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[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

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

I

The facts are not in dispute. Re-

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.

spondent 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

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

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(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,

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.

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

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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

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.

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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

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 long-shoremen injured seaward of the water's edge. The line of demarcation between land and water became known as the "Jensen line."

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

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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

15. See *Knickerbocker Ice Co. v Stewart*, 253 US 149, 64 L Ed 894, 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 compensa-

tion 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 employ-

ment" for purposes of being the employee of a statutory employer: "Workers who

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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.

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

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[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 inter-

pretation 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-*

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As a marine construction
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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.

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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 promulgate 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 con-

cerned 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

involved 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 Commis-

signers 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)].

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"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.

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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 Work-

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islative 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

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 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. . . ." 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.²⁸ 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, 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.

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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 "mar-

time 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 covered" [459 US 320]

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

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 380, 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

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Other aspects of the statutory scheme support our understanding of the "maritime employment" status requirement. Congress removed from § 2(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

[459 US 321]

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 Con-

gress 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*

[459 US 322]

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.

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).

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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

[459 US 323]

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 ju-

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jurisdiction landward in light of the inadequacy of most state compensation systems. See S Rep, at 12; HR Rep, at 10.

to perform their employment duties upon navigable waters.³⁴

[459 US 325]

IV

[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

[459 US 324]

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

[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.

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 *NCL 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."

STOP

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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 provision" ap-

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plicable 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.

LEXSER 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.

OPINION BY:

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, in 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*.

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 *Jalaruma*. 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 be 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 no dispute 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 (e) 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); *Anuszkewski 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 *Saranow 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 (CA1 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 Società 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 the shipowner'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 longshoremen 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. Mattis*, 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. Hawk*, 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

***PR2B] 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 Bonsai, 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 the shipowner 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 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," § 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 § 1918.51 (b) 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 Jalarat* 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 the winch 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. *Canizao 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 or 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 12, 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 equip-

ment 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, judgment 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. 308 (E.D. La. 1981); *The Etna*, 43 F. Supp. 303 (E.D. 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. Plowdha*, 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. Dampskisakieselskabet Int'l*, 170 F. Supp. 601, 609-610 (SD Cal. 1959), *aff'd sub nom. Metropolitan Stevedore Co. v. Dampskisakieselskabet 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 (1999); 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 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
Bent 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 Maritimes (collectively, the Shipowners), pursuant to section 6(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 PÉNAVAL, 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 "caught 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 (Guil-

ford), 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-

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 steve-

1. Greenwood also presented the Shipowners' journal entries describing the poor condition of the crane's roller, electric cable, and the fact that "from 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 Pollard (Pollard) corroborated this testimony. Pollard, 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;

quently, 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." *McConn 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

defect. 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 examine only the question raised by the motion for a direct verdict—whether the evidence is sufficient

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. 1023, 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 Replac., A Corp., Inc. v. Agency Rent-A-Car, Inc.*, 786 F.2d 884, 888 n. 3 (5th Cir.1984), *cert. denied*, 469 U.S. 1160, 105 S.Ct. 910, 88 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 1013, 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

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); *Melwine 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; *Merwins*, 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 emerged from *Scindia* is that the primary responsibility for the safety of the long-shoremen rests upon the stevedore." *Randolph v. Loeis*, 896 F.2d 964, 970 (5th Cir. 1990).

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 *Salmeyer 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 (1975)). 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-

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." *Mazey v. Freightliner Corp.*, 665 F.2d 1367, 1371

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; *Seltman*, 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. *Macey*, 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 this 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 his 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 Rajah*, 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 Pollard 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 179, 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, Pollard, 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").

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 Green-

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 1623.

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

wood'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.¹¹ There is really nothing apart from this, Greenwood's only meaningful liability witnesses were Logue and Pollard, whose testimony merely tended to corroborate Logue's.¹² 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-

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 the 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 difference in the manner in which the crane was operating. . . ."

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

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.

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

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); *Reply v. Mobil Oil Corp.*, 859 F.2d 375, 378 (5th Cir.1983)). 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 broke 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 *Reply*, 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 suf-

ficient 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. Sanmika Co.*, 873 F.2d 842, 854 (5th Cir.1989), cert. denied, 493 U.S. 1050, 110 S.Ct. 863, 107 L.Ed.2d 847; *Helaine v. Mobil Oil Co.*, 709 F.2d 1081, 1087 (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").

ceeding"); *In the Matter of Double D Drudging 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 28, 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." *Helaine*, 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

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,

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

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.

"fails to warn on turning over the ship of hidden defects of which he should have known." *Pimental v. LTD Canadian Pac. Bul.* 985 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 experienced 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 Pollard. 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, Pollard 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, Pollard'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 co-workers form this particular gang of steve-

does, 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 he came to him in this case. He's the guy who's operating the crane at the time that Mr. Greenwood gets hurt. Well, you know, the

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 question-

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 him, self."

On appeal, however, the Shipowners' change their story and claim that Logue's testimony con-

ing 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 the 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." *Macey v. Freightliner Corp.*,

cerning 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.