."); *Scindia Steam,* 101 S.Ct. at 1626-27 ("The statutory duty of the *stevedore* under § 941 to provide a safe place to work has been implemented by the Safety and Health Regulations for Longshoring. 29 CFR § 1918.1 *et seq.*" (emphasis added)).FN35

FN35. Because Bias was working on the dock, and not on the vessel, the illumination standards found in 29 C.F.R. § 1917.123 probably apply instead of the standards found in § 1918.92. *See*29 C.F.R. § 1917.1(a) ("The regulations of this part apply to employment within a marine terminal ... including the loading, unloading, movement or other handling of cargo, ship's stores or gear within the terminal ...."); 29 U.S.C. § 1918.1(a) ("The regulations of this part apply to longshoring operations and related employments *aboard vessels.*"(emphasis added)). Regardless of which regulation applies, however, both are promulgated under the authority of 33 U.S.C. § 941, which clearly places the responsibility for compliance on the stevedore, not the vessel.

*6 Bias seeks to circumvent this well established principle by disguising the duty to provide adequate lighting as the active control duty. The court is not persuaded. As another district court faced with an identical argument explained,

> [i]t may be true that the lights on the ship remained in the control of the shipowner. But the lighting in that area [where the plaintiff longshoreman was working] did not remain in the control of the shipowner. Even accepting as true the plaintiff's deposition testimony that it was dark and shadowy in the corner where he fell, ... that evidence cannot support a finding that the shipowner was negligent, because it is the duty of the stevedore, not the shipowner, to provide adequate lighting.

Landsem v. Isuzu Motors, Ltd., 534 F.Supp. 448, 451 (D.Ore.1982).*See also Matthews v. Pan Ocean Shipping Co., Ltd.,* No. 91-0069, 1992 WL 59158, *1-2 (E.D.Pa. March 19, 1992) (adopting the analysis from *Landsem* and concluding that the shipowner owed no duty to provide adequate lighting for the longshoreman plaintiff even though "[t]he ship's crew moved lights to areas of active operations, and no other lighting was provided"). As the Fifth Circuit has explained, allowing Bias "to foist the duty of complying with these health and safety regulations upon the shipowner [would] employ exactly the type of liability without fault concept from which Congress sought to free vessels by the passage of the 1972 Amendments [to the LHWCA]." *Brown v. Mitsubishi Shintaku Ginko,* 550 F.2d 331, 333 (5th Cir.1977) (internal quotation marks and citation omitted). Furthermore, adopting Bias' legal theory would perversely encourage shipowners to shut off all lighting attached to the ship since they would be better off providing no light whatsoever, rather than risk liability by providing some light-which might not be adequate-and triggering the active control duty. As a matter of law, Bias cannot recover on the basis of the active control duty.FN36

FN36. Bias cites *Masinter v. Tenneco Oil Co., 867 F.2d 892 (5th Cir.892)*, for the proposition that stevedores are not always responsible for providing adequate lighting and that the vessel has that duty if it maintains control of the lighting. *See* Plaintiff's Supplemental Response to Defendant, Hanjin Shipping Co. Ltd.'s, Motion for Summary Judgment, Docket Entry No. 57, at 4. Bias, however, misinterprets *Masinter*.In *Masinter* the Fifth Circuit did conclude that the vessel was liable to the plaintiff under the active control duty, in part because it negligently failed to provide adequate lighting. *See Masinter*, 867 F.2d at 897-98. The court reached this conclusion, however, because the vessel owner was *"contractually bound"* to remain in control of the vessel, and therefore had a "continuing duty of care to those aboard the vessel." *Id.* at 897.Thus, the vessel owner had a duty to the plaintiff because the plaintiff was injured in an *area* under the active control of the vessel, not because the vessel retained active control of the lights themselves. *See id.* at 897-98. *Masinter* does not establish that a shipowner is responsible for providing adequate lighting in an area controlled by a stevedore just because the vessel maintains control over lights that happen to shine into that area.

D. The Duty to Intervene

The duty to intervene "concerns the vessel's obligations with regard to cargo operations in areas under the principal control of the independent stevedore."*Howlett*, 114 S.Ct. at 98.In such areas the shipowner has no duty "to take reasonable steps to discover and correct dangerous conditions that develop during the loading or unloading process." *Scindia Steam*, 101 S.Ct. at 1623. The shipowner may generally rely on the stevedore to ensure that cargo transfer operations are conducted safely. *Id.* If, however, the vessel owner has *actual* knowledge (1) that a hazard exists, (2) that the hazard poses an unreasonable risk of harm, (3) "that the stevedore, in the exercise of 'obviously improvident' judgment, means to work on in the face of it and therefore cannot be relied on to remedy it," the shipowner must intervene. *Randolph v. Laeisz*, 896 F.2d 964, 970-971 (5th Cir.1990) (quoting *Masinter v. Tenneco*, 867 F.2d 892, 897 (5th Cir.1989)).*See also Greenwood v. Societe Francaise De*, 111 F.3d 1239, 1248 (5th Cir.1997); *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842, 852-53 (5th Cir.1989), *abrogated on other grounds by Kirksey v. Tonghai Maritime*, 535 F.3d 388, 396 (5th Cir.2008).

*7 Bias asserts that because there is evidence in the record that the vessel owner was notified of the dark conditions on the dock, and that it responded by mounting lights on the ship to illuminate the work area, there is at least a fact issue as to whether the shipowner had actual knowledge of the hazard and that the stevedore intended to continue work in the face of the hazard. Further, Bias contends that whether the shipowner knew that the darkness presented an unreasonably dangerous condition and whether the stevedore's decision to continue work in the darkness was obviously improvident are fact questions for the jury.

The court does not agree with Bias' interpretation of the evidence in the record. Specifically, Bias has not pointed to any evidence suggesting that Hanjin knew that Gulf Stream would order its workers to resume working without first providing adequate lighting.

Bias testified that Hanjin was made aware of the lack of adequate illumination on the dock where Bias was working.FN37Further, he testified that members of the ship's crew, presumably Hanjin employees, responded by affixing lights to the *Calcutta* to illuminate Bias' work area on the dock.FN38Bias explained that Loyde, his supervisor, instructed Bias' crew of longshoremen to cease working while the lights were being affixed, and that they did not resume working until after the lights had been attached to the ship.FN39Bias testified that even after the lights were attached, it remained too dark on the dock.FN40

FN37. Videotaped Oral Deposition of Kelvin Keith Bias, at 172-76.

FN38.*Id.* at 173-76.

FN39. *Id.* at 173-77, 185-87.

FN40. *See id.* at 96, 141-42, 172-73.

This evidence tends to show only that Hanjin was put on notice of the hazardous condition and perhaps, viewing the evidence in the light most favorable to Bias, that Hanjin knew that the darkness posed an unreasonable risk of harm. The evidence may even support an inference that Hanjin employees observed and recognized that the lights they affixed to the ship did not remedy the dangerous condition.

Lacking, however, is any evidence that Hanjin employees knew or observed that Gulf Stream ordered or would order its employees back to work in the dangerous condition. *See* Futo v. Lykes Bros. Steamship Co., Inc., 742 F.2d 209, 220 (5th Cir.1984) (explaining that the "critical" issue was "whether or not any [shipowner] employee actually saw a [stevedore] employee working on the [unreasonably dangerous] scaffold, and concluding that there was no evidence in the record indicating that "the [shipowner's] employees knew that the [stevedore's] employees were working or would work under this condition"). The court cannot presume that just because there were Hanjin employees on the ship or in the area that they actually observed Gulf Stream employees resuming work in the inadequately lit area. *See id.* ("Mere presence of [the shipowner's] employees on the vessel and even their knowledge of the [unreasonably dangerous] condition ... itself are simply not enough."). Such a presumption would amount to a "speculative leap." *Id.; see also* Little, 37 F.3d at 1075 ("We do not ... in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts).

*8 Further, no evidence suggests that Hanjin employees knew that they could not rely on Gulf Stream to take further steps, if necessary, to provide adequate illumination.FN41 *See* Greenwood, 111 F.3d at 1248 (explaining that shipowner must have "actual knowledge that it could not rely on the stevedore to protect its employees"). Moreover, Hanjin had no duty to monitor Gulf Stream to ensure that it did not put its employees back to work without first providing sufficient light. *See* Scindia Steam, 101 S.Ct. at 1623 (explaining that the shipowner has no duty "to take reasonable steps to discover ... dangerous conditions," or to "oversee the stevedore's activity").

FN41. This is particularly true here because, as discussed above, regulations promulgated under the LHWCA explicitly require the *stevedore* to provide adequate lighting. *See* 29 C.F.R. § 1917.123; 29 C.F.R. § 1918.92. *See also* Landsem, 534 F.Supp. at 451 ("[T]he duties imposed on the stevedore by law and the shipowner's justifiable expectation that they will be met are relevant to determining whether the shipowner has breached its duty.").

Bias has failed to point to evidence in the record sufficient to create a genuine issue of material fact as to whether Hanjin's duty to intervene was triggered.FN42 Hanjin is entitled to summary judgment.

FN42. The court is not persuaded by the authority provided by Bias in his Supplemental Response to Defendant, Hanjin Shipping Co. Ltd.'s, Motion for Summary Judgment (Docket Entry No. 57). Two of the six cases cited clearly support the proposition that the duty to intervene is not triggered absent a showing by the plaintiff that the vessel owner had actual knowledge that the stevedore would proceed in the face of the unreasonably dangerous condition *and* could not be relied upon to ensure that the work environment was safe for its longshoreman employees. Gay v. Barge 266, 915 F.2d 1007, 1012 (5th Cir.1990); Randolf, 896 F.2d at 970. Therefore, to the extent these cases reach a different result, they can be distinguished on the fact. Turner v. Costa Line Cargo Servs., Inc., 744 F.2d 505, 510-11 & n. 9 (5th Cir.1984), and LeBlanc v. United States, 732 F.Supp. 709, 715-16 (E.D.Tex.1990), suggest that the plaintiff may not need to show that the vessel owner actually knew that the stevedore would work on in the face of the unreasonably dangerous condition, but only that the vessel owner actually knew the stevedore could not be relied upon to ensure that the work environment was safe for its longshoreman employees. Even if these two cases correctly recite the law, Bias has not presented any evidence suggesting that Hanjin knew that Gulf Stream would not fulfil its responsibility to ensure that its employees had adequate light. Ponce v. M/V Altair, 493 F.Supp.2d 880, 892-93 (S.D.Tex.2007), is not consistent with Fifth Circuit precedent. The *Ponce* court concluded that the duty to intervene applied based on a finding that the vessel owner "did or should have recognized the risk," and did not require the plaintiff to show that the vessel owner had *actual* knowledge of the dangerous condition. *Id.* at 892.Further, the court in *Ponce* did not require the plaintiff to show that the vessel owner had *actual* knowledge that the stevedore would work on in the face of the dangerous condition and could not be relied upon to remedy the dangerous condition, allowing the plaintiff instead to show only that the stevedore was unlikely to recognize the dangerous condition, and implying that the vessel owner should have known this. *Id.* at 892-93.Finally, in Masinter v. Tenneco Oil Co., 867 F.2d 892 (5th Cir.1989), the court concluded the vessel owner was liable based only on the active control duty. Therefore, the holding did not involve the duty to intervene and provides no guidance for applying it.

IV. *Conclusion and Order*

Based on the foregoing analysis, Defendant Hanjin Shipping Co. Ltd.'s Motion for Summary Judgment (Docket Entry No. 39) is **GRANTED**.

STANLEY D. EDMONDS, Petitioner,

v

COMPAGNIE GENERALE TRANSATLANTIQUE

443 US 256, 61 L Ed 2d 521, 99 S Ct 2753

[No. 78-479]

Argued March 19, 1979. Decided June 27, 1979.

OPINION OF THE COURT

[443 US 258]

Mr. Justice White delivered the opinion of the Court.

On March 3, 1974, the S. S. Atlantic Cognac, a containership owned by respondent, arrived at the Portsmouth Marine Terminal, Va. Petitioner, a longshoreman, was then employed by the Nacirema Operating Co., a stevedoring concern that the shipowner had engaged to unload cargo from the vessel. The longshoreman was injured in the course of that work, and he received benefits for that injury from his employer under the Longshoremen's and Harbor Workers' Compensation Act. 44 Stat 1424, as amended, 33 USC §§ 901 et seq. [33 USCS §§ 901 et seq.]. In addition, the longshoreman brought this negligence action against the shipowner in Federal District Court.

[1a] A jury determined that the longshoreman had suffered total damages of $100,000, that he was responsible for 10% of the total negligence resulting in his injury, that the stevedore's fault, through a coemployee's negligence, contributed 70%, and that the shipowner was accountable for 20%.[1] Following an established principle of maritime law, the District Court reduced the award to the longshoreman by the 10% attributed to his own negligence.[2] But also in accordance with maritime law, and the common law as well, the court refused further to reduce the award against the shipowner in proportion to the fault of the employer.

[2a, 3a] The United States Court of Appeals for the Fourth Circuit, with two judges dissenting, reversed en banc, holding that the

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1972 Amendments to the Act, 86 Stat 1251, had altered the traditional admiralty rule by making the shipowner liable only for that share of the total damages equivalent to the ratio of its fault to the total fault. 577 F2d 1153, 1155-1156 (1978).[3] Other Courts of Appeals have reached the contrary conclusion.[4] We granted certiorari to resolve this conflict, 439 US 952, 58 L Ed 2d 343, 99 S Ct 348 (1978), and, once again,[5] we have before us a question of the meaning of the 1972 Amendments.

1. The District Court set aside a jury verdict for the longshoreman in an earlier trial because of errors in the jury instructions.

2. [1b] The plaintiff's negligence is not an absolute bar to recovery under maritime law, which accepts the concept of comparative negligence of plaintiff and defendant. Pope & Talbot, Inc. v Hawn, 346 US 406, 408-409, 98 L Ed 143, 74 S Ct 202 (1953); The Max Morris, 137 US 1, 15, 34 L Ed 586, 11 S Ct 29 (1890); see n 23, infra.

3. A panel of the Court of Appeals had earlier reached a similar conclusion. 558 F2d 186, 193-194 (1977); see n 26, infra.

4. Zapico v Bucyrus-Erie Co. 579 F2d 714, 725 (CA2 1978); Samuels v Empresa Lineas Maritimas Argentinas, 573 F2d 884, 887-889 (CA5 1978), cert pending, No. 78-795; Dodge v Mitsui Shintaku Ginko K. K. Tokyo, 528 F2d 669, 671-673 (CA9 1975), cert denied, 425 US 944, 48 L Ed 2d 188, 96 S Ct 1685 (1976); Shellman v United States Lines, Inc., 528 F2d 675, 679-680 (CA9 1975), cert denied, 425 US 936, 48 L Ed 2d 177, 96 S Ct 1668 (1976). See also Cella v Partenreederei MS Ravenna, 529 F2d 15, 20 (CA1 1975) (indicating agreement with Dodge, supra), cert denied, 425 US 975, 48 L Ed 2d 799, 96 S Ct 2175 (1976); Marant v Farrell Lines, Inc., 550 F2d 142, 145-147 (CA3 1977) (discussing but reserving the issue); id., at 147-152 (Van Dusen, J., concurring) (expressing concern over validity of apportionment of damages).

5. See also Northeast Marine Terminal Co. v Caputo, 432 US 249, 53 L Ed 2d 320, 97 S Ct

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I

[4a, 5, 6a, 7a] Admiralty law is judge-made law to a great extent, United States v Reliable Transfer Co. 421 US 397, 409, 44 L Ed 2d 251, 95 S Ct 1708 (1975); Fitzgerald v United States Lines Co. 374 US 16, 20, 10 L Ed 2d 720, 83 S Ct 1646 (1963), and a longshoreman's maritime tort action against a shipowner was recognized long before the 1972 amendments, see Pope & Talbot, Inc. v Hawn, 346 US 406, 413–414, 98 L Ed 143, 74 S Ct 202 (1953), as it has been since.[6] As that law had evolved by 1972, a

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longshoreman's award in a suit against a negligent shipowner would be reduced by that portion of the damages assignable to the longshoreman's own negligence; but, as a matter of maritime tort law, the shipowner would be responsible to the longshoreman in full for the remainder, even if the stevedore's negligence contributed to the injuries.[7] This latter rule is in accord with the common law, which allows an injured party to sue a tortfeasor for the full amount of damages for an indivisible injury that the tortfeasor's negligence was a substantial factor in causing, even if the concurrent negligence of others contributed to the incident.[8]

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The problem we face today, as was true of similar problems the Court has dealt with in the past, is complicated by the overlap of loss-allocating mechanisms that are guided by somewhat inconsistent principles. The liability of the ship to the longshoreman is determined by a combination of judge-made and statutory law and, in the present context, depends on a showing of negligence or some other culpability. The long-

2348 (1977); Director, Workers' Compensation Programs v Rasmussen, 440 US 29, 59 L Ed 2d 122, 99 S Ct 903 (1979); P. C. Pfeiffer Co. v Diverson Ford, No. 78-125 (to be reargued October Term 1979).

6. Title 33 USC § 933(a) [33 USCS § 933(a)], which was unchanged in 1972, states that when a longshoreman "determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive . . . compensation or to recover damages against such third person." Section 905(b), which was added in 1972, states that the longshoreman "may bring an action against [the shipowner] as a third party in accordance with the provisions of section 933 . . . ."

7. [4b] See, e.g., Cooper Stevedoring Co. v Fritz Kopke, Inc., 417 US 106, 108, 113, 40 L Ed 2d 694, 94 S Ct 2174 (1974) (longshoreman could have recovered entire damages from shipowner responsible for 50% of the total fault); Halcyon Lines v Haenn Ship Ceiling & Refitting Corp., 342 US 282, 283, 96 L Ed 318, 72 S Ct 277 (1952) (shipowner responsible for 25% of negligence required to pay 100% of damages, and contribution unavailable from negligent shoreside contractor, an employer under the Act). See also The Atlas, 93 US 302, 23 L Ed 863 (1876); The Juniata, 93 US 337, 23 L Ed 930 (1876). We stated the common-law rule in The Atlas and adopted it as part of admiralty jurisprudence: "Nothing is more clear than the right of a plaintiff, having suffered such a loss, to sue in a common-law action all the wrong-doers, or any one of them, at his election; and it is equally clear, that, if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss." 93 US, at 315, 23 L Ed 863.

8. [6b, 7b] Restatement (Second) of Torts §§ 433A, 875, and 879 (1965 and 1979); T. Cooley, Law of Torts 142–144 (1879); W. Prosser, Law of Torts § 47, pp 297–299, and § 52, pp 314–315 (4th ed 1971); cf. Washington & Georgetown R. Co. v Hickey, 166 US 521, 527, 41 L Ed 1101, 17 S Ct 661 (1897). A tortfeasor is not relieved of liability for the entire harm he caused just because another's negligence was also a factor in effecting the injury. "Nor are the damages against him diminished." Restatement, supra, § 879, comment a. Likewise, under traditional tort law, a plaintiff obtaining a judgment against more than one concurrent tortfeasor may satisfy it against any one of them. Id., § 886. A concurrent tortfeasor generally may seek contribution from another, id., § 886A, but he is not relieved from liability for the entire damages even when the nondefendant tortfeasor is immune from liability. Id., § 880. These principles, of course, are inapplicable where the injury is divisible and the causation of each part can be separately assigned to each tortfeasor. Id., §§ 433A(1) and 881.

shoreman-victim, however, and his stevedore-employer—also a tortfeasor in this case—are participants in a workers' compensation scheme that affords benefits to the longshoreman regardless of the employer's fault and provides that the stevedore's only liability for the longshoreman's injury is to the longshoreman in the amount specified in the statute.[9] 33 USC § 905 [33 USCS § 905]. We have more than once attempted to reconcile these systems.

[2b] Against this background, Congress acted in 1972, among other things,[11] to eliminate the shipowner's liability to the longshoreman for unseaworthiness and the stevedore's liability to the shipowner for unworkmanlike service resulting in injury to the longshoreman—in other words, to overrule Sieracki and Ryan. See Northeast Marine Terminal Co. v Caputo, 432 US 249, 260–261, and n 18, 53 L Ed 2d 320, 97 S Ct 2348 (1977); Cooper Stevedoring Co. v Fritz Kopke, Inc., supra, at 113 n 6, 40 L Ed 2d 694, 94 S Ct 2174. Though admitting that nothing in either the statute or its history expressly indicates that Congress intended to modify as well the existing rules governing the longshoreman's maritime negligence suit against the shipowner by diminishing damages recoverable from the latter on the basis of the proportionate fault of the nonparty stevedore, 577 F2d, at 1155, and n 2, the en banc Court of Appeals found that such a result was necessary to reconcile two sentences added in 1972 as part of 33 USC § 905(b) [33 USCS § 905(b)]. The two sentences state:

"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

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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." 33 USC § 905(b) [33 USCS § 905(b)].

The Court of Appeals described the perceived conflict in this fashion:

"The first sentence says that if the injury is caused by the negligence of a vessel the longshoreman may recover, but the second sentence says he may not recover anything of the ship if his injury was caused by the negligence of a person providing stevedoring services. The sentences are irreconcilable if read to mean that any negligence on the part of the ship will warrant recovery while any negligence on the part of the stevedore will defeat it. They may be harmonized only if read in apportioned terms." 577 F2d, at 1155.

For a number of reasons, we are unpersuaded that Congress intended to upset a "long-established and familiar principl[e]" of maritime law by imposing a proportionate-fault rule. Cf. Isbrandtsen Co. v Johnson, 343 US 779, 783, 96 L Ed 1294, 72 S Ct 1011 (1952).

9. Generally, workers' compensation benefits are not intended to compensate for an employee's entire losses. 1 A. Larson, Law of Workmen's Compensation § 2.50, (1978). The 1972 Amendments to the Act, however, make a determined effort to narrow the gap between the harm suffered and the benefits payable.

11. The Amendments also increased compensation benefits, expanded the Act's geographic coverage, and instituted a new means of adjudicating compensation cases. Robertson, Jurisdiction, Shipowner Negligence and Stevedore Immunities under the 1972 Amendments to the Longshoremen's Act, 28 Mercer L Rev 515, 516 (1977).

A

In the first place, the conflict seen by the Court of Appeals is largely one of its own creation. Both sides admit that each sentence may be read so as not to conflict with the other. The first sentence addresses the recurring situation, reflected by the facts in this case, where the party injured by the negligence of the vessel is a longshoreman employed by a stevedoring concern. In these circumstances, the longshoreman may sue the vessel as a third party, but his employer, the stevedore, is not to be liable directly or indirectly for any damages that may be recovered. This first sentence overrules Ryan and prevents the vessel from recouping from the

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stevedore any of the damages that the longshoreman may recover from the vessel. But the sentence neither expressly nor implicitly purports to overrule or modify the traditional rule that the longshoreman may recover the total amount of his damages from the vessel if the latter's negligence is a contributing cause of his injury, even if the stevedore, whose limited liability is fixed by statute, is partly to blame.

The second sentence of the paragraph is expressly addressed to the different and less familiar arrangement where the injured longshoreman loading or unloading the ship is employed by the vessel itself, not by a separate stevedoring company—in short, to the situation where the ship is its own stevedore.[12] In this situation, the second sentence places some limitations on suits against the vessel for injuries caused during its stevedoring operations.[13] Whatever these limitations may be, there is no conflict between the two sentences, and one arises only if the second sentence is read, as the Court of Appeals read it, as applying to all injured longshoremen, whether employed by the ship or by an independent stevedore. Nothing in the legislative history advises this construction of the sentence,[14]

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and we see no reason to depart from the language of the statute in this respect.

This leaves the question of the measure of recovery against a shipowner, whether or not it is doing its own stevedoring, when as shipowner it is only partially responsible for the negligence, but we are quite unable to distill from the face of the obviously awkward wording of the two sentences any indication that Congress intended to modify the preexisting rule that a longshoreman who is injured by the concurrent negligence of the stevedore and the ship may recover for the entire amount of his injuries from the ship.

12. The first proposals in the legislative movement that produced the 1972 Amendments would have made all shipowners statutory employers, not just those also acting as stevedores, and thus cut off any tort action by the longshoreman. S 525, 92d Cong, 1st Sess, § 1 (1971), Legislative History of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 (Committee Print compiled for the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare), pp 393-394 (1972). Congress ultimately decided to preserve the longshoremen's tort action against shipowners acting as shipowners.

13. In Jackson v Lykes Bros. S. S. Co. 386 US 731, 18 L Ed 2d 488, 87 S Ct 1419 (1967), and Reed v The Yaka, 373 US 410, 10 L Ed 2d 448, 83 S Ct 1349 (1963), we upheld a longshoreman's negligence or unseaworthiness action against the shipowner-stevedore.

14. See S Rep No. 92-1125, p 11 (1972) (hereinafter S Rep) ("Accordingly, the bill provides in the case of a longshoreman who is *employed directly* by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services") (emphasis supplied). The House Report, HR Rep No. 92-1441 (1972), is identical to the Senate Report in all respects material to this case. Accordingly, further references will be only to the Senate Report.

B

The legislative history strongly counsels against the Court of Appeals' interpretation of the statute, which modifies the longshoreman's pre-existing rights against the negligent vessel. The reports and debates leading up to the 1972 Amendments contain not a word of this concept.[17] This silence is most eloquent, for such reticence while contemplating an

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important and controversial change in existing law is unlikely.[18] Moreover, the general statements appearing in the legislative history concerning § 905(b) are inconsistent with what respondent argues was in the back of the legislators' minds about this specific issue. The Committees repeatedly refer to the refusal to limit the shipowner's liability for negligence,[19] which they felt left the vessel in the same position as a land-based third party whose negligence injures an employee.[20] Because an employee generally may recover in full from a third-party concurrent tortfeasor,[21] these statements are hardly indicative of an intent to modify the law in the respect found by the Court of Appeals. At the very least, one would expect some hint of a purpose to work such a change, but there was none.

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The shipowner denies that the legislative history is so onesided, relying upon statements that vessels "will not be chargeable with the negligence of the stevedore or [the] employees of the stevedore." S Rep 11; see 577 F2d, at 1156 n 2. But in context these declarations deal only with removal of the shipowner's liability under the warranty of seaworthiness for acts of the stevedore[22]—even nonnegligent ones.[23]

C

Finally, we note that the proportionate-fault rule adopted by the Court of Appeals itself produces consequences that we doubt Congress intended. It may remove some inequities, but it creates others and appears to shift some burdens to the longshoreman.

17. In the Senate hearings, a plaintiff's lawyer mentioned diminution of damages as a possible solution so long as the shipowner's liability for unseaworthiness was retained. The only committee member present rejected this proposal, and Congress apparently never gave it serious consideration. See Hearings on S 2318, S 525, and S 1547 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong, 2d Sess, 354-355 (1972).

18. Laborers' International Union, Local No. 1057 v NLRB, 186 US App DC 13, 20, 567 F2d 1006, 1013 (1977).

The debate over § 905(b) involved the removal of the shipowner's liability for unseaworthiness. That occurred as a concomitant of ending liability under the stevedore's warranty of workmanlike service, which was a quid pro quo for increasing the compensation benefits. See S Rep 9-10. Some Congressmen objected to removing the vessel's liability for unseaworthiness because that would deny millions of dollars of relief for longshoremen's injuries. 118 Cong Rec 36382-36384 (1972) (Reps. Eckhardt, Dent, and Ashley). Indeed, the concern shared by some Congressmen over any modification of third-party actions "had political ramifications which . . . resulted in forestalling any improvements in the . . . Act for over twelve years." S Rep 9. Those Congressmen likely would have assailed the diminution of the longshoreman's recovery in proportion to the stevedore's fault if they had any inkling that the amendments did that.

19. S Rep 2, 5, 10.

20. Id., at 8 ("where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured"); accord, id., at 10 and 11.

21. See n 8, supra; 2A Larson, supra n 9, § 75.22, at 14-263; Soule, Toward an Equitable and Rational Allocation of Employee Injury Losses in Cases with Third Party Liability, 1979 Ins Counsel J 201, 202-208.

22. S Rep 9-11.

23. E.g., Italia Societa per Azioni di Navigazione v Oregon Stevedoring Co. 376 US 315,

As we have said, § 905 permits the injured longshoreman to sue the vessel and exempts the employer from any liability to the vessel for any damages that may be recovered. Congress clearly contemplated that the employee be free to sue the third-party vessel, to prove negligence and causation on the vessel's part, and to have the total damages set by the court or jury without regard to the benefits he has received or to which he may be entitled under the Act. Furthermore,

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under the traditional rule, the employee may recover from the ship the entire amount of the damages so determined. If he recovers less than the statutory benefits, his employer is still liable for the statutory amount.

Under this arrangement, it is true that the ship will be liable for all of the damages found by the judge or jury; yet its negligence may have been only a minor cause of the injury. The stevedore-employer may have been predominantly responsible; yet its liability is limited by the Act, and if it has lien rights on the longshoreman's recovery it may be out-of-pocket even less.

Under the Court of Appeals' proportionate-fault rule, however, there will be many circumstances where the longshoreman will not be able to recover in any way the full amount of the damages determined in his suit against the vessel. If, for example, his damages are at least twice the benefits paid or payable under the Act and the ship is less than 50% at fault, the total of his statutory benefits plus the reduced recovery from the ship will not equal his total damages. More generally, it would appear that if the stevedore's proportionate fault is more than the proportion of compensation to actual damages, the longshoreman will always fall short of recovering the amount that the factfinder has determined is necessary to remedy his total injury, even though the diminution is due not to his fault, but to that of his employer.[24]

But the impact of the proportionate-fault rule on the longshoreman does not stop there. Under § 933(b), an administrative order for benefits operates as an assignment to the stevedore-employer of the longshoreman's rights against the third party unless the longshoreman sues within six months. And a corresponding judicially created lien in the employer's

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favor operates where the longshoreman himself sues.[25] In the past, this lien has been for the benefits paid up to the amount of the recovery.[26] And under § 933(c), which Congress left intact in 1972, where the stevedore-employer sues the vessel as statutory assignee it may retain from any recovery an amount equal in general to the expenses of the suit, the costs of medical services and supplies it provided the employee, all compensation benefits paid, the present value of benefits to be paid, plus one-fifth of whatever might remain. Under the Court of Appeals' proportionate-fault system, the longshoreman would get very little, if any, of the diminished re-

11 L Ed 2d 732, 84 S Ct 748 (1964).

The shipowner also relies upon the Reports' reference to "comparative negligence," S Rep 12, but in context it is obvious that Congress alluded only, and not erroneously, see Prosser, Comparative Negligence, 51 Mich L Rev 465 n 2 (1953), to the comparative negligence of the plaintiff longshoreman and the defendant shipowner—a concept that, unlike the proposal before us today, was well established in admiralty. See S Rep 12; 33 USC § 905(a) [33 USCS § 905(a)]; n 2, supra. It would be particularly curious for Congress to refer expressly to the established principle of comparative negligence, yet say not a word about adopting a new rule limiting the liability of the shipowner on the basis of the nonparty employer's negligence.

24. See Zapico v Bucyrus-Erie Co. 579 F2d, at 725 ("one is still left to wonder why the longshoreman injured by the negligence of a third party should recover less when his employer has also been negligent than when the employer has been without fault").

25. See The Etna, 138 F2d 37 (CA3 1943).

26. The original Fourth Circuit panel opinion would have made the shipowner liable for

covery obtained by his employer. Indeed, unless the vessel's proportionate fault exceeded the ratio of compensation benefits to total damages, the longshoreman would receive nothing from the third-party action, and the negligent stevedore might recoup all the compensation benefits it had paid.

Some inequity appears inevitable in the present statutory scheme, but we find nothing to indicate and should not presume that Congress intended to place the burden of the inequity on the longshoreman whom the Act seeks to protect.[27] Further, the 1972 Amendments make quite clear that "the employer shall not be liable to the vessel for such damages *directly or indirectly*," 33 USC § 905(b) [33 USCS § 905(b)] (emphasis supplied),[28] and that with the disappearance of the ship's contribution and indemnity right against the stevedore the latter

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should no longer have to appear routinely in suits between longshoreman and shipowner.[29] Consequently, as we have done before, we must reject a "theory that nowhere appears in the Act, that was never mentioned by Congress during the legislative process, that does not comport with Congress' intent, and that restricts . . . a remedial Act . . . ." Northeast Marine Terminal Co. v Caputo, 432 US, at 278–279, 53 L Ed 2d 320, 97 S Ct 2348.

an amount equal not just to his proportionate fault, but also to the employer's lien. 558 F2d, at 194. The en banc court refused to make the vessel liable for the additional amount of the lien and declined to rule on any alteration of the lien since the employer was not party to the suit. 577 F2d, at 1156.

27. Cf. Northeast Marine Terminal Co. v Caputo, 432 US, at 279, 53 L Ed 2d 320, 97 S Ct 2348.

Accordingly, we reverse the judgment below and remand for proceedings consistent with this opinion.

It is so ordered.

Mr. Justice Powell took no part in the consideration or decision of this case.

STOP

SEPARATE OPINION

Mr. Justice Blackmun, with whom Mr. Justice Marshall and Mr. Justice Stevens join, dissenting.

The jury in this case found that the shipowner, the stevedore, and the longshoreman were each partially responsible

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for the latter's (petitioner Stanley Edmonds) injury. A member of

28. "It is the Committee's intention to prohibit such recovery under any theory including, without limitation, theories based on contract or tort." S Rep 11; see Pope & Talbot, Inc. v Hawn, 346 US, at 412, 98 L Ed 143, 74 S Ct 202 ("reduction of [the shipowner's] liability at the expense of [the employer] would be the substantial equivalent of contribution"); Dodge v Mitsui Shintaku Ginko K. K. Tokyo, 528 F2d, at 673; Steinberg, The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: Negligence Actions by Longshoremen against Shipowners—A Proposed Solution, 37 Ohio St LJ 767, 792–793 (1976).

29. See S Rep 9 ("much of the financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs" of stevedores in third-party actions).

NOTES

1. Open and obvious. Where an open and obvious danger aboard a ship does not involve the ship or its gear, but instead is a condition created by the contractor, the shipowner has no duty to intervene. *Bass v. Aetna Cas. & Sur. Co.*, 727 F. Supp. 312 (S.D. Miss. 1989). One court found no vessel owner liability in a situation of a longshoreman tripping over a padeye (open and obvious danger), *Salvato v. Hakko Maritime Corp.*, 718 F. Supp. 1443 (N.D. Cal. 1989), while another denied liability if the accident was due to previously stowed cargo (open and obvious), *Gigante v. Runship*, 904 F.2d 694 (3rd Cir. 1990); and a third reached the same conclusion due to the hazards of a coiled rope at a foot of a ladder being obvious, *Ludwig v. Pan Ocean Shipping Co.*, 941 F.2d 849 (9th Cir. 1991). But, another court found that the hazards of an unguarded or uncovered ladder opening was a question for the jury on the issue of vessel owner negligence. *Martenez v. Korea Shipping Corp.*, 903 F.2d 606 (9th Cir. 1990). Additional decisions on the subject of the turnover duty being satisfied if a dangerous condition aboard the vessel is obvious to the stevedore are: *Delange v. Dutra Construction Co., Inc.*, 183 F.3d 916, 921 (9th Cir. 1999) (the duty to warn attaches only to hazards that are not known to the injured worker and would not be obvious or anticipated by him); *Manuel v. Cameron Offshore Boats, Inc.*, 103 F.3d 31 (5th Cir. 1997); *Burchett v. Cargill, Inc.*, 48 F.3d 173 (5th Cir. 1995); *Pimental v. Ltd. Canadian Pacific Bul.*, ____ F. Supp. ____, 1991 WL 369922 (S.D. Tex. 1991) *aff'd.* 956 F.2d 13 (5th Cir. 1992); *Davis v. Portline Transportes Maritime International*, 16 F.3d 532 (3d Cir. 1994) (imposed liability since the vessel owner should have foreseen that the longshore workers would not be aware of ice patches on the deck); *Ludwig v. Pan Ocean Shipping Co., Ltd.*, 941 F.2d 849 (9th Cir. 1991); *Gigante v. Runship, Ltd.*, 904 F.2d 694 (3d Cir. 1990); *Dino v. Farrell Lines, Inc.*, 80 F. Supp. 282 (D.N.J. 1999); and *La Martina v. Pan Ocean Drilling Co., Ltd.*, 815 F. Supp. 878 (D. Md. 1992).

2. Proving negligence. *Witt v. American Trading Transportation Co., Inc.*, 820 F. Supp. 1249 (D. Ore. 1993), concludes that a repairer has no action under 905(b) if the source of the injury is the subject of the repair work. *Davis v. Portline Maritime*, 16 F.3d 532 (3d Cir. 1994) holds that if the vessel owner remedies a dangerous condition, it must do so with reasonable care. In a *SS YAKA* situation, there is no right to recover if the conduct is that of a stevedoring nature as opposed to that of a vessel owner. *Morehead v. Atkinson-Kiewit, Inc.*, 97 F.3d 603 (1st Cir. 1996) (*en banc*). However, there may be a recovery if the

employer in its capacity of a vessel owner is negligent. *Guilles v. Sea-Land Serv., Inc.*, 12 F.3d 381 (2d Cir. 1993).

3. Cargo operations underway/duty to intervene. *Fontenot v. United States*, 89 F.3d 205 (5th Cir. 1996) holds that there is no duty to intervene if the defect is not caused by the vessel's equipment, it is open and obvious, and is in the contractor's work area. In *Brown v. Philippine President Lines*, 704 F. Supp. 606 (E.D. Pa. 1989), the vessel owner did not breach its duty to act once it became aware that the stevedore was continuing to use its malfunctioning equipment even if the stevedore's judgment was obviously improvident. *Wilcox v. Trans Pacific Shipping Co., Inc.*, 923 F.2d 3 (1st Cir. 1991) concerns improper lighting in the hold of a vessel. In order to establish liability, the plaintiff must show that the vessel was under an obligation to supply the lights and the vessel owner knew or should have known that additional lights were needed. *Prinski v. Termar Navigation Co.*, ____ F. Supp. ____, 1992 A.M.C. 1541 (E.D. Pa.), *aff'd*, 944 F.2d 898 (3d Cir. 1991) holds that the vessel owner has no duty to supervise cargo operations at a U.S. port in order to discover dangerous conditions. *See also, Burchett v. Cargill, Inc.*, 48 F.3d 173 (5th Cir. 1995). *Gravatt v. City of New York*, 226 F.3d 108 (2d Cir. 2000) recognized that a passive vessel owner has no ongoing duty to supervise and to inspect once cargo operations commence. *England v. Reinauer Transportation Companies, L.P.*, 194 F.3d 265 (1st Cir. 1999) holds that there can be no "turnover" defense by the vessel owner if it retained operational control relative to the work areas or the equipment furnished by the vessel. In the *England* case, it was customary in the Port of Boston for the tug owner to check and to tighten the barge's lines during the course of cargo operations. The longshoreman was injured due to a slack line. Both the tug and barge owners were found to have been negligent with respect to the plaintiff's injury. Another decision accepting a 905(b) negligence action if the vessel's representative participated in the work is *O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002).

4. Cargo operations completed. A cargo checker injured five days after discharge operations were completed could not maintain a 905(b) negligence action because the plaintiff did not face the hazards of navigation. *Bachemin v. Mitsui and Company (U.S.A.), Inc.*, 713 F. Supp. 204 (E.D. La. 1989).

5. The Supreme Court missed an opportunity to clarify a dispute between the Third and Ninth Circuits regarding the extent of the shipowner's duty. *Derr v. Kawasaki Kisen K.K.*, 835 F.2d

490 (3d Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988) involved a longshore worker who was assigned to discharge cargo that had shifted during the course of the voyage. Derr was aware of this condition prior to his injury. The trial court gave a directed verdict for the vessel owner, which was affirmed on appeal. The Third Circuit held that the ship has no duty to inspect cargo loading operations, and concluded that it had the duty to warn the discharging stevedore only when the ship has actual knowledge of a danger with the stow in situations in which the danger is not open and obvious. This Court recognized that its analysis was contrary to *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982). This split between the Ninth and Third Circuits was later resolved in favor of *Derr*, *Howlett v. Birkdale Chipping Co., S.A.*, 512 U.S. 92, 114 S. Ct. 2057, 129 L. Ed. 2d 78 (1994). A Ninth Circuit decision that accepts the *Howlett* decision by reversing its prior conclusion is *Riggs v. Scindia Steam Navigation Co.*, 35 F.3d 1466 (9th Cir. 1994).

Woods v. Sammisa Co., Ltd., 873 F.2d 842, 848 (5th Cir. 1989) concerned an injury due to the manner in which the steel cargo was loaded at a foreign port. The Fifth Circuit used the rationale of *Derr* and concluded that *Scindia* imposed "a duty on the shipowner to correct, as to all dangerous conditions including those relating to cargo, equipment-related and other defects of which it has actual knowledge and which it actually knows the stevedore does not intend to correct." The Fifth Circuit parted with *Derr* by concluding that a jury should pass on the negligence issue if evidence indicated that the vessel knew or should have known of the cargo being stowed at the load port in such a manner that would create an unsafe condition in the course of discharging operations. The court further concluded that the vessel owner has no duty to warn the stevedore or its employees of obvious defects with the stow. Justices Rehnquist, White and Kennedy dissented from the denial of the vessel owner's petition for writ of certiorari on the basis of a conflict between the Third and Fifth Circuits. *Sammiline Company, Inc. v. Woods*, 493 U.S. 1050 (1990).

6. The *Woods* decision is important for another reason, namely the liability of a time charterer to the injured longshoreman for damages, and to the vessel owner by way of indemnity/contribution. The court concluded that pursuant to the "load, trim and discharge provision" (Clause 8), the time charterer breached a duty to the injured longshoreman due to its supervisory role in the cargo operations at the load port. *Randall v. Chevron U.S.A., Inc.*, 13 F.3d 888, as amended on rehearing with respect to Part IV, 22 F.3d 568 (5th Cir. 1994), concluded that a time charterer/employer is subject to a 905(b) action for negligence

by one of its employees who is not a seaman; the action turns on whether the employer is acting in its capacity as time charterer. *Carpenter v. Universal Star Shipping, S.A.*, 924 F.2d 1539 (9th Cir. 1991), concluded that the "load, stow and trim" provision set forth in Clause 8 of the charter party afforded no remedy to the injured longshoreman against the charterer, but could be used in the vessel's claim for contribution/indemnity against the charterer. Also in *Woods*, the vessel owner's request for indemnity/contribution was rejected on the ground that the owner retained overall control of the vessel. This conclusion relative to the interpretation of the charter party was acknowledged to contradict *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300, 1305-1306 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982), and *Fernandez v. Chios Shipping Co.*, 542 F.2d 145, 151-153 (2d Cir. 1976). The dissent in the Supreme Court's refusal to accept a writ of certiorari in *Woods* referred to this lack of uniformity among the Circuit Courts.

8. *Elberg v. Mobil Oil Corp.*, 967 F.2d 1146 (7th Cir. 1992) sets forth a very restrictive obligation of the vessel owner with respect to a duty to intervene relative to conditions in the work area. *Williams v. M/V SONORA*, 958 F.2d 808 (5th Cir. 1993) holds that the vessel owner has a duty to intervene if the stevedore will not remedy a condition that arises if the vessel owner has some element of control over the cargo operations, or an appurtenance of the ship is involved.

13. *Pacini v. Island Stevedores, Inc., et al.*, 55 F.3d 633 (5th Cir. 1995) reviews the vessel owner's turnover duty with the statement that it does not extend to open and obvious conditions. It is a duty to warn the stevedore of defects about which the vessel owner should know, which would include the placing of a warning sign across a ladder in the stevedore's work area prior to the start of work. *Delange v. Dutra Construction Co., Inc.*, 183 F.3d 916 (9th Cir. 1999) states that the "turnover duty" or "duty to warn" attaches only to hazards "that are not known by the longshoreman and would not be obvious to or anticipated by him if reasonably competent in the performance of his work." *Reed v. U.S.L. Corporation*, 178 F.3d 988 (8th Cir. 1999) is in accord. *Jackson v. Egyptian Navigation Co.*, F.3d 2004 W.L. 736865 (3d Cir. 2004) relied upon *Howlett* and *Serbin v. Bora Corp.*, 96 F.3d 66, 70 (3d Cir. 1996) stated that the turnover duty is to warn the stevedore of non-obvious hazards. The plaintiff fell from a board in the stow; the trial court concluded that the case could not go to the jury. This conclusion was affirmed with the statement "[T]he ship has no duty to warn

about an obvious hazard in the work area that a competent stevedore would be expected to discover while properly performing its duties."

14. *Ryan-Walsh, Inc. v. Maritima Aragua, S.A.*, ____ F. Supp. ____, 1994 U.S. Dist. Lexis 7427, (E.D. La. 1994), *aff'd* 48 F.3d 531, (5th Cir. 1995), is a decision in which the compensation carrier/employer filed a 905(b) negligence action against the vessel owner on behalf of the injured longshoreman. The court held that the vessel's turnover duty associated with the work area does not extend to open and obvious defects unless the alternative to facing the unsafe condition is unduly impracticable or time consuming. The duty of reasonable care extends to longshore workers with respect to areas that remain "under the active control of the vessel." The duty to intervene extends to areas under the principal control of the stevedore.

15. *Green v. Vermillion Corp.*, 144 F.3d 332 (5th Cir. 1998) holds that a worker at a duck camp injured on navigable waters had an action based upon unseaworthiness and general maritime negligence against his employer. The LHWCA was not applicable due to the recreational camp exception from statutory coverage; therefore, the injured worker was not limited to a 905(b) action against the employer-vessel owner. Also, the court held that the exclusive remedy provision of the Louisiana Compensation Act could not be applied since it would interfere with the uniform application of the general maritime law. The Eleventh Circuit reached a contrary conclusion regarding the effect to be given the exclusive remedy provision of a state worker's compensation act in a maritime context. *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523, 1533 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991). Remember that the state law is usually preempted by the LHWCA, if applicable. *Perron v. Benn Maintenance and Fabricators, Inc.*, 970 F.2d 1409 (5th Cir. 1992).

16. The vessel owner has an obligation not to create a dangerous condition aboard the vessel once work starts. *Davis v. Portline Transportes Maritime*, 16 F.3d 532 (3d Cir. 1994). A decision commenting upon the vessel owner's duty in the context of "active operations/active control" is *Coyle v. Krestjan Palusalu Marine Company*, 83 F. Supp. 2d 535 (E.D. Pa. 2000). For conditions that arise after work commences, the plaintiff must show crew involvement in an area under vessel control. The Ninth Circuit concluded that the vessel owner had a continuing duty of exercising due care to the longshore worker in the context of the ship's mooring lines. It appears that this court comes close to the *Scindia* rejected doctrine of

reasonable care under the circumstances. *Christensen v. Georgia-Pacific Corp.*, 279 F.3d 807 (9th Cir. 2002).

17. An interesting corollary to *Edmonds* is set forth in *Fontenot v. Dual Drilling Co.*, 179 F.3d 969 (5th Cir. 1999). Fontenot was employed by ENSCO on a fixed platform that was owned by Dual Drilling Co., off the Louisiana coast. He collected compensation benefits pursuant to the LHWCA from ENSCO. An action was thereafter filed against Dual for general damages. A Louisiana statute permits a non-employer to deduct from any recovery by the plaintiff the proportionate fault of the non-party employer (ENSCO). This result is contrary to *Edmonds*. It should be noted as predicates that state law governs Fontenot's action pursuant to the terms of the OCSLA,[1] and the platform is not a vessel for the purpose of triggering a 905(b) cause of action similar to *Edmonds*. The adjoining state third party action law applies to a fixed structure even though the compensation recovered from the employer is pursuant to the LHWCA.

18. *White v. Bethlehem Steel Corp.*, 222 F.3d 146 (4th Cir. 2000) focuses upon an action by a harbor worker employed by one of Bethlehem Steel's subcontractors. The injury was allegedly due to Bethlehem Shipyard's failure to properly supervise the work. The court concluded that the injured worker was a "borrowed servant" of Bethlehem Shipyard; therefore, his action against the "borrowing employer" was limited to compensation pursuant to the Longshore Act. The authority of the "borrowing employer" need only encompass the worker's performance of the particular work in which he was engaged at the time of the accident. In other words, the issue is whether the worker was for all practical purposes an employee of the borrowing company. The court also states that "[T]hus, a central purpose of these changes to the LHWCA was to `minimize the need for litigation as a means for providing compensation for injured workmen.'"

1/ The Outer Continental Shelf Lands Act covers personal injuries on fixed structures. On the subject of worker's compensation benefits from the employer, state compensation is applicable within that state's coastal waters, while compensation payments are made pursuant to the LHWCA if the fixed structure is situated outside state territorial waters. The adjoining state's substantive law applies to fixed structures over navigable water if there is no "inconsistency" with federal law.

OFFSHORE WORKERS ON ARTIFICIAL ISLANDS

This chapter will deal with remedies for workers on fixed rigs/artificial islands, as contrasted with remedies of workers on mobile rigs (workers on mobile structures are generally considered to be seamen and are entitled to the remedies discussed earlier in this book). With the growth of offshore oil exploration and production off the U.S. coast, an increasing number of personal injury and death claims have been brought in both state and federal courts. The appropriate route for, and amount of, recovery depends not only upon the location of the tort, but also upon the type of structure on which it occurs. The focus of this section is upon the coastal waters of the United States, an area covered by the Outer Continental Shelf Lands Act, 43 U.S.C. 1331, *et seq.*

The territorial waters of each coastal state generally extend three miles from shore, although the seaward limit for Texas and Florida is 10.4 miles. *United States v. Louisiana*, 363 U.S. 1 (1960). Workers injured on fixed structures within the U.S. territorial waters who are not "seamen" must seek benefits from their employers under the adjoining state's compensation scheme or under the LHWCA. *See, Herb's Welding v. Gray*, 470 U.S. 414 (1985). Generally speaking, the only cause of action for compensation of a worker assigned to a fixed structure within the territorial waters of an adjoining state is compensation pursuant to that state's law. This statement assumes that the employee is not a seaman and does not come within the status test of the Longshore Act. Workers injured on a fixed structure on the Shelf outside state territorial waters have an action for compensation against their employer pursuant to the LHWCA. <u>Third party negligence actions for injuries on fixed structures</u> are also subject to the laws and limits of the adjoining state irrespective of the structure's location on the Shelf. A 905(b) negligence action is available to a worker injured on a vessel and covered by the Longshore Act; the location of the vessel on the Shelf is of no consequence; however, even though a worker is covered by the Longshore Act's compensation benefits for any injury on a fixed structure outside of state territorial waters, the worker's third-party action is governed by the law of the adjoining state.

Employees injured on fixed structures outside a state's territorial waters can seek compensation from their employer only through the LHWCA, which is made applicable to platform injuries occurring outside state territorial waters on the Outer Continental Shelf of the United States by the Outer Continental Shelf Lands Act (OCSLA), 4 3 U.S. C. S 1333(b). *Barger v. Petroleum Helicoloters, Inc.*, 692 F. 2d (5th Cir. 1982); *Gaudet v. Exxon Corp.*, 562 F. 2d 353 (5th Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). Third party actions arising within or beyond state's territorial waters on fixed structures are governed by the adjoining state's laws and limitations, OCSLA, 43 U.S.C. S 1333 (a)(2)(A) (See the text in the footnote below.) *Chevron Oil v. Huson*, 404 U.S. 97 (1971). Such surrogate law must not be inconsistent with federal law; in the event of an inconsistency, federal law will apply instead. Artificial islands situated within or beyond state territorial waters are not within maritime jurisdiction. Hence neither the general maritime law nor the Death on the High Seas Act (DOHSA) is applicable. *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969).

There are problems in applying the state law in an indiscriminate manner to third party actions falling within the purview of the OCSLA. If the state's cause of action is not inconsistent with federal law, the cause of action is borrowed in its entirety. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981). If an offshore worker assigned to an artificial island is injured while on a vessel, Jones Act jurisdiction does not apply unless the worker is a "seaman." The situs of the accident aboard a vessel on the Shelf is of no consequence; the injured worker assuming no Jones Act coverage, may receive compensation under the LHWCA from his employer and pursue third party negligence claims pursuant to 905(b) against the vessel owner. An injury on a fixed structure within a state's territorial waters does not automatically preclude an action for compensation under the LHWCA provided the "status" and "situs" requirements of the LHWCA are met. *See Herb's Welding, supra.*

The OCSLA does not pertain to the rights of a "seaman," since this category of worker can claim the Jones Act recovery against his employer irrespective of the vessel's location or location of the accident. .

Attention is directed to 43 U.S.C. § 1333(a)(1) (the OCSLA), which applies to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon . . ., or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources. . . . " (emphasis supplied).

43 § SUBMERGED LANDS

§ 1333. Laws and regulations governing lands

(a) Constitution and United States laws; laws of adjacent States; publication of projected State lines; international boundary disputes; restriction on State taxation and jurisdiction

(1) The Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however*, That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2)(A) to the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

(B) Within one year after September 18, 1978, the President shall establish procedures for setting any outstanding international boundary dispute respecting the outer Continental Shelf.

(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

(b) Longshore and Harbor Workers' Compensation Act applicable; definitions

With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the Longshore and Harbor Workers' Compensation Act [33 U.S.C.A. § 901 et seq.]. For the purposes of the extension of the provisions of the Longshore and Harbor Workers' Compensation Act under this section -

(1) the term "employee" does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;

(2) the term "employer" means an employer any of whose employees are employed in such operations; and

(3) the term "United States" when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures thereon.

§ 1349. Citizens suits, jurisdiction and judicial review

(b) Jurisdiction and venue of actions

(1) Except as provided in subsection (c) of this section, the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals, or (B) the cancellation, suspension, or termination of a lease or permit under this subchapter. Proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose.

(2) Any resident of the United States who is injured in any manner through the failure of any operator to comply with any rule, regulation, order, or permit issued pursuant to this subchapter may bring an action for damages (including reasonable attorney and expert witness fees) only in the judicial district having jurisdiction under paragraph (1) of this subsection.

[404 US 97]

CHEVRON OIL COMPANY, Petitioner,

v

GAINES TED HUSON

404 US 97, 30 L Ed 2d 296, 92 S Ct 349

[No. 70–11]

Argued October 20, 1971. Decided December 6, 1971.

OPINION OF THE COURT

[404 US 98]

Mr. Justice Stewart delivered the opinion of the Court.

The respondent, Gaines Ted Huson, suffered a back injury while working on an artificial island drilling rig owned and operated by the petitioner, Chevron Oil Co., and located on the Outer Continental Shelf off the Gulf Coast of Louisiana. The injury occurred in December 1965. Allegedly, it was not until many months later that the injury was discovered to be a serious one. In January 1968 the respondent brought suit for damages against the petitioner in federal district court. The respondent's delay in suing the petitioner ultimately brought his case to this Court.

The issue presented is whether the respondent's action is time barred and, more particularly, whether state or federal law determines the timeliness of the action. That issue must be resolved under the Outer Continental Shelf Lands Act, 67 Stat 462, 43 USC § 1331 et seq. (hereinafter "Lands Act"), which governs injuries occurring
[404 US 99]
on fixed structures on the Outer Continental Shelf. When this lawsuit was initiated, there was a line of federal court decisions interpreting the Lands Act to make general admiralty law, including the equitable doctrine of laches, applicable to personal injury suits such as the respondent's. The petitioner did not question the timeliness of the action as a matter of laches. While pretrial discovery proceedings were still under way, however, this Court announced its decision in Rodrigue v Aetna Casualty & Surety Co., 395 US 352, 23 L Ed 2d 360, 89 S Ct 1835. That decision entirely changed the complexion of this case. For it established that the Lands Act does *not* make admiralty law applicable to actions such as this one. Relying on Rodrigue, the District Court held that Louisiana's one-year limitation on personal injury actions, rather than the admiralty doctrine of laches, must govern this case. It concluded, therefore, that the respondent's action was time barred and granted summary judgment for the petitioner.

[1, 2] On appeal, the respondent argued that Rodrigue should not be applied retroactively to bar actions filed before the date of its announcement. But the Court of Appeals declined to reach that question. Instead, it held that the interpretation of the Lands Act in Rodrigue does not compel application of the state statute of limitations or prevent application of the admiralty doctrine of laches. It concluded that the doctrine of laches should have

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been applied by the District Court and, therefore, reversed that court's judgment and remanded the case for trial. 430 F2d 27. We granted certiorari to consider the Court of Appeals' construction of the Lands

[404 US 100]

Act and of Rodrigue. 402 US 942, 29 L Ed 2d 109, 91 S Ct 1608. We hold that the Lands Act, as interpreted in Rodrigue, requires that the state statute of limitations be applied to personal injury actions. We affirm the judgment of the Court of Appeals, however, on the ground that Rodrigue should not be invoked to require application of the Louisiana time limitation retroactively to this case.

I

[3] The Lands Act makes the Outer Continental Shelf, including fixed structures thereon, an area of exclusive federal jurisdiction, 43 USC § 1333 (a) (1). The Act extends the laws of the United States to this area, 43 USC § 1333 (a) (1), and provides that the laws of the adjacent State shall also apply "[t]o the extent that they are applicable and not inconsistent" with applicable federal laws, 43 USC § 1333 (a) (2).[4] To the extent

[404 US 101]

that a comprehensive body of federal law is applicable under § 1333 (a) (1), state law "inconsistent" with that law would be inapplicable under § 1333 (a) (2).

In Rodrigue, we clarified the scope of application of federal law and state law under § 1333 (a) (1) and § 1333 (a) (2). By rejecting the view that comprehensive admiralty law remedies apply under § 1333 (a) (1), we recognized that there exists a substantial "gap" in federal law. Thus, state law remedies are not "inconsistent" with applicable federal law. Accordingly, we held that, in order to provide a remedy for wrongful death, the "gap" must be filled with the applicable body of state law under § 1333 (a) (2).

The Court of Appeals acknowledged that Rodrigue clearly establishes that the remedy for personal injury, as for wrongful death, cannot be derived from admiralty law but must be governed by the law of the adjacent State, Louisiana. But the court held that Louisiana's time limitation on personal injury actions need not be applied with the substantive remedy. It supported this holding by reference to the terms of § 1333 (a) (2) that limit the applica-

4. The full text of § 1333(a)(1) and § 1333(a)(2) reads:

"(a) (1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however*, That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

"(2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State as of August 7, 1953 are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artifical islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf."

tion of state law under the Lands Act. The Louisiana time limitation, the Court of Appeals reasoned, is not "applicable" of its own force and is "inconsistent" with the admiralty doctrine of laches. The court held that, despite the holding in Rodrigue, the laches doctrine is applicable as a matter of federal common law. We must disagree.

[4] The Court of Appeals did not suggest that state statutes of limitations are per se inapplicable under § 1333(a)(2). Rather, it focused on the peculiar nature of

[404 US 102]

the Louisiana time limitation on personal injury actions found in Art 3536, La. Civ. Code Ann. Article 3536 provides that personal injury actions shall be "prescribed" by one year. The Court of Appeals attached much significance to the fact that Art 3536 "prescribes," rather than "perempts," such actions. Under Louisiana law, "prescription," unlike "peremption," bars the remedy but does not formally extinguish the right to recovery. See Page v Cameron Iron Works, 259 F2d 420, 422–424; Istre v Diamond M. Drilling Co. 226 So 2d 779, 794–795 (La App); Succession of Pizzillo, 223 La 328, 335, 65 So 2d 783, 786. This characterization has importance under principles of the conflict of laws. It has been held, as a matter of Louisiana conflicts law, that mere "prescriptive" time limitations are not binding outside their own forum. See Fidelity & Casualty Co. v C/B Mr. Kim, 345 F2d 45, 50; Kozan v Comstock, 270 F2d 839, 841; Istre v Diamond M. Drilling Co., supra, at 795. Reasoning from this principle of conflicts law, the Court of Appeals concluded that the "prescriptive" limitation is not "applicable" in a federal court adjudicating a claim under the Lands Act.

[1, 5] We hold, however, that the "prescriptive" nature of Art 3536 does not undercut its applicability under the Lands Act. Under § 1333(a)(2) of the Act, "[s]tate law bec[omes] federal law federally enforced." Rodrigue v Aetna Casualty & Surety Co., supra, at 365, 23 L Ed 2d at 370. It was the intent of Congress, expressed in the Senate Committee Report, in the Conference Report, and on the floor of the Senate, that state laws be "adopted" or "enacted" *as federal law*. See id., at 357–358, 23 L Ed 2d at 365. Thus a federal court applying Louisiana law under § 1333(a)(2) of the Lands Act is applying it as federal law—as the law of the federal forum. Since the federal court is not, then, applying the law of *another* forum in

[404 US 103]

the usual sense, ordinary conflict of laws principles have no relevance. Article 3536 is "applicable" in federal court under the Lands Act just as it would be applicable in a Louisiana court.[5]

The policies underlying the federal absorption of state law in the Lands Act make this result particularly obvious. As we pointed out in Rodrigue, Congress recognized that " 'the Federal Code was never designed to be a complete body of law in and of itself' " and thus that a comprehensive body of state law was needed. Id., at 358, 361, 23 L Ed 2d at 365, 367. Congress also

[1] 5. This is not to imply that a federal court adjudicating a claim under state law as absorbed in the Lands Act must function as it would in a diversity case. See Erie R. Co. v Tompkins, 304 US 64, 82 L Ed 1188, 58 S Ct 817, 114 ALR 1487; Guaranty Trust Co. v York, 326 US 99, 89 L Ed 2079, 65 S Ct 1464, 160 ALR 1231; Levinson v Deupree, 345 US 648, 651, 97 L Ed 1319, 1323, 73 S Ct 914. We hold only that the state statute of limitations is part of the law to be applied in federal court as it would be part of the law to be applied in a state court.

recognized that the "special relationship between the men working on these artificial islands and the adjacent shore to which they commute" favored application of state law with which these men and their

but specifies no particular statute of limitations to govern actions under the right, the general rule is to apply the state statute of limitations for

[404 US 105]

courts fill in those "gaps" themselves by creating new federal common law.[8]

II

Although we hold that Louisiana's one-year statute of limitations must be applied under the Lands Act as interpreted in Rodrigue, we do not blind ourselves to the fact that this is, in relevant respect, a pre-Rodrigue case. The respondent's injury occurred more than three years before the announcement of our decision in Rodrigue. He instituted the present lawsuit more than one year before Rodrigue. Yet, if the Louisiana statute of limitations controls in this case, his action was time barred more than two years before Rodrigue. In these circumstances, we must consider the respondent's argument that the state statute of limitations should be given nonretroactive application under Rodrigue.

[11–13] In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, e. g., Hanover Shoe v United Shoe Machinery Corp., supra, at 496, 20 L Ed 2d at 1243, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., Allen v State Board of Elections, supra, at 572, 22 L Ed 2d at 20. Second, it has been stressed that "we must . . . weigh the merits

[404 US 107]

. . . and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Linkletter v Walker, supra, at 629, 14 L Ed 2d at 608. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." Cipriano v City of Houma, supra, at 706, 23 L Ed 2d at 652.

[2, 14] Upon consideration of each of these factors, we conclude that the Louisiana one-year statute of limitations should not be applied retroactively in the present case. Rodrigue was not only a case of first impression in this Court under the Lands Act, but it also effectively overruled a long line of decisions by the Court of Appeals for the Fifth Circuit holding that admiralty law, including the doctrine of laches, applies through the Lands Act. See, e. g., Pure Oil Co. v Snipes, 293 F2d

8. Contrary to the suggestion by Mr. ... at 651–652, 97 L Ed at 1823, 1824. As

60; Movible Offshore Co. v Ousley, 346 F2d 870; Loffland Bros. Co. v Roberts, 386 F2d 540. When the respondent was injured, for the next two years until he instituted his lawsuit, and for the ensuing year of pretrial proceedings, these Court of Appeals decisions represented the law governing his case. It cannot be assumed that he did or could foresee that this consistent interpretation of the Lands Act would be overturned. The most he could do was to rely on the law as it then was. "We should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights." Griffin v Illinois, 351 US 12, 26, 100 L Ed 891, 903, 76 S Ct 585, 55 ALR 2d 1055 (Frankfurter, J., concurring in judgment).

[15] To hold that the respondent's lawsuit is retroactively time barred would be anomalous indeed. A primary purpose underlying the absorption of state law as federal

[404 US 108]

law in the Lands Act was to aid injured employees by affording them comprehensive and familiar remedies. Rodrigue v Aetna Casualty & Surety Co., supra, at 361, 365, 23 L Ed 2d at 367, 369. Yet retroactive application of the Louisiana statute of limitations to this case would deprive the respondent of any remedy whatsoever on the basis of superseding legal doctrine that was quite unforeseeable. To abruptly terminate this lawsuit that has proceeded through lengthy and, no doubt, costly discovery stages for a year would surely be inimical to the beneficent purpose of the Congress.

It would also produce the most "substantial inequitable results," Cipriano v City of Houma, supra, at 706, 23 L Ed 2d at 652, to hold that the respondent "slept on his rights" at a time when he could not have known the time limitation that the law imposed upon him. In Cipriano v City of Houma, supra, we invoked the doctrine of nonretroactive application to protect property interests of "cities, bondholders, and others connected with municipal utilities"; and, in Allen v State Board of Elections, supra, we invoked the doctrine to protect elections held under possibly discriminatory voting laws. Certainly, the respondent's potential redress for his allegedly serious injury—an injury that may significantly undercut his future earning power—is entitled to similar protection. As in England v State Board of Medical Examiners, supra, nonretroactive application here simply preserves his right to a day in court.[10]

[404 US 109]

Both a devotion to the underlying purpose of the Lands Act's absorption of state law and a weighing of the equities requires nonretroactive application of the state statute of limitations here. Accordingly, although holding that the opinion of the Court of Appeals reflects a misapprehension of Rodrigue, we affirm its judgment remanding this case to the trial court.

It is so ordered.

STOP

10. We do *not* hold here that Rodrigue, in its entirety, must be applied nonretroactively. Rather, we hold only that state statutes of limitations, applicable under Rodrigue's interpretation of the Lands Act, should not be applied retroactively. Retroactive application of all state substantive remedies under Rodrigue would not work a comparable hardship or be so inconsistent with the purpose of the Lands Act.

Mary E. BARGER, Plaintiff-Appellee, Cross-Appellant,

v.

PETROLEUM HELICOPTERS, INC., Defendant-Appellant, Cross-Appellee.

No. 81-2262.

United States Court of Appeals, Fifth Circuit.

Nov. 10, 1982.

Rehearing and Rehearing En Banc

ana to platforms located in the Gulf of Mexico on the outer Continental Shelf. While he was flying a helicopter carrying eleven passengers, the helicopter crashed into the Gulf forty miles offshore, killing all aboard. Barger's widow and children seek damages in admiralty for his death from his employer, Petroleum Helicopters,[1] contending that Barger was a Jones Act seaman and also asserting maritime tort claims for the alleged unseaworthiness of the helicopter. After trial on the merits, the district

... of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act [33 U.S.C.A. §§ 901–950 (West 1978 & Supp.1982) (LHWCA)]." 43 U.S.C.A. § 133(b).[3] Section 933(i) of the LHWCA provides that this compensation is the exclusive remedy of an injured employee against his employer. 33 U.S.C.A. § 933(i). Therefore, if Barger was covered by 43 U.S.C. § 1333(b), there can be no recovery against his employer under general maritime law. Even if admiralty jurisdiction existed because Barger's death resulted from an aircraft crash on the high seas, *see Smith,* 684 F.2d at 1109, recovery would be barred by § 933(i) and the claim would fail on the merits.

[1] The *Barger* plaintiffs argue that Barger was a Jones Act seaman, and therefore excluded from coverage under 43 U.S.C. § 1333(b). That section provides that the term "employee" does not include "a master or member of a crew of any vessel." 43 U.S.C. § 1333(b)(1). For the same reasons discussed in *Smith,* 684 F.2d at 1112–14, we conclude that a helicopter cannot be considered a "vessel," and, therefore, that this exclusion from LHWCA coverage does not extend to Barger.

[2] *Smith* involved several claims. Jordan, whose claim was asserted by his beneficiary (Smith), was flying a plane. Kolb and Barger were both piloting helicopters. Jordan's aircraft, like Barger's, had attachments enabling it to land on and take off from water. Kolb's helicopter apparently had no such attachment. But each of these aircraft, whether or not fitted with pontoons, was designed primarily to fly through the air not to travel on water. The dissent of our respected colleague apparently assumes that a helicopter sans pontoons used for the self-same purpose, to transport personnel to and from offshore platforms, is not a vessel. Neither a plane nor a helicopter undergoes a miraculous transformation from aircraft into vessel when pontoons are attached to it, and their pilots do not by this act become members of a "vessel's" crew. The helicopter's amphibian adaptations were designed solely to permit it to take off from and land on water and to taxi on water in order to position itself for loading and unloading with a view to travel through the air. It was an aircraft that might use the surface of the water for a time to facilitate airborne commerce. An airplane does not become an automobile because it has wheels attached and can taxi on runways. The wheels no more change aircraft into land vehicles than pontoons change aircraft into vessels. Just as a vessel does not lose its nautical quality merely because it is anchored for a time to serve as a drilling platform, an aircraft does not become a vessel because it is adapted to float and taxi on the water for brief periods in order to perform incidental functions that aid in its primary mission. The Jones Act was designed to aid those who face the hazards of the sea, not the perils of the air. Barger did not meet death from a collision at sea or the action of the waves but as a result of an aircraft disaster. *See* Symposium, *Aircraft as Vessels Under the Jones Act and General Maritime Law,* 22 S.Tex. L.J. 595, 600–03 (1982).

[3] It remains only to be determined, then, whether the claim against Barger's employer is covered by the OCSLA. This depends on (1) whether Barger's death was the "result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting ... the natural resources ... of the outer Continental Shelf," and (2) whether Barger's employer, Petroleum Helicopters, was an "employer" within the intendment of 43 U.S.C. § 1333(b)(2).

3. The section continues:

For the purposes of the extension of the provisions of the Longshoremen's and Harbor Workers' Compensation Act under this section—

(1) the term "employee" does not include a master or member of a crew of any vessel ...;

(2) the term "employer" means an employer any of whose employees are employed in [exploring for, developing, removing, or transporting by pipeline the natural resources ... of the subsoil and seabed of the outer Continental Shelf].

43 U.S.C.A. § 1333(b) (West Supp.1982).

The first of these conditions is clearly met. In *Stansbury v. Sikorski Aircraft,* 681 F.2d 948 (5th Cir.1982), a Chevron Oil Company employee was killed when the Chevron-owned helicopter in which he was a passenger crashed on the high seas over the Shelf. We held that the compensation act provided Stansbury's sole remedy against his employer, Chevron, because Stansbury had been inspecting work done under his supervision on a fixed rig located on the Shelf. "His work furthered the rig's operations and was in the regular course of the extractive operations on the [Shelf]. *But for those operations,* he would not have been in the helicopter. His death, therefore, occurred 'as a result of operations' as required by the OCSLA." *Id.* at 951 (emphasis added). Barger likewise would not have been killed in a helicopter crash in the Gulf of Mexico "but for" the fact that he was employed to transport eleven workers to a fixed platform on the Shelf. His work furthered mineral exploration and development activities and was in the regular course of such activities.

With respect to the second condition for OCSLA coverage, the term "employer" means "an employer any of whose employees are employed in [operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting . . . the natural resources . . . of the outer Continental Shelf]." 43 U.S.C. § 1333(b)(2). Unlike the employer in *Stansbury,* Barger's employer, Petroleum Helicopters, was not itself engaged in mineral operations. However, helicopter transportation of men and equipment from the mainland to the offshore rigs and back plays an important role in "developing" the Shelf. This transportation is an "operation conducted . . . for the purpose of" natural resource development. Helicopter pilots involved in these operations perform the same function with respect to resource development whether employed directly by a producer or by a separate contractor, and should not be treated differently on the basis of who their immediate employer is. We decline to inject another element of inconsistency into an area already beset by more than its fair share of incongruous results.[4]

Aside from the fact that this case involves an employer and employee, the only kind of claim to which the compensation remedy applies, there is another important distinction between Barger's claim and the claim in *Smith.* The OCSLA compensation coverage provision already quoted is expansive. It extends to *every* injury or death "occurring as a result of operations . . . for the purpose of exploring for, developing, removing, or transporting . . . natural resources." 43 U.S.C.A. § 1333(b). The state law extension clause, however, is considerably narrower, providing *only* for the application of state law to "the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon." 43 U.S.C. § 1333(a). Thus state law is made applicable only to workers in certain areas and not to all employees engaged in mineral development, while the compensation statute reaches any employee killed or injured while exploiting the Shelf's resources.

We, therefore, hold that Barger's exclusive remedy against his employer was LHWCA compensation.[5] The district court's judgment is REVERSED and the case is REMANDED for further proceedings not inconsistent with this opinion.

STOP

4. *See generally* Robertson, *Injuries to Marine Petroleum Workers: A Plea for Radical Simplification,* 55 Tex.L.Rev. 973, 973 (1977) ("Since the oil industry went offshore, the legal system has struggled to produce a body of injury law that is rational, fair, internally consistent, and acceptably productive of safety incentives. The result has been chaos.") (footnote omitted).

5. The district court held in the alternative that, even if Barger were covered by the LHWCA, section 905(b) of that act gives a covered employee the right to bring an action against the "vessel owner" for negligence. Citing *Smith v. M/V Captain Fred,* 546 F.2d 119 (5th Cir.1977), the court noted that the "circumstances that the vessel owner and the employer are the same entity does not preclude such an action." However, section 905(b) is simply irrelevant here unless a helicopter is a "vessel." We have concluded that it is not. *See* text *supra* and *Smith,* 684 F.2d at 1112–13. Therefore, workers' compensation remains Barger's sole remedy against his employer.

JOHN R. BROWN, Circuit Judge, dissenting;

To the dual holding[1] that the helicopter was not a "vessel" and Barger, its pilot, was not a "seaman", I must respectfully dissent.

To narrow the point of difference, I wish to make clear the extensive areas in which I am in full agreement with Judge Rubin's scholarly analysis. Without a doubt, 43 U.S.C. § 1333(b) of the Outer Continental Shelf Lands Act (OCSLA) brings into play § 933(i) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) which prescribes the exclusive remedy for injury and death cases by the Act. I quite agree that Barger's death was the "result of operations conducted on the Outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting . . . the natural resources . . . of the Outer Continental Shelf . . .", 43 U.S.C. § 1333(b); and that his employer, Petroleum Helicopters, Inc., was engaged in such operations in performing the essential service of transporting men and equipment from the mainland to the offshore rigs.

At the same time, I agree the case is not controlled by the local law of the adjacent state (Louisiana) as "surrogate" federal law under the OCSLA, 43 U.S.C. § 1333(a)(2)(A). See text accompanying n. 25, 684 F.2d at 1109. *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969).[2] I also agree that the Kolb claim against the third party in *Smith* for the death of a helicopter pilot in waters off the Outer Continental Shelf was a maritime claim within the jurisdiction of the admiralty. 684 F.2d 1111–12.

And I embrace wholeheartedly the Court's conclusion that the suit by the helicopter owner in the Kolb claim of *Smith* for loss of a helicopter was within the admiralty jurisdiction. *Id.* at 1112. All of this means that for the death of Barger the Longshoremen's Act is the exclusive remedy against the employer, Petroleum Helicopters, Inc., *unless* he was ". . . a master or member of the crew of [a] vessel . . . ." 43 U.S.C. § 1333(b)(1).

This dramatizes the narrow, but significant, difference in our views. The Court having held (i) in the Kolb third party death action that the claim under DOHSA was within the admiralty and it was so maritime as to be beyond the reach of adjacent surrogate law, 43 U.S.C. § 1333(a)(2)(A); and having held (ii) in the claim for the owner's loss of the helicopter that the helicopter was engaged "in a maritime-type function, transporting persons over the sea", 684 F.2d at 1111, because the aircraft was "being used in place of a vessel to ferry personnel and supplies to and from offshore drilling structures, . . ." and this bore ". . . the type of significant relationship to traditional maritime activity . . . necessary to invoke admiralty jurisdiction . . .", *Id.* at 1112, the case suddenly loses its admiralty character by the interposition of the Longshoremen's Act.

It is no answer that this is what Congress has prescribed since the LHWCA provides itself that seamen are excluded. The helicopter is doing what a vessel would ordinarily do—transport persons and property to and from the mainland and the offshore structure. The pilot is doing what the master and crew of a vessel would do, namely, operate the craft. Each activity is maritime and maritime related. Each meets the exclusions and principles set forth in *Executive Jet Aviation, Inc. v. City of Cleveland*,

1. The dual determination was based, in effect, on the almost contemporaneous holding of the Court as to the Smith claim in *Smith v. Pan Air Corporation*, 684 F.2d 1102, 1112, n. 39 (5th Cir.1982). Of necessity, this dissent attacks that determination. Instead of concurring specially because of a decision binding on me until altered by the Court en banc, I am dissenting, since with the filing of this dissent I will seek formally rehearing en banc, F.R.A.P. Rule 35, of the instant case which will inevitably bring into question the correctness of the *Smith* decision.

2. The Court states:

> Unlike both Monk and the workers considered in *Rodrigue*, the helicopter pilot was engaged in a maritime-type function, transporting persons over the seas.
>
> We hold, therefore, that admiralty jurisdiction over Kolb's claim against nonemployer third parties is not ousted by section 1333(a) of the OCSLA.

684 F.2d at 1111–12 (note omitted).

[470 US 414]

HERB'S WELDING, INC., et al., Petitioners

v.

ROBERT H. GRAY, Jr., et al.

470 US 414, 84 L Ed 2d 406, 105 S Ct 1421

[No. 83-728]

Argued October 3, 1984. Decided March 18, 1985.

OPINION OF THE COURT

[470 US 415]

Justice White delivered the opinion of the Court.

[1a] The Longshoremen's and Harbor Workers' Compensation Act (LHWCA or Act), 44 Stat 1424, as amended, 33 USC § 901 et seq. [33 USCS §§ 901 et seq.], provides compensation for the death or disability of any person engaged in "maritime employment," § 902(3), if the disability or death results from an injury incurred upon the navigable waters of the United States or any adjoining pier or other area customarily used by an employer in loading, unloading, repairing, or building a vessel, § 903(a). Thus, a worker claiming under the Act must satisfy

[470 US 416]

both a "status" and a "situs" test. The court below held that respondent Robert Gray, a welder working on a fixed offshore oil-drilling platform in state territorial waters, was entitled to benefits under the Act. We reverse for the reason that Gray was not engaged in maritime employment.

I

Respondent Gray worked for Herb's Welding, Inc., in the Bay Marchand oil and gas field off the Louisiana coast. Herb's Welding provided welding services to the owners of drilling platforms. The field was located partly in Louisiana territorial waters, i. e., within three miles of the shore, and partly on the Outer Continental Shelf. Gray ate and slept on a platform situated in Louisiana waters. He spent roughly three-quarters of his working time on platforms in state waters and the rest on platforms on the Outer Continental Shelf. He worked exclusively as a welder, building and replacing pipelines and doing general maintenance work on the platforms.

[2a, 3a] On July 11, 1975, Gray was welding a gas flow line on a fixed platform located in Louisiana waters. He burnt

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through the bottom of the line and an explosion occurred. Gray ran from the area, and in doing so hurt his knee. He sought benefits under the LHWCA for lost wages, disability, and medical expenses. When petitioner United States Fidelity & Guaranty Co., the workers' compensation carrier for Herb's Welding, denied LHWCA benefits, Gray filed a complaint with the Department of Labor. The Administrative Law Judge (ALJ), relying on our decision in Rodrigue v Aetna Casualty & Surety Co. 395 US 352, 23 L Ed 2d 360, 89 S Ct 1835 (1969), ruled that because Gray's work was totally involved in the exploration for, and development and transmission of, oil and gas from submerged lands, it was not relevant to traditional maritime law and lacked any significant maritime connection. Gray therefore did not satisfy the LHWCA's status requirement.

The Benefits Review Board reversed on other grounds. 12 BRBS 752 (1980). By a vote of 2–1, it concluded that irrespective of the nature of his employment, Gray could recover by virtue of a provision of the Outer Continental Shelf Lands Act, 67 Stat 462, 43 USC § 1331 et seq. [43 USCS §§ 1331 et seq.] (Lands Act), that

[470 US 418]

grants LHWCA benefits to offshore oil workers injured on the Outer Continental Shelf.[4] Although Gray had been injured in state waters, the Board felt that his injury nonetheless could be said to have occurred, in the words of the statute, "as a result of" operations on the outer shelf. It considered his work "integrally related" to such operations. 12 BRBS, at 757. The dissenting Board member argued that the Lands Act provides LHWCA benefits only for injuries actually occurring in the geographic area of the outer shelf. Id., at 761-763.

The Board reaffirmed its position after the case was remanded to the ALJ for entry of judgment and calculation of benefits, and petitioners sought review in the Court of Appeals for the Fifth Circuit. That court affirmed, relying directly on the LHWCA rather than on the Lands Act. 703 F2d 176 (1983). With regard to the Act's situs requirement, it noted that this Court had compared drilling platforms to wharves in Rodrigue v Aetna Casualty & Surety Co., supra. Given that the 1972 Amendments to the LHWCA extended coverage to accidents occurring on wharves, it would be incongruous if they did not also reach accidents occurring on drilling platforms. Also, since workers injured on movable barges, on fixed platforms on the Outer Continental Shelf, or en route to fixed platforms, are all covered, there would be a "curious hole" in coverage if someone in Gray's position was not. 703 F2d, at 177–178. As for Gray's status, the Court of Appeals, differing with the ALJ, held that Gray's work bore "a realistically significant

[470 US 419]

relationship to traditional maritime activity involving navigation and commerce on navigable waters," id., at 179–180, because it was an integral part of the offshore drilling process, which, the court had held in Pippen v Shell Oil Co. 661 F2d 378 (1981), was itself maritime commerce. We granted certiorari. 465 US 1098, 80 L Ed 2d 122, 104 S Ct 1589 (1984).

II

A

When extractive operations first moved offshore, all claims for injuries on fixed platforms proceeded under state workers' compensation schemes. See Hearings, at 396, 409, 411. See also Robertson 993. With the 1953 passage of the Lands Act, Congress extended LHWCA coverage to oil workers more than three miles offshore. 43 USC § 1333(b) [43 USCS § 1333(b)]. Because until 1972 the LHWCA itself extended coverage only to accidents occurring on navigable waters, 33 USC § 903 (1970 ed) [33 USCS § 903], and because stationary rigs were considered to be

4. The relevant section provides:

"With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the Outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act." 67 Stat 463, as amended, 43 USC § 1333(b) [43 USCS § 1333(b)].

H-00024

islands, Rodrigue v Aetna Casualty & Surety Co., supra, oil rig workers inside the 3-mile limit were left to recover under state schemes. See, e. g., Freeman v Chevron Oil Co. 517 F2d 201 (CA5 1975); Gifford v Aurand Mfg. Co. 207 So2d 160 (La App 1968). Any worker, inside or outside the 3-mile limit, who qualified as a seaman was not covered by the LHWCA, but could sue under the Jones Act, 46 USC § 688 [46 USCS § 688], the Death on the High Seas Act, 46 USC § 761 et seq. [46 USCS §§ 761 et seq.], and the general maritime law. Hearings, at 411–414, 450–459, 487; see n 1, supra. See also Wright, Jurisdiction in the Tidelands, 32 Tulane L Rev 175, 186 (1958).

So matters stood when Congress amended the LHWCA in 1972. What is known about the congressional intent behind that legislation has been amply described in our prior opinions. See, e. g., Director, OWCP v Perini North River Associates, 459 US 297, 74 L Ed 2d 465, 103 S Ct 634 (1983); Sun Ship, Inc. v Pennsylvania, 447 US 715, 717–722, 65 L Ed 2d 458, 100 S Ct 2432 (1980); Northeast Marine

[470 US 420]

Terminal Co. v Caputo, 432 US 249, 256–265, 53 L Ed 2d 320, 97 S Ct 2348 (1977). The most important of Congress' concerns, for present purposes, was the desire to extend coverage to longshoremen, harborworkers, and others who were injured while on piers, docks, and other areas customarily used to load and unload ships or to repair or build ships, rather than while actually afloat. Whereas prior to 1972 the Act reached only accidents occurring on navigable waters, the amended 33 USC § 903 [33 USCS § 903] expressly extended coverage to "adjoining area[s]." At the same time, the amended definition of an "employee" limited coverage to employees engaged in "maritime employment."

The Act, as amended, does not mention offshore drilling rigs or the workers thereon. The legislative history of the amendments is also silent, although early in the legislative process, a bill was introduced to extend the Act to all offshore oil workers. The bill died in Committee. While hardly dispositive, it is worth noting that the same Committee considered the 1972 Amendments to the LHWCA, and the possible extension of the Lands Act's application of the LHWCA to drilling platforms, apparently without it ever occurring to anyone that the two might have been duplicative. The concurrent but independent reconsideration of both the Lands Act and the LHWCA, the congressional view that the amendments to the latter involved the "[e]xtension of [c]overage to [s]horeside [a]reas," HR Rep No 92-1441, p 10 (1972), and the absence of any mention of drilling platforms in the discussion of the LHWCA, combine to suggest that the 1972 Congress at least did not intentionally extend the LHWCA to workers such as Gray.[5]

5. Petitioners view Congress' failure to extend LHWCA coverage to all offshore oil workers as an explicit rejection of the position adopted by the court below. However, it appears that the bill, S 1547, was designed not so much to increase the benefits of those not covered, as to limit the remedies of those workers who could qualify as seamen and so were not confined to the workers' compensation scheme. See 117 Cong Rec 10490–10491 (1971) (statement of Sen. Tower); Hearings, at 396–403, 418–419, 602. The bill was opposed because it would limit recoveries by those who did better without LHWCA coverage. Id., at 589–590, 602. See generally Boudreaux v American Workover, Inc. 680 F2d 1034, 1053 (CA5 1982).

graphical boundary that will predictably result in workers moving in and out of coverage.

As we have said before in this area, if Congress' coverage decisions are mistaken as a matter of policy, it is for Congress to change them. We should not legislate for them. See Victory Carriers, Inc. v Law, 404 US 202, 216, 30 L Ed 2d 383, 92 S Ct 418 (1971).

IV

[11] Because Gray's employment was not "maritime," he does not qualify for benefits under the LHWCA. We need not determine whether he satisfied the Act's situs requirement. We express no opinion on his argument that he is covered by 43 USC § 1333(b) [43 USCS § 1333(b)]. The judgment is reversed, and the

[470 US 428]

case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

SEPARATE OPINION

Justice Marshall, with whom Justice Brennan, Justice Blackmun, and Justice O'Connor join, dissenting.

Today the Court holds that a marine petroleum worker is not covered by the Longshoremen's and Harbor Workers' Compensation Act (LHWCA or Act), 44 Stat 1424, as amended, 33 USC § 901 et seq. [33 USCS §§ 901 et seq.], when pursuing his occupation on a fixed offshore rig within the 3-mile limit of a State's territorial waters. Although such an individual routinely travels over water as an essential part of his job and performs the rest of his job adjacent to and surrounded by water, he is not covered because, in the Court's view, his occupation is not "maritime employment." See § 2(3), 33 USC § 902(3) [33 USCS § 902(3)]. The Court reaches this conclusion even though a worker of the same occupation, working in the same industry, and performing the same tasks on a rig located in the same place, would be covered if that rig were one that was capable of floating.[1] Neither the Court, nor any of the parties have identified any reason why Congress might have

[470 US 429]

desired this distinction. To the contrary, a principal congressional goal behind the 1972 Amendments was to rid the Act of just such arbitrary distinctions derived from traditional admiralty jurisprudence. Because the coverage pattern that the Court adopts is at odds with the Act's 1972 Amendments, and because the accident here meets the Amendments'

1. "Floating" petroleum rigs are classified as vessels in admiralty jurisprudence, see Producers Drilling Co. v Gray, 361 F2d 432, 437 (CA5 1966), and as such have long been within the Act's coverage. Ante, at 416-417, n 2, 84 L Ed 2d, at 410. It must be emphasized, however, that in admiralty law, the classification of a structure as "floating" turns only on its capacity to float, and not on the relevance of bouyancy to its typical use or its state at the time of an injury. Many "floating" offshore petroleum rigs are so classified because they are floated to their drilling sites; but once there, they are elevated above the water and supported by legs that rest on the ocean bottom. See Producers Drilling Co., supra, at 437 (classification includes "'almost any structure that once floated or is capable of floating on navigable waters . . .' and . . . includes 'special purpose structures not usually employed as a means of transport by water but designed to float on water'") (quoting Offshore Co. v Robison, 266 F2d 769, 771 (CA5 1959). See also n 14, infra.

status and situs tests, I respectfully dissent.

[453 US 473]

GULF OFFSHORE COMPANY, A DIVISION OF THE POOL COMPANY, Petitioner,

v

MOBIL OIL CORPORATION et al.

453 US 473, 69 L Ed 2d 784, 101 S Ct 2870

[No. 80-590]

Argued March 31, 1981. Decided July 1, 1981.

OPINION OF THE COURT

[453 US 475]

Justice **Powell** delivered the opinion of the Court.

[1a, 2a] This case requires us to determine whether federal courts have exclusive jurisdiction over personal injury and indemnity cases arising under the Outer Continental Shelf Lands Act, 67 Stat 462, as amended, 43 USC § 1331 et seq. (1976 ed and Supp III) [43 USCS §§ 1331 et seq.]. We also consider whether the rule of Norfolk & Western R. Co. v Liepelt, 444 US 490, 62 L Ed 2d 689, 100 S Ct 755 (1980), that the jury be instructed that personal injury damages awards are not subject to federal income taxation, is applicable to such a case.

I

Respondent, Mobil Oil Corp., contracted with petitioner, Gulf Offshore Co., for the latter to perform certain completion operations on oil drilling platforms offshore of Louisiana. As part of the agreement, petitioner promised to indemnify Mobil for all claims resulting directly or indirectly from the work. While the work was in progress in September 1975, the advent of Hurricane Eloise required that workers be evacuated from oil platforms in the Gulf of Mexico.

Steven Gaedecke was an employee of petitioner working on an oil drilling platform above the seabed of the Outer Continental Shelf. As the storm approached, a boat chartered

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by Mobil took him safely aboard. Shortly thereafter, while assisting crewmen attempting to evacuate other workers from the platforms in turbulent sea, he was washed across the deck of the vessel by a wave. He suffered injuries primarily to his back.

Gaedecke brought this suit for damages in the District Court of Harris County, a Texas state court, alleging negligence by Mobil and the boatowner. Mobil filed a third-party complaint for indemnification against petitioner.[1] In its third-party answer, petitioner denied that the state court had subject-matter jurisdiction over the third-party complaint. Petitioner argued that Mobil's cause of action arose under the Outer Continental Shelf Lands Act (OCSLA), and that OCSLA vested exclusive subject-matter jurisdiction

1. Mobil claimed indemnification on the grounds of both its contract with petitioner and the allegation that petitioner's negligence caused the accident. Prior to trial Gaedecke entered into a conditional settlement agreement with Mobil, which limited his potential recovery against Mobil to $200,000; in return Mobil agreed to proceed against petitioner for indemnification only on the basis of the contract. Gaedecke also settled his claim with the boatowner.

in a United States district court. The Texas trial court rejected this contention, and the case went to trial before a jury.

In submitting the case to the jury, the trial court denied a request by petitioner to instruct them that personal injury damages awards are not subject to federal income taxation and that they should not increase or decrease an award in contemplation of tax consequences. The jury found Mobil negligent and awarded Gaedecke $900,000 for his injuries. The jury also found, however, that Gaedecke sustained his injuries while performing work subject to the contract of indemnification. Based on the two verdicts, the trial judge entered judgment against petitioner in the amount of $900,000.

The Texas Court of Civil Appeals affirmed. 594 SW2d 496 (1979). It held that the Texas state courts had subject-matter

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jurisdiction over the causes of action.[2] It acknowledged that OCSLA governed the case, but found no explicit command in the Act that federal-court jurisdiction be exclusive. The court also observed that exclusive federal-court jurisdiction was unnecessary because the Act incorporates as federal law in personal injury actions the laws of the State adjacent to the scene of the events, when not inconsistent with other federal laws. 43 USC § 1333(a)(2) [43 USCS § 1333(a)(2)]. Thus, the court reasoned, "[t]he end result would be an application of the same laws no matter where the forum was located, whether state or federal." 594 SW2d, at 502. The court also held that the trial court did not err in refusing to instruct the jury that damages awards are not subject to federal income taxation. The Texas Supreme Court denied review.

We granted certiorari to resolve a conflict over whether federal courts have exclusive subject-matter jurisdiction over suits arising under OCSLA and to consider whether an instruction that damages are not taxable is appropriate in such a case. 449 US 1033, 66 L Ed 2d 494, 101 S Ct 607 (1980).

II

A

[3, 4] The general principle of state-court jurisdiction over cases arising under federal laws is straightforward: state courts may assume subject-matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state-court

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adjudication. Dowd Box Co. v Courtney, 368 US 502, 507–508, 7 L Ed 2d 483, 82 S Ct 519 (1962); Claflin v Houseman, 93 US 130, 136, 23 L Ed 833 (1876). This rule is premised on the relation between the States and the National Government within our federal system. See The Federalist No. 82 (Hamilton). The two exercise concurrent sovereignty, although the Constitution limits the powers of each and requires the States to recognize federal law as paramount. Federal law confers rights binding on state courts, the subject-matter jurisdiction of which is governed in the first instance by state laws.

2. Texas had in personam jurisdiction over Mobil and petitioner, each of whom does business in Texas. Gaedecke was a resident of Harris County, Tex.

[5] In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction. See California v Arizona, 440 US 59, 66–67, 59 L Ed 2d 144, 99 S Ct 919 (1979); Dowd Box Co. v Courtney, 368 US, at 507–508, 7 L Ed 2d 483, 82 S Ct 519. Congress, however, may confine jurisdiction to the federal courts either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests. See ibid.; Claflin, supra, at 137, 23 L Ed 833. See also Garner v Teamsters, 346 US 485, 98 L Ed 228, 74 S Ct 161 (1953) (grievance within jurisdiction of National Labor Relations Board to prevent unfair labor practice not subject to relief by injunction in state court).

B

[1b, 6, 7a] No one argues that Congress explicitly granted federal courts exclusive jurisdiction over cases arising under OCSLA.

[453 US 479]

Congress did grant United States district courts "original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf . . . ." 43 USC § 1333(b) [43 USCS § 1333(b)].[5] It is black letter law, however, that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action.[6] United States v Bank of New York Co., 296 US 463, 479, 80 L Ed 331, 56 S Ct 343 (1936).

OCSLA declares the Outer Continental Shelf to be an area of "exclusive federal jurisdiction." 43 USC § 1333(a)(1) [43 USCS § 1333(a)(1)].

5. Congress amended and recodified the jurisdictional provisions of OCSLA in 1978, without effecting any change that casts light on the issue of exclusive federal-court jurisdiction before us today. Pub L 95-372, Title II, § 208(b), 92 Stat 657. See S Conf Rep No. 95-1091, p 114 (1978). But cf. Pub L 95-372, Title II, § 208(a)(2)(B), 92 Stat 657 (contemplating suit by the Attorney General in state court to remedy violations of the Act). The grant of jurisdiction to a federal district court is now codified at 43 USC § 1349(b)(1) (1976 ed, Supp III) [43 USCS § 1349(b)(1)]. In this opinion, we employ the Code citations prior to the recodification.

6. [7b] This principle defeats petitioner's reliance on the provision in § 1333(a)(2): "All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States." The phrase "such applicable laws" refers to the laws of the adjacent States, which § 1333(a)(2) incorporates as federal law for the Outer Continental Shelf. See infra, at 480–481, 69 L Ed 2d, at 793. The language relied upon merely makes clear that these borrowed state laws are to be enforced like other federal laws, and nothing indicates an intent to exclude state courts from the subject-matter jurisdiction they exercise generally over federal claims.

Chevron Oil Co. v Huson, 404 US 97, 100, 30 L Ed 2d 296, 92 S Ct 349 (1971).[7]

[453 US 480]

Petitioner does contend that the assertion of exclusive political jurisdiction over the Shelf evinces a congressional intent that federal courts exercise exclusive jurisdiction over controversies arising from operations on the Shelf.

See Fluor Ocean Services, Inc. v Rucker Co. 341 F Supp 757, 760 (ED La 1972). This argument is premised on a perceived incompatibility between exclusive federal sovereignty over the Outer Continental Shelf and state-court jurisdiction over controversies relating to the Shelf. We think petitioner mistakes the purpose of OCSLA and the policies necessitating exclusive federal-court jurisdiction.

[8] OCSLA extends the "Constitution and laws and civil and political jurisdiction of the United States" to the subsoil and seabed of the Outer Continental Shelf and to "artificial islands and fixed structures" built for discovery, extraction, and transportation of minerals. 43 USC § 1333(a)(1) [43 USCS § 1333(a)(1)].

All law applicable to the Outer Continental Shelf is federal law, but to fill the substantial "gaps" in the coverage of federal law, OCSLA borrows the "applicable and not inconsistent" laws of the adjacent States as surrogate federal law.

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§ 1333(a)(2); Rodrigue v Aetna Casualty Co. 395 US 352, 355–359, 23 L Ed 2d 360, 89 S Ct 1835 (1969). Thus, a personal injury action involving events occurring on the Shelf is governed by federal law, the content of which is borrowed from the law of the adjacent State, here Louisiana. See id., at 362–365, 23 L Ed 2d 360, 89 S Ct 1835. Cf. United States v Kimbell Foods, Inc., 440 US 715, 59 L Ed 2d 711, 99 S Ct 1448 (1979) (state law incorporated as federal common law concerning priority of liens created by federal law).

[9] The OCSLA plan is not inimical to state-court jurisdiction over personal injury actions. Nothing inherent in exclusive federal sovereignty over a territory precludes a state court from entertaining a personal injury suit concerning events occurring in the territory and governed by federal law. Ohio River

7. The legislative history confirms that the purpose of OCSLA was "to assert the exclusive jurisdiction and control of the Federal Government of the United States over the seabed and subsoil of the outer Continental Shelf, and to provide for the development of its vast mineral resources." S Rep No. 411, 83d Cong, 1st Sess, 2 (1953) (hereinafter 1953 S Rep). Congress enacted OCSLA in the wake of decisions by this Court that the Federal Government enjoyed sovereignty and ownership of the seabed and subsoil of the Outer Continental Shelf to the exclusion of adjacent States. See United States v Texas, 339 US 707, 94 L Ed 1221, 70 S Ct 918 (1950); United States v Louisiana, 339 US 699, 94 L Ed 1216, 70 S Ct 914 (1950). See also United States v California, 332 US 19, 91 L Ed 1889, 67 S Ct 1658 (1947). See generally Maryland v Louisiana, 451 US 725, 730, 68 L Ed 2d 576, 101 S Ct 2114 (1981). Congress chose to retain exclusive federal control of the administration of the Shelf because it underlay the high seas and the assertion of sovereignty there implicated the foreign policies of the Nation. See 1953 S Rep, at 6. Much of OCSLA provides a federal framework for the granting of leases for exploration and extraction of minerals from the submerged lands of the Shelf. See 43 USC §§ 1334–1343 [43 USCS §§ 1334–1343].

Congress was not unaware, however, of the close, longstanding relationship between the Shelf and the adjacent States. See 1953 S Rep, at 6. This concern manifested itself primarily in the incorporation of the law of adjacent States to fill gaps in federal law. See Rodrigue v Aetna Casualty Co., 395 US 352, 365, 23 L Ed 2d 360, 89 S Ct 1835 (1969). It should be emphasized that this case only involves state-court jurisdiction over actions based on incorporated state law. We express no opinion on whether state courts enjoy concurrent jurisdiction over actions based on the substantive provisions of OCSLA.

Contract Co. v Gordon, 244 US 68, 61 L Ed 997, 37 S Ct 599 (1917). See 16 USC § 457 [16 USCS § 457] (personal injury and wrongful-death actions involving events occurring "within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any State" shall be maintained as if the place were under the jurisdiction of the State). Cf. Evans v Cornman, 398 US 419, 424, 26 L Ed 2d 370, 90 S Ct 1752 (1970) (residents of an area of exclusive federal jurisdiction within a State are "subject to the process and jurisdiction of state courts"). "The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe." The Federalist No. 82, p 514 (H Lodge ed 1908) (Hamilton), quoted in Claflin v Houseman, 93 US, at 138, 23 L Ed 833. State courts routinely exercise subject-matter jurisdiction over civil cases arising from events in other States and governed by the other States' laws. See, e.g., Dennick v Railroad Co., 103 US 11, 26 L Ed 439 (1881). Cf. Allstate Ins. Co. v Hague, 449 US 302, 66 L Ed 2d 521, 101 S Ct 633 (1981). That the location of the event giving rise to the suit is an area of exclusive federal jurisdiction rather than another State, does not introduce any new limitation on the forum State's subject-matter

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jurisdiction.[8] Ohio River Contract Co. v Gordon, supra, at 72, 61 L Ed 997, 37 S Ct 599.

Section 1333(a)(3) provides that "adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom." Petitioner argues that state-court jurisdiction over this personal injury case would contravene this provision. This argument again confuses the political jurisdiction of a State with its judicial jurisdiction. Section 1333(a)(3) speaks to the geographic boundaries of state sovereignty, because Congress primarily was concerned in enacting OCSLA to assure federal control over the Shelf and its resources. See n 7, supra. The language of the provision refers to "any interest in or jurisdiction over" real property, minerals, and revenues, not over causes of action. Indeed, opponents of OCSLA urged Congress to extend the political boundaries of the States seaward over the Shelf, at least for some purposes. See 99 Cong Rec 7230 (remarks of Sen. Ellender), 7232 (remarks of Sen. Long) (1953). The Senate Report explains that § 1333(a)(3) was intended to make plain that the adoption of state law as federal law cannot be the basis for a claim by the State "for participation in the administration of or revenues from the areas outside of State boundaries." 1953 S Rep, at 23.

[10] We do not think the legislative history of OCSLA can be read to rebut the presumption of concurrent state-court jurisdiction, given Congress' silence on the subject in the statute

8. OCSLA does supersede the normal choice-of-law rules that the forum would apply. See Chevron Oil Co. v Huson, 404 US 97, 102–103, 30 L Ed 2d 296, 92 S Ct 349 (1971). It also provides where proper venue will be found: "in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose." 43 USC § 1349(b)(1)(1976 ed, Supp III) [43 USCS § 1349(b)(1)].

itself. Petitioner relies principally on criticisms by the two Senators from Louisiana. Ellender and Long, who opposed the bill that eventually became OCSLA.[9] Yet "[t]he fears and doubts of the opposition are no authoritative guide to the construction of legislation." Schwegmann Bros. v Calvert Corp. 341 US 384, 394, 95 L Ed 1035, 71 S Ct 745, 44 Ohio Ops 395, 60 Ohio L Abs 81, 19 ALR2d 1119 (1951).[10] Moreover, the amendments offered by the Senators sought to confer political control over the Shelf and its mineral wealth on the States, not jurisdiction on the state courts over OCSLA cases. See 99 Cong Rec 7230 (Sen. Ellender), 7232 (Sen. Long) (1953).[11]

C

[1c] The operation of OCSLA will not be frustrated by state-court jurisdiction over personal injury actions. The factors generally recommending exclusive federal-court jurisdiction over an area of federal law include[12] the desirability of uniform

interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims.[13] These factors cannot support exclusive federal jurisdiction over claims whose governing rules are borrowed from state law. There is no need for uniform interpretation of laws that vary from State to State. State judges have greater expertise in applying these laws and certainly cannot be thought unsympathetic to a claim only because it is labeled federal rather than state law.

Allowing personal injury and contract actions in state courts will advance interests identified by Congress in enacting OCSLA. A recurring consideration in the deliberations leading to enactment was "the special relationship between the men working on these [platforms] and the adjacent shore to which they commute to visit their families." Rodrigue v Aetna Casualty Co., 395 US, at 365, 23 L Ed 2d 360, 89 S Ct 1835. Allowing state-court jurisdiction over these cases will allow

9. Petitioner also relies on a report made to the Senate Committee by the Department of Justice, which argued that the Federal Government should "have the exclusive control of lawmaking and law enforcement" on the Shelf. 1953 S Rep, at 6. But Congress rejected the Department's premise that the Shelf is "not comparable to . . . federally owned areas within a State." Ibid. See Rodrigue v Aetna Casualty Co., 395 US, at 365, 23 L Ed 2d 360, 89 S Ct 1835. Section 1333(a)(1) rather provides that the federal laws apply to the Shelf "to the same extent as if the Outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State."

10. Senator Long did express the fear that OCSLA placed exclusive jurisdiction over all civil suits in federal district courts. 1953 S Rep, at 66 (minority report); 99 Cong Rec 7233 (1953).

11. Most of the Senators' statements regarding OCSLA's effect on state-court jurisdiction criticize placing exclusive criminal jurisdiction in federal courts. See, e. g., id., at 7231–7232 (Sen. Ellender). But the statute that gives federal courts exclusive jurisdiction over federal crimes, 18 USC § 3231 [18 USCS § 3231], has no relevance to this case.

12. Exclusive federal-court jurisdiction over a cause of action generally is unnecessary to protect the parties. The plaintiff may choose the available forum he prefers, and the defendant may remove the case if it could have been brought originally in a federal court. 28 USC § 1441(b) [28 USCS § 1441(b)]. Also, exclusive federal jurisdiction will not prevent a state court from deciding a federal question collaterally even if it would not have subject-matter jurisdiction over a case raising the question directly. See Note, Exclusive Jurisdiction of Federal Courts in Private Civil Actions, 70 Harv L Rev 509, 510 (1957).

13. See Redish & Muench, Adjudication of Federal Causes of Action in State Court, 75 Mich L Rev 311, 329–335 (1976); Note, 70 Harv L Rev, supra n 12, at 511–515.

these workers, and their lawyers, to pursue individual claims in familiar, convenient, and possibly less expensive fora. See Chevron Oil Co. v Huson, 404 US, at 103, 30 L Ed 2d 296, 92 S Ct 349 (state statute of limitations applies to personal injury actions arising under OCSLA).

In summary, nothing in the language, structure, legislative history, or underlying policies of OCSLA suggests that Congress intended federal courts to exercise exclusive jurisdiction over personal injury actions arising under OCSLA. The Texas courts had jurisdiction over this case.

III

[2b] The Court of Civil Appeals held that petitioner was not entitled to an instruction cautioning the jury that personal

[453 US 485]

injury damages awards are not subject to federal income taxation, § 104(a)(2) of the Internal Revenue Code of 1954, 26 USC § 104(a)(2) [26 USCS § 104(a)(2)]. In so ruling the court relied on Johnson v Penrod Drilling Co. 510 F2d 234, 236–237 (CA5) (en banc) (per curiam), cert denied, 423 US 839, 46 L Ed 2d 58, 96 S Ct 68 (1975), a Jones Act case where the Court of Appeals prohibited presenting evidence or instructing the jury as to the impact of taxes on damages awards based on lost wages. This Court subsequently held that a defendant in a suit brought under the Federal Employers' Liability Act (FELA), 45 USC § 51 et seq. [45 USCS §§ 51 et seq.], is entitled to an instruction that damages for lost future wages are not subject to federal income taxation. Norfolk & Western R. Co. v Liepelt, 444 US 490, 62 L Ed 2d 689, 100 S Ct 755 (1980).[14] Petitioner now argues that Liepelt applies to an OCSLA personal injury action and that this case should be remanded for a new trial on damages before a properly instructed jury.[15]

Our first task is to determine the source of law that will govern whether such an instruction must be available in an OCSLA case. OCSLA, as discussed above, mandates that state laws apply as federal laws "[t]o the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws." 43 USC § 1333(a)(2) [43 USCS § 1333(a)(2)]. In any particular case, the adjacent State's law applies to those

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areas "which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf . . . ." Ibid. The statute thus contains an explicit choice-of-law provision. See n 8, supra. The parties agree that the substantive law of Louisiana applies to this case, unless it is inconsistent with federal law.

[11a, 12a] To apply the statutory directive a court must consider the content of both potentially applicable federal and state law. Subse-

14. Liepelt also found error in the trial court's refusal to allow the defendant to introduce evidence showing the effect of income taxes on the plaintiff's future earnings. 444 US, at 493–496, 62 L Ed 2d 689, 100 S Ct 755. This case does not present the question whether this second holding is applicable to OCSLA cases.

15. Respondents argue that we cannot address the necessity of giving the requested instruction because petitioner did not preserve its objection in the trial court in the manner required by Texas law. This argument is incorrect. The Texas Court of Civil Appeals held on the merits that petitioner was not entitled to the instruction.

We also reject respondents' contention that we are foreclosed from deciding the issue because petitioner did not introduce any evidence about the effect of taxation on Gaedecke's future earnings. No evidentiary predicate is required to instruct a jury *not* to consider taxes.

quent to the decision of the Texas court, as noted above, we held in Liepelt, supra, that a defendant in an FELA case is entitled to an instruction that damages awards are not subject to federal income taxation.[16] As FELA afforded no guidance on this issue, the holding articulated a federal common-law rule. The purpose was to eliminate from the deliberations

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of juries "an area of doubt or speculation that might have an improper impact on the computation of the amount of damages." 444 US, at 498, 62 L Ed 2d 689, 100 S Ct 755.[17] Thus, the instruction furthers strong federal policies of fairness and efficiency in litigation of federal claims. If Congress had been silent about the source of federal law in an OCSLA personal injury case, Liepelt would require that the instruction be given.

But Congress was not silent. It incorporated for this case the applicable law of Louisiana, but only "[t]o the extent [it is] not inconsistent" with federal law. The statute does not distinguish between federal statutory and judge-made law. It would seem then that if Louisiana law is "inconsistent," Liepelt controls. Doubt arises, however, because in OCSLA Congress borrowed a remedy provided by state law and thereby "specifically rejected national uniformity" as a paramount goal. Chevron Oil v Huson, 404 US, at 104, 30 L Ed 2d 296, 92 S Ct 349. In Chevron, we held that Louisiana rather than federal common law provided the federal statute of limitations for personal injury damages actions under OCSLA. We recognized that

16. [11b, 12b] Respondents' argument that Liepelt should apply prospectively only is insubstantial. Here, we address a change in the law occurring while the case is on direct appeal. "[A]n appellate court must apply the law in effect at the time it renders its decision." Thorpe v Housing Authority of City of Durham, 393 US 268, 281, 21 L Ed 2d 474, 89 S Ct 518, 49 Ohio Ops 2d 374 (1969); see United States v Schooner Peggy, 1 Cranch 103, 2 L Ed 49 (1801). While there well might be an exception to the rule to prevent "manifest injustice," Bradley v Richmond School Board, 416 US 696, 717, 40 L Ed 2d 476, 94 S Ct 2006 (1974), this equitable exception does not reach a private civil suit where the change does not extinguish a cause of action but merely requires a retrial on damages before a properly instructed jury. Lang v Texas & Pacific R. Co. 624 F2d 1275, 1279-1280, and n 9 (CA5 1980). Indeed, considerations of fairness support retroactive application: failure to give the instruction may lead to the plaintiff recovering a windfall award. Norfolk & Western R. Co. v Liepelt, supra, at 497-498, 62 L Ed 2d 689, 100 S Ct 755.

The overwhelming weight of authority supports retroactive application of this decision. See O'Byrne v St. Louis Southwestern R. Co. 632 F2d 1285 (CA5 1980); Flanigan v Burlington Northern Inc. 632 F2d 880 (CA8 1980); Lang v Texas & Pacific R. Co., supra; Crabtree v St. Louis-San Francisco R. Co., 89 Ill App 3d 35, 411 NE2d 19 (1980). Other cases have applied Liepelt retroactively without comment. Cazad v Chesapeake & Ohio R. Co., 622 F2d 72 (CA4 1980); Seaboard Coast Line R. Co. v Yow, 384 So 2d 13 (Ala 1980). But see Ingle v Illinois Central Gulf R. Co. 608 SW2d 76 (Mo App 1980), cert denied, 450 US 916, 67 L Ed 2d 341, 101 S Ct 1359 (1981).

17. The general applicability of Liepelt is indicated by the Court's quotation with approval of the explanation of need for the instruction in Domeracki v Humble Oil & Refining Co. 443 F2d 1245, 1251 (CA3), cert denied, 404 US 883, 30 L Ed 2d 165, 92 S Ct 212 (1971), a longshoreman's action based on the unseaworthiness of a vessel.

"'We take judicial notice of the "tax consciousness" of the American public. Yet, we also recognize, as did the court in Dempsey v Thompson, 363 Mo 339, 251 SW2d 42 (1952), that few members of the general public are aware of the special statutory exemption for personal injury awards contained in the Internal Revenue Code.

"'"[T]here is always danger that today's tax-conscious juries may assume (mistakenly of course) that the judgment will be taxable and therefore make their verdict big enough so that plaintiff would get what they think he deserves after the imaginary tax is taken out of it."

"'II Harper & James, The Law of Torts § 25.12, at 1327-1328 (1956)'" Liepelt, supra, at 497, 62 L Ed 2d 689, 100 S Ct 755.

None of the Court's reasoning was directed particularly at FELA.

"Congress made clear provision for filling the 'gaps' in
[453 US 488]
federal law; it did not intend that federal courts fill those 'gaps' themselves by creating new federal common law." Id., at 104–105, 30 L Ed 2d 296, 92 S Ct 349. In this case, we face an analogous question: does the incorporation of state law preclude a court from finding that state law is "inconsistent" with a federal common-law rule generally applicable to federal damages actions?

We need answer this question only if Louisiana law would not require that the instruction be given upon timely request. The court below never addressed this question[18] but relied solely on federal case law now superseded. Under these circumstances it is the better practice to remand this case to the Texas Court of Civil Appeals for a determination of whether Louisiana law requires the instruction and, if it does not, whether Liepelt displaces the state rule in an OCSLA case. If the court decides that it was error to refuse the instruction, it may then address respondents' argument that petitioner was not prejudiced by the error.

Affirmed in part, vacated in part, and remanded.

Justice Stewart took no part in the consideration or decision of this case.

SEPARATE OPINION

Justice **Blackmun**, with whom Justice **Brennan** and Justice **Marshall** join, concurring in part and concurring in the result.

I join the Court's opinion as to Parts I and II, and I concur in the decision to remand this case for further proceedings as
[453 US 489]
to the applicability of the rule adopted in Norfolk & Western R. Co. v Liepelt, 444 US 490, 62 L Ed 2d 689, 100 S Ct 755 (1980). I write separately because I have reservations about the Court's expressed intention to apply the Liepelt rule expansively, a ruling I consider unwise and unnecessary to this case in its present posture.

As the Court makes clear, ante, at 488, 69 L Ed 2d, at 797–798 the Texas Court of Civil Appeals on remand must determine, first, what Louisiana law requires as to this form of instruction, and, second, whether that state rule is "inconsistent" with OCSLA or "other federal law." 43 USC § 1333(a)(2) [43 USCS § 1333(a)(2)]. The Court acknowledges, and I agree, that the choice-of-law provision contained in OCSLA creates "[d]oubt," ante, at 487, 69 L Ed 2d, at 797, as to whether Congress intended state law or federal law to govern the grant of this instruction. As I understand OCSLA, the purpose of incorporating state law was to permit actions arising on

18. The Louisiana cases that have come to our attention do not provide conclusive guidance. Compare the earlier case of Guerra v Young Construction Corp. 165 So 2d 882 (La App 1964) (not error to deny the instruction), with the later cases of DeBose v Trapani, 295 So 2d 72 (La App 1974), and Francis v Government Employers' Ins. Co. 376 So 2d 609 (La App 1979) (proper to *give* the instruction). These Louisiana cases were considered by the Court of Appeals for the Fifth Circuit in a diversity case, Croce v Bromley Corp. 623 F2d 1084 (1980), cert denied sub nom Bromley Corp. v Cortese, 450 US 981, 67 L Ed 2d 816, 101 S Ct 1516 (1981), and it followed the holding in Guerra.

these federal lands to be determined by rules essentially the same as those applicable to actions arising on the bordering state lands. Congress apparently intended to provide a kind of local uniformity of result, regardless of whether the action arose on shelf lands or on neighboring state lands. I would read the statute, thus, to encourage use of state law, and I would permit the state court to weigh, as an initial matter and only if the Louisiana rule differs from the Liepelt rule, whether Congress' desire for local uniformity outweighs any perceived need, as a matter of federal common law, for the instruction. I do not find it self-evident that Liepelt created a general "federal common-law rule," that so greatly "furthers strong federal policies of fairness and efficiency in litigation of federal claims," ante, at 486, 487, 69 L Ed 2d, at 796, 797, as to require its application in cases governed by the Outer Continental Shelf Lands Act. In my view, this question was not settled in Liepelt, and it remains open for future adjudication.

CARL BIENVENU, Petitioner, versus TEXACO, INC; DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR; INSURANCE COMPANY OF NORTH AMERICA, Respondents.

No. 96-60625

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

164 F.3d 901; 1999 U.S. App. LEXIS 249; 1999 AMC 1255

January 11, 1999, Decided

SUBSEQUENT HISTORY: [**1] As Revised February 17, 1999.

PRIOR HISTORY: Petition for Review of an Order of the Benefits Review Board. 94-0565.

DISPOSITION: REVERSED and REMANDED.

COUNSEL: For CARL BIENVENU, Petitioner: David Bruce Allen, Stephen M. LaRussa & Associates, Houma, LA.

For TEXACO, INC., INSURANCE COMPANY OF NORTH AMERICA, Respondents: Elizabeth Slatten Healy, Jones, Walker, Weachter, Poitevent, Carrere & Denegre, New Orleans, LA. John D. Fitzmorris, Jr., Courtenay, Forstall, Hunter & Fontana, New Orleans, LA. Wayne G. Zeringue, Jr., Jones, Walker, Waechter, Poitevent, Carrere & Denegre, New Orleans, LA.

For DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, Repondent: Michael Scott Hertzig, Washington, DC. Thomas O. Shepherd, Jr., Clerk, Benefit Review Board, Washington, DC. Carol A. De Deo, US Department of Labor, Dir, Office of Workers Comp. Programs, Washington, DC. Joshua T. Gillelan, II, Office of the Solicitor of Labor, Washington, DC.

JUDGES: Before POLITZ, Chief Judge, and JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, PARKER, and DENNIS, Circuit Judges. * EDITH H. JONES, Circuit Judge, dissenting. DeMOSS, Circuit [**2] Judge, with whom, SMITH, Circuit Judge, joins dissenting.

* Judges King and Duhe are recused.

OPINION BY: HIGGINBOTHAM; DAVIS

OPINION

[*902] HIGGINBOTHAM and DAVIS, Circuit Judges:

Carl Bienvenu seeks benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA) for injuries sustained on navigable waters during the course of his employment. His petition requires us to enter the unsettled waters of our LHWCA jurisprudence. In deciding that Bienvenu is entitled to LHWCA benefits, we right our wayward precedent and chart a smoother course for future panels to follow.

I.

Bienvenu worked for Texaco, Inc., in the Caillou Island production field as a pumper specialist. By 1987 he had been employed by [*903] Texaco in this field for about twenty-two years. The Caillou Island production field is a five-mile by twelve-mile area located within three miles of the Louisiana coast and contains