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COMMENTS

SHIPOWNER LIABILITY UNDER SECTION 905(b) OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT: A PROPOSED STANDARD OF CARE

I. Introduction

In its enactment of the 1972 Amendments¹ to the Longshoremen's and Harbor Workers' Compensation Act (LHWCA),² Con-

1. Pub. L. No. 92-576, §§ 2-22, 86 Stat. 1251 (codified at 33 U.S.C. §§ 901-950 (1976)).

2. The LHWCA was enacted by Congress in response to several decisions by the Supreme Court. These decisions include *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52 (1914) and *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917). In *Imbrovek*, the Supreme Court held that an action by a longshoreman against a shipowner was within the jurisdiction of the federal courts. 234 U.S. at 62. The Court, in reaching this conclusion, noted that the Constitution provides that "[t]he judicial power shall extend . . . to all Cases of admiralty and maritime Jurisdiction." *Id.* at 58 (quoting U.S. CONST. art. III, § 2). The Court then reasoned that since the plaintiff longshoreman was "injured on a ship, lying in navigable waters, and while he was engaged in the performance of a maritime service," then, his claim was maritime in nature. *Id.* at 61. In *Jensen*, the Supreme Court held that a workmen's compensation award granted pursuant to a New York statute to the widow of a fatally injured longshoreman constituted an encroachment by the state of New York upon the federal courts' maritime jurisdiction and upon Congress's maritime authority. 244 U.S. at 215-17.

Following *Jensen*, Congress made two attempts to confer jurisdiction over *all* workmen's compensation claims to the state courts. Act of June 10, 1922, ch. 216, 42 Stat. 634; Act of October 6, 1917, ch. 97, 40 Stat. 395. The Supreme Court, however, found both these statutes to be unconstitutional delegations of the federal courts' maritime jurisdiction. See *Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920).

As a result of these two Supreme Court decisions, longshoremen had no prospects for coverage under a state workmen's compensation statute. In response to the longshoremen's dilemma, Congress enacted the LHWCA in 1927. Longshoremen's and Harbor Workers' Compensation Act, ch. 509, §§ 1-50, 44 Stat. 1424 (1927). The LHWCA, was modeled upon New York's workmen's compensation statute. N.Y. WORK. COMP. LAW (Laws of 1922, ch. 615) (current version at N.Y. WORK. COMP. LAW §§ 1-328 (McKinney 1965 & Supp. 1980)). Accordingly, the LHWCA provided an injured longshoreman with fixed benefits and barred an injured longshoreman from bringing suit against his employer, the stevedoring company. Longshoremen's and Harbor Workers' Compensation Act, ch. 509, §§ 4-5, 44 Stat. 1424 (1927). The LHWCA did permit an injured longshoreman to recover damages against one, other than his employer, who was liable in damages. *Id.* § 33.

For comprehensive discussions of the cases preceding the enactment of the LHWCA, see

gress accomplished several objectives.³ First, Congress increased significantly the maximum benefits⁴ that could be paid to an injured longshoreman.⁵ Second, Congress nullified two Supreme Court decisions, *Seas Shipping Co. v. Sieracki*⁶ and *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*⁷ In *Sieracki*, the Supreme Court permitted an injured longshoreman to maintain an action against a shipowner premised upon the "unseaworthiness" of the shipowner's vessel.⁸ A finding of "unseaworthiness" resulted

Hurst v. Triad Ship. Co., 554 F.2d 1237, 1241-44 (3d Cir. 1977); Lucas v. "Brinknes" Schif-fahrts Ges., 379 F.Supp. 759, 761-65 (E.D. Pa. 1974); G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 6-45 (2d ed. 1975); Note, *The Vessel Owner's Standard of Care under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act*, 23 LOY. L. REV. 986, 987-92 (1977); Comment, *Negligence Standards under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: Examining the View-points*, 21 VILL. L. REV. 244, 245-52 (1976).

3. Both the House of Representatives and the Senate issued reports which set forth their objectives in enacting the 1972 Amendments to the LHWCA. See H.R. Rep. No. 1441, 92d Cong., 2d Sess. 1-14, reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4698-711 [hereinafter cited as *House Report*]; S. Rep. No. 1125, 92d Cong., 2d Sess. 1-16 (1972) [hereinafter cited as *Senate Report*]. Among Congress's principal objectives in enacting the 1972 Amendments was the protection of "the health and safety of employees who work on board vessels." *House Report, supra*, at 4703.

4. Prior to the enactment of the 1972 Amendments, the maximum benefit which an injured longshoreman could recover was \$70 per week. The last increase had been in 1961. As a result of the 1972 Amendments, the maximum weekly benefit was raised to "200% of the national weekly wage [which was] to be determined annually by the Secretary of Labor." *House Report, supra* note 3, at 4700.

5. In the interest of uniformity, this Comment will refer to those covered as a result of the 1972 Amendments to the LHWCA as "longshoremen." The coverage of these Amendments extends, however, to "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker." 33 U.S.C. § 902(3) (1976). The 1972 Amendments do not cover "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." *Id.*

6. 328 U.S. 85 (1946).

7. 350 U.S. 124 (1956).

8. 328 U.S. at 94-95. This case arose when a longshoreman, while working aboard the defendant's vessel, was struck by a falling boom and tackle. This accident was found to be the result of a defectively forged shackle which supported the boom. *Id.* at 87. The finding that this condition rendered the defendant's vessel "unseaworthy" was undisputed. *Id.* at 88. The Supreme Court had previously restricted recovery under the "unseaworthiness" cause of action to suits by a seaman against the shipowner. See generally *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944); *The Osceola*, 189 U.S. 158 (1903). In *Sieracki*, the Supreme Court, in extending the "unseaworthiness" cause of action to longshoremen, reasoned that a longshoreman "is doing a seaman's work and [is] incurring a seaman's hazards." *Id.* at 99.

in the imposition of absolute liability upon the shipowner.⁹ In *Ryan*, a shipowner who had been held liable to an injured longshoreman was permitted to seek indemnity from the longshoreman's employer, the stevedoring company.¹⁰ This indemnification action was based upon the stevedoring company's breach of an implied warranty to perform its duties in a "workmanlike" manner.¹¹

As a result of the 1972 Amendments, section 905(b) of the LHWCA provides that an injured longshoreman¹² can recover damages against a shipowner only upon a showing of negligence.¹³

9. *Id.* at 94. The Court described the "unseaworthiness" cause of action as "essentially a species of liability without fault," *id.*, and stressed that the obligation of the shipowner to maintain a "seaworthy" vessel could not be delegated. *Id.* at 100. In determining that a longshoreman was entitled to an "unseaworthiness" cause of action, the Supreme Court said that a longshoreman performed services which had traditionally been the responsibility of the ship's crew. *Id.* at 99. There is, however, authority to suggest that the loading and unloading of vessels has not, for several centuries, been among the customary responsibilities of the ship's crew. See Shields & Byrne, *Application of the "Unseaworthiness" Doctrine to Longshoremen*, 111 U. PA. L. REV. 1137, 1140-47 (1963).

10. 350 U.S. at 134-35. This case arose when a shipowner, after being held liable under the LHWCA for injuries to a longshoreman who was working aboard his vessel, sought indemnity for these damages from the longshoreman's employer, the stevedoring company. *Id.* at 127. The Supreme Court noted that while the LHWCA barred suits by injured longshoremen against their employer, it fails to bar suits by other parties who seek to recover damages against the stevedoring company. *Id.* at 130.

11. *Id.* at 133. The Court said that a stevedoring company, upon entering into a contract for its services, warrants that it will discharge its duties "in a reasonably safe manner." *Id.* at 134. The Court also said that this warranty need not be express; it could also be implied as "[i]t is of the essence of . . . [the] stevedoring contract." *Id.* at 133.

12. It should be noted that, typically, the shipowner is not the employer of the longshoremen. Rather, a shipowner seeking to have his vessel loaded or unloaded, contracts for this purpose with a stevedoring company. The shipowner, to the extent necessary for these cargo operations, relinquishes his vessel to the stevedoring company. The stevedoring company, in turn, employs the longshoremen and directs their work aboard the vessel. For a detailed discussion regarding the nature of a longshoreman's work see M. NORRIS, *THE LAW OF MARITIME PERSONAL INJURIES* §§ 1-7 (3d ed. 1975).

13. 33 U.S.C. § 905(b) (1976). Section 905(b) permits an injured longshoreman to recover damages "caused by the negligence of a vessel" and provides that the stevedoring company "shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void." Section 905(b) also provides that the "liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred" and that the "[t]he remedy provided in this subsection shall be exclusive of all other remedies against the vessel." *Id.*

Section 905(b) allows an injured longshoreman to bring an *in rem* proceeding against a vessel. This provision, however, does not bar an injured longshoreman from bringing a suit *in personam* against the shipowner. See G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* § 6-57 at 450 (2d ed. 1975). In the interest of uniformity, this Comment will generally refer to actions against either the vessel or the shipowner as actions against the shipowner.

In addition, section 905(b) bars a negligent shipowner from seeking indemnity from a stevedoring company.¹⁴ Since the enactment of the 1972 Amendments to the LHWCA, the standard of care that a shipowner owes to those who work aboard his vessel has been the subject of both judicial consideration¹⁵ and legal commentary.¹⁶ The House and Senate Reports on the 1972 Amendments and section 905(b) of the LHWCA provide only limited guidance as to the shipowner's standard of care.¹⁷ Congress chose, instead, to entrust the judiciary with the primary responsibility for developing a standard of care.¹⁸

14. Following the enactment of the 1972 Amendments, the question remained as to whether the shipowner would be required to pay an injured longshoreman's entire damages when the conduct of both the shipowner and the stevedoring company contributed to the longshoreman's injuries. See *Shellman v. United States Lines Inc.*, 528 F.2d 675 (9th Cir. 1975), cert. denied, 425 U.S. 936 (1976); *Dodge v. Mitsui Shintaku Ginko K.K. Tokyo*, 528 F.2d 669 (9th Cir. 1975), cert. denied, 425 U.S. 944 (1976). The Supreme Court in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), held that "a longshoreman who is injured by the concurrent negligence of the stevedore and the ship may recover for the entire amount of his injuries from the ship." *Id.* at 266.

15. See notes 21-174 *infra* and accompanying text.

16. See generally Gorman, *The Longshoremen's and Harbor Workers' Compensation Act—after the 1972 Amendments*, 6 J. MAR. L. & COM. 1 (1974); Hazen & Toriello, *Longshoremen's Personal Injury Actions under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act*, 53 ST. JOHN'S L. REV. 1 (1978); Robertson, *Jurisdiction, Shipowner Negligence and Stevedore Immunities under the 1972 Amendments to the Longshoremen's Act*, 28 MERCER L. REV. 515 (1977) [hereinafter cited as *Shipowner Negligence & Stevedore Immunities*]; Theis, *Amended Section Five of the Longshoremen's and Harbor Workers' Compensation Act*, 41 TENN. L. REV. 773 (1974); Comment, *Developing a Consistent Theory of Vessel Liability to Injured Longshoremen under the LHWCA*, 45 BROOKLYN L. REV. 731 (1979); Comment, *Negligence Standards under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: Examining the Viewpoints*, 21 VILL. L. REV. 244 (1976); Note, *The Injured Longshoreman vs. the Shipowner After 1972: Business Invitees, Land-Based Standards, and Assumption of Risk*, 28 HASTINGS L.J. 771 (1977) [hereinafter cited as *The Injured Longshoreman*]; Note, *The Vessel Owner's Standard of Care under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act*, 23 LOY. L. REV. 986 (1977).

17. Section 905(b) requires that the injured longshoreman's cause of action be based upon the shipowner's negligence and not upon any warranty as to the "seaworthiness" of the vessel. The House Report, for example, provides that a shipowner's liability is equivalent to the liability of "land-based" third parties and that the doctrines of assumption of risk and contributory negligence are inapplicable in determining the issue of shipowner liability. *House Report, supra* note 3, at 4702, 4705. The Senate Report on the 1972 Amendments to the LHWCA has the same provision. *Senate Report, supra* note 3, at 8, 12.

18. See *House Report, supra* note 3, at 4704. The development of a standard of care "can only be resolved through the application of accepted principles of tort law and the ordinary process of litigation." *Id.*

Congress, in providing a negligence cause of action against the shipowner, sought uniform application of this cause of action throughout the nation's ports.¹⁹ Cases pertaining to section 905(b) have arisen in all the "maritime" circuits.²⁰ Differing opinions as to what constitutes shipowner negligence have developed and continue to exist. Therefore, Congress's objective of a uniformly applied standard of care remains unfulfilled. Section II of this Comment will discuss the initial decisions arising under section 905(b). Section III will analyze recent efforts by courts to develop a standard of care for shipowners. Finally, in Section IV, a standard of care for shipowners will be proposed.

II. The Initial Cases Arising Under Section 905(b)

A. The Application of Traditional Real Property Concepts

An injured longshoreman's ability to recover under section 905(b) of the LHWCA was severely limited by the application of traditional real property concepts.²¹ These concepts included, first, conditions which were "open and obvious" and, second, conditions which were within the "control" of the stevedoring company. A court which found either of these conditions to be present invariably concluded that the shipowner was not negligent.²² Congress, in its reports on the 1972 Amendments, made several references to "land-based" principles of negligence in discussing the shipowner's standard of care.²³ Courts which heard the initial cases arising under section 905(b) noted these references and sought to determine the "status"²⁴ of one who worked aboard a vessel. A determi-

19. See *id.* at 4705.

20. Coverage under the LHWCA extends to injuries occurring on the navigable waters of the United States (including piers, docks, and adjoining areas), 33 U.S.C. § 903(a) (1976). The circuits in which cases pertaining to section 905(b) have arisen include the First, Second, Third, Fourth, Fifth, Seventh, and Ninth Circuits.

21. See notes 22-50 *infra* and accompanying text.

22. See *Bovia v. S/S Agia Erini*, 433 F. Supp. 1020, 1022 (E.D. La. 1977); *Cummings v. "Sidarma" Soc.*, 409 F. Supp. 869, 872 (E.D. La. 1976); *Hite v. Maritime Overseas Corp.*, 380 F. Supp. 222, 224 (E.D. Tex. 1974). See also notes 28-50 *infra* and accompanying text.

23. See *House Report*, *supra* note 3, at 4701-05. The Report states that shipowner liability should be determined by the same criteria as the liability of "land-based third parties." *Id.*

24. The "status" of one who entered upon another's land has traditionally determined the "duty" which the landowner owed to him. Such "status" categories, in descending order

nation of "status" was thereby made a prerequisite to any determination of shipowner liability.²⁵

The consensus reached in these initial cases was that the "status" of a longshoreman, working aboard a vessel, was that of a "business invitee."²⁶ Courts initially reached this conclusion by relying on the fact that the stevedoring company's relationship with the shipowner is that of an independent contractor.²⁷ In *Fedison v. Vessel Wislica*,²⁸ a longshoreman, who was loading cargo on the defendant's vessel, fell into an opening between two cargo crates.²⁹ The longshoreman, in bringing suit, contended that the existence of a space between the cargo crates constituted negligence on the part of the shipowner.³⁰

The *Fedison* court, in rejecting the longshoreman's contention,³¹ observed that the stevedoring company "which employed the plaintiff was an independent contractor hired by the vessel to load cargo."³² In addition, the court stated that "[i]t is black-letter law that the owner of a premise owes no duty to warn an invitee of a defect or danger which is . . . obvious or which should be observed by the invitee in the exercise of ordinary care."³³ Although the

as to the standard of care, include invitees, licensees, and trespassers. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 58 at 357 (4th ed. 1971).

25. See notes 26-34 *infra* and accompanying text.

26. The "business invitee" or "business visitor" has traditionally been one whose entry upon the landowner's property is premised upon business which concerns the landowner. The landowner has a duty to warn such a person of those conditions within the landowner's knowledge or which the landowner with reasonable care might discover. See PROSSER, *supra* note 24, § 61 at 385.

27. See *Frasca v. Prudential-Grace Lines, Inc.*, 394 F. Supp. 1092, 1097 (D. Md. 1975); *Hite v. Maritime Overseas Corp.*, 380 F. Supp. 222, 226 (E.D. Tex. 1974).

28. 382 F. Supp. 4 (E.D. La. 1974).

29. *Id.* at 5.

30. *Id.* at 6. The plaintiff longshoreman argued that the shipowner had "breached its duty to provide him with a safe place to work." *Id.*

31. *Id.* at 5. The court noted that such openings are common and that longshoremen generally ask their supervisors for dunnage (sheets of rough plywood) to cover these openings. The court also noted that there was no significant evidence that any longshoremen had requested dunnage from the ship's crew. *Id.*

32. *Id.* at 7.

33. *Id.* This statement by the court is in accord with the views of the late Dean Prosser. A landowner has "no obligation to protect the invitee against dangers . . . which are so obvious and apparent to him that he may reasonably be expected to discover them." PROSSER, *supra* note 24, § 61 at 394 (footnotes omitted).

court in *Fedison* gave additional reasons for its decision,³⁴ considerable emphasis was placed upon the fact that the injury-causing condition could be "readily observed by the plaintiff."³⁵

In addition to the court in *Fedison*, other courts, in the early cases arising under section 905(b), also considered a longshoreman to be a "business invitee"³⁶ and concluded that a shipowner had no duty to warn a longshoreman of a condition which was "open and obvious."³⁷ The trend that emerged from these early decisions was that, when the injury-causing condition was "open and obvious," shipowner liability was precluded.³⁸

The concept of "control" over the cargo operations presented another limitation to an injured longshoreman seeking to recover under section 905(b). Early decisions indicated that when the stevedoring company had "control" over the cargo operations, shipowner liability could no longer arise.³⁹

One such case was *Citizen v. M/V Triton*,⁴⁰ where the plaintiff longshoreman was an employee of a stevedoring company that was engaged in loading a cargo of flour sacks aboard the defendant's vessel.⁴¹ The same stevedoring company had already, in another port, loaded a portion of this cargo.⁴² When the defendant's vessel subsequently arrived, there were open spaces between the flour

34. The court noted, for example, that the cargo operation "was obviously within the expertise of the stevedore and among its responsibilities as an independent contractor to conduct . . . [this operation] in a safe manner." 382 F. Supp. at 8.

35. *Id.*

36. See, e.g., *Anuszewski v. Dynamic Mariners Corp.*, 540 F.2d 757, 759 (4th Cir. 1976), *cert. denied*, 429 U.S. 1098 (1977); *Crowshaw v. Koninklijke Nedlloyd*, 398 F. Supp. 1224, 1230 (D. Ore. 1975); *Frasca v. Prudential-Grace Lines, Inc.*, 394 F. Supp. 1092, 1097 (D. Md. 1975); *Ramirez v. Toko Kaiun K. K.*, 385 F. Supp. 644, 646 (N.D. Cal. 1974); *Hite v. Maritime Overseas Corp.*, 380 F. Supp. 222, 226 (E.D. Tex. 1974).

37. See *Cummings v. "Sidarma" Soc.*, 409 F. Supp. 869, 872 (E.D. La. 1976). See generally note 36 *supra*.

38. One commentator, for example, in discussing the cases which arose shortly after the enactment of the 1972 Amendments to the LHWCA, noted that "the available decisions that have reached the merits of the longshoreman's action against the shipowner have overwhelmingly gone for the shipowner, twenty-one to three." Robertson, *Negligence Actions by Longshoremen Against Shipowners Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act*, 7 J. MAR. L. & COM. 447, 453 (footnotes omitted).

39. See notes 40-50 *infra* and accompanying text.

40. 384 F. Supp. 198 (E.D. Tex. 1974).

41. *Id.* at 199.

42. *Id.* The first part of this cargo was loaded in Galveston, Texas; the vessel then proceeded to Beaumont, Texas, the port at which the plaintiff was injured. *Id.*

sacks,⁴³ and the plaintiff longshoreman was injured when he stepped into one of these spaces.⁴⁴ As in *Fedison*,⁴⁵ the plaintiff contended that the existence of spaces within the cargo constituted negligence on the part of the shipowner.⁴⁶

In rejecting the longshoreman's contention, the *Citizen* court noted that in both ports the stevedoring company "was in sole charge of the loading of the bagged flour in the various hatches of the vessel."⁴⁷ The *Citizen* court also observed that the manner and method for loading the cargo was determined by the stevedoring company and that the ship's crew was not a participant in this operation.⁴⁸ In holding that the shipowner had not been negligent, the court stated that any duty which may have existed to discover and correct the condition of the cargo rested upon the stevedoring company.⁴⁹ The stevedoring company had "control of the work being done in the [vessel's] hold."⁵⁰

B. Development of a Standard of Care

In the initial cases arising under section 905(b), courts described instances in which shipowner liability could not arise but generally declined thereby to provide a standard of care for shipowners.⁵¹

43. *Id.* at 200.

44. *Id.*

45. 382 F. Supp. 4 (E.D. La. 1974). See also notes 28-35 *supra* and accompanying text.

46. *Citizen v. M/V Triton*, 384 F. Supp. at 201. The plaintiff had argued that the shipowner was negligent in that he had constructive knowledge of an "unseaworthy" condition. *Id.* Whether this condition would have constituted unseaworthiness under the law prior to the 1972 Amendments is subject to debate. Compare *Boutte v. M/V Malay Maru*, 370 F.2d 906, 908 (5th Cir. 1967) (where plaintiff's foot "slipped into the space" between bales of cotton the court failed to find unseaworthiness) with *Strachan Ship. Co. v. Alexander*, 311 F.2d 385, 386 (5th Cir. 1962) ("large hole" between stowed bales of cotton constituted unseaworthiness).

47. 384 F. Supp. at 200.

48. *Id.*

49. *Id.* at 201.

50. *Id.* (emphasis added). There were other cases arising shortly after the enactment of the 1972 Amendments in which courts found the shipowner to be free of negligence when the stevedoring company had "control" of either the cargo operations or of the vessel's work area. See, e.g., *Bess v. Agromar Line*, 518 F.2d 738, 742 (4th Cir. 1975) ("[t]he allegedly unsafe condition was the result of the loading process which was under the sole control of the independent stevedoring company"); *Cummings v. "Sidarma" Soc.*, 409 F. Supp. 869, 870 (E.D. La. 1976) ("[t]he operation was under the exclusive management and control of the stevedore company").

51. See notes 21-50 *supra* and accompanying text.

There were, however, a few instances in which the the courts did provide a standard of care.⁵² In *Ramirez v. Toko Kaiun K.K.*,⁵³ the plaintiff and his fellow longshoremen were experiencing difficulty in unloading a cargo of steel pipe from the defendant's vessel.⁵⁴ The plaintiff, while attempting to position a cable under one of the pipes, was injured when the cable began "spinning wildly," striking him in the chest.⁵⁵ In his suit, the plaintiff contended that his injury was the result of the shipowner's negligence.⁵⁶

The *Ramirez* court, in granting the defendant shipowner's motion for summary judgment,⁵⁷ noted that "[t]he precise cause of the accident was never satisfactorily established at trial."⁵⁸ In addition, the court noted that the cargo had been certified as "safely stowed,"⁵⁹ that any difficulties with the unloading had not been brought to the attention of the ship's crew,⁶⁰ and that any of the longshoremen could have stopped the procedure when an unsafe condition developed.⁶¹ After reviewing the House Report on the 1972 Amendments to the LHWCA,⁶² the court concluded that "[t]he primary responsibility for the safety of the longshoreman lies with the stevedoring company."⁶³ The *Ramirez* decision is dis-

52. See *Bovia v. S/S Agia Erini*, 433 F. Supp. 1020, 1022 (E.D. La. 1977); *Frasca v. Prudential-Grace Lines, Inc.* 394 F. Supp. 1092, 1098 (D. Md. 1975).

53. 385 F. Supp. 644 (N.D. Cal. 1974).

54. *Id.* at 646-47.

55. *Id.* at 647.

56. *Id.* at 653. The plaintiff argued that the shipowner had failed to "provide [him with] a 'reasonably safe place to work.'" *Id.*

57. *Id.* at 654.

58. *Id.* at 648.

59. *Id.* at 646. This certification had been provided by an "independent cargo appraiser." *Id.*

60. *Id.* at 653.

61. *Id.* at 648. Although a longshoreman may stop a procedure when an unsafe condition develops, some courts have questioned whether the shipowner may assert this as a defense. See *Santos v. Scindia Steam Navig. Co.*, 598 F.2d 480, 488 (9th Cir. 1979); *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505, 509 (2d Cir. 1976).

62. 385 F. Supp. at 649-53.

63. 385 F. Supp. at 653. Other courts have reached a similar conclusion. See, e.g., *Clemmons v. Mitsui O.S.K. Lines, Ltd.*, 596 F.2d 746, 750 (7th Cir. 1979); *Chavis v. Finnlines, Ltd. O/Y*, 576 F.2d 1072, 1078 (4th Cir. 1978); *McCarthy v. Silver Bulk Ship, Ltd.*, 487 F. Supp. 1021, 1028 (E.D. Pa. 1980); *Murphy v. National Ship. Corp. of Pak.*, 459 F. Supp. 1173, 1178 (C.D. Cal. 1978); *Espinoza v. United States Lines, Inc.*, 444 F. Supp. 405, 410 (S.D.N.Y.), *aff'd*, 586 F.2d 832 (2d Cir. 1978); *Valle v. Jugoslavenska Linejska Plovidba*, 434 F. Supp. 608, 611 (S.D.N.Y. 1977). It should be noted, however, that neither the House Report nor the Senate Report on the 1972 Amendments to the LHWCA provides that the primary

tinguishable from other early cases concerning section 905(b) in that the court proposed a standard of care for shipowners. The court stated that

the shipowner must (1) exercise ordinary care to place the ship and equipment in such condition that an experienced stevedore will be able, when exercising ordinary care, to discharge the cargo in a workmanlike manner and with reasonable safety to persons and property, and (2) give the stevedore warning of any concealed or latent defects that are known by the shipowner.⁶⁴

It is also significant to note that the *Ramirez* court cited section 343A of the Restatement (Second) of Torts.⁶⁵ Section 343A provides that a landowner is not necessarily relieved of liability merely because an injury-causing condition was "open and obvious."⁶⁶

Following *Ramirez*, a number of courts adopted section 343A as a standard of care for shipowners.⁶⁷ *Gay v. Ocean Transport & Trading, Ltd.*⁶⁸ illustrates this development. In *Gay*, the fall of a pallet resulted in injury to the plaintiff longshoreman.⁶⁹ This pallet fell from the top of a stack of pallets after a boom wire had caught on it.⁷⁰ The trial court, in granting summary judgment for the shipowner, noted that the injury-causing condition had been created by the stevedoring company.⁷¹ In addition, the trial court con-

responsibility for the safety of the longshoreman rests with the stevedoring company. A statement that the primary responsibility is on the stevedoring company may, on occasion, preclude inquiry as to the responsibility of the shipowner where such inquiry may be warranted. It may be more appropriate for a court to examine the nature of the shipowner's responsibility rather than categorically subordinating it to the responsibility of the stevedoring company.

64. 385 F. Supp. at 646.

65. *Id.* Section 343A provides in pertinent part that:

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. RESTATEMENT (SECOND) OF TORTS, § 343A(1) (1965) (emphasis added).

66. See note 65 *supra*.

67. See *Brown v. Mitsubishi Shintaku Ginko*, 550 F.2d 331, 333 (5th Cir. 1977); *Anuszewski v. Dynamic Mariners Corp.*, 540 F.2d 757, 759 (4th Cir. 1976), *cert. denied*, 429 U.S. 1098 (1977); *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505, 508 (2d Cir. 1976); *Frasca v. Prudential-Grace Lines, Inc.*, 394 F. Supp. 1092, 1101 (D. Md. 1975).

68. 546 F.2d 1233 (5th Cir. 1977).

69. *Id.* at 1240.

70. *Id.*

71. *Id.* Courts which heard the initial cases arising under § 905(b), in addition to finding

sidered this condition to be "open and obvious" and known to both the stevedoring company and the shipowner.⁷²

On appeal, the Fifth Circuit upheld the findings of the trial court as "not clearly erroneous."⁷³ The Fifth Circuit sought, however, to disavow any "possible intimation . . . that a vessel has no duty concerning any danger which is open and obvious to the stevedore or its employees."⁷⁴ The court acknowledged that the "traditional rule"⁷⁵ would relieve a landowner of any duty to warn invitees of "open and obvious" dangers.⁷⁶ The court in *Gay* stated, however, that this rule was "premised in large part on the concepts of contributory negligence and assumption of risk" and was thereby inappropriate in section 905(b) cases.⁷⁷ Therefore, the Fifth Circuit concluded that this "traditional rule" should be replaced by the "modern trend"⁷⁸ which was embodied in sections 343 and 343A of the Restatement.⁷⁹

the shipowner free of negligence when the injury-causing condition was *open and obvious* or within the *control* of the stevedoring company, considered the shipowner to be free of negligence when the injury-causing condition had been *created* by the stevedoring company. See *Munoz v. Flota Merchante Grancolombiana, S.A.*, 553 F.2d 837, 841 (2d Cir. 1977); *Brown v. Mitsubishi Shintaku Ginko*, 550 F.2d 331, 334 (5th Cir. 1977); *Crowshaw v. Koninklijke Nedlloyd*, 398 F. Supp. 1224, 1229 (D. Ore. 1975).

72. *Gay v. Ocean Trasp. & Trading, Ltd.*, 546 F.2d at 1240.

73. *Id.*

74. *Id.*

75. *Id.* See also note 33 *supra* and accompanying text.

76. 546 F.2d at 1240.

77. *Id.* at 1241-42.

78. *Id.* at 1241. "[T]he obviousness or knowledge of a dangerous condition on certain property does not necessarily relieve the owner of his obligation to take further precautions to remedy the danger." *Id.* (footnote omitted).

79. *Id.* at 1242. In adopting §§ 343 and 343A of the Restatement, the court in *Gay* sought to promote uniformity in regard to the shipowner's standard of care. 546 F.2d at 1242. Section 343 provides that:

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, § 343 (1965). For the text of § 343A see note 65 *supra*.

C. Criticism of the Early Approaches to Section 905(b) Liability

The application of the real property concepts of "invitee,"⁸⁰ "open and obvious,"⁸¹ and "control"⁸² to the standard of care required of a shipowner became the subject of criticism.⁸³ It was argued that the courts' strict adherence to these "land-based" principles had resulted in unfair limitations upon an injured longshoreman's ability to recover under section 905(b).⁸⁴

Regarding the classification of the longshoreman as a "business invitee," one commentator contended that when an individual has been classified as an invitee "technical niceties often exonerate a landowner even when he [the landowner] has failed to exercise reasonable care."⁸⁵ Another commentator argued that any analogy between a longshoreman and an invitee was inappropriate in that invitees on land are "basically self-reliant and aware" while maritime employees are the beneficiaries of a "well-developed tradition of solicitude."⁸⁶ Furthermore, the Supreme Court, in a case concerning a social visitor aboard a vessel, rejected the use of terms such as invitee in considering the shipowner's standard of care.⁸⁷ In addition, state courts, in considering the issue of landowner liability,

80. See notes 26-38 *supra* and accompanying text.

81. *Id.*

82. See notes 39-50 *supra* and accompanying text.

83. See notes 84-101 *infra* and accompanying text.

84. See *Shipowner Negligence & Stevedore Immunities*, *supra* note 16 at 536; *The Injured Longshoreman*, *supra* note 16, at 772.

85. *The Injured Longshoreman*, *supra* note 16, at 787. It was noted, for example, that where a "business invitee" has "assumed a risk" a landowner, despite negligent conduct, can escape liability. *Id.* at 878 n.132.

86. Robertson, *Negligence Actions by Longshoremen Against Shipowners Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act*, 7 J. MAR. L. & COM. 447, 451 (1976).

87. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959). In *Kermarec*, an individual was injured while making a social visit aboard the defendant's vessel. *Id.* at 626. The district court had classified the plaintiff as a "gratuitous licensee" and had concluded that the defendant shipowner had not breached any duty to the plaintiff. *Id.* The Second Circuit affirmed this decision. The Supreme Court, however, reversed and held that the use of concepts such as "invitee" or "licensee" was inappropriate in determining the shipowner's standard of care to those aboard his vessel. *Id.* at 630. The Court characterized these concepts as "inherited from a culture deeply rooted to the land" and said that their application in contemporary society has "produced confusion and conflict." *Id.* at 631. Consequently, the Supreme Court held that the shipowner's standard of care should be "reasonable care under the circumstances of each case." *Id.* at 632.

are in the process of abandoning the use of "status" classifications.⁸⁸

Criticism has also been addressed at the trend, which had emerged in the early section 905(b) cases,⁸⁹ whereby a shipowner would be considered free of negligence when the injury-causing condition was "open and obvious."⁹⁰ Although section 343A of the Restatement does contain a qualification in this regard,⁹¹ it has been said that "[w]hether or not the open and obvious doctrine is qualified, it presents a significant barrier" to an injured longshoreman's ability to recover against a shipowner.⁹² A principal criticism was that this "doctrine," despite the qualification contained in section 343A, evoked the concepts of assumption of risk and contributory negligence.⁹³ It has been noted that sections 343 and 343A of the Restatement define the shipowner's "duty in terms of the plaintiff's perception, [while] frequently preventing inquiry into the reasonableness of the . . . [shipowner's] conduct."⁹⁴ In addition, Congress, in enacting the 1972 Amendments, specifically barred the use of assumption of risk and contributory negligence from the consideration of shipowner liability.⁹⁵ Commentators, relying on these conclusions, have stated that the concept of "open and obvious" conditions are inappropriate in cases arising under section 905(b) of the LHWCA.⁹⁶

88. See *Oulette v. Blanchard*, 116 N.H. 552, 364 A.2d 631 (1976); *Basso v. Miller*, 40 N.Y.2d 233, 352 N.E.2d 868, 386 N.Y.S.2d 564 (1976); *Mile High Fence Co. v. Radovich*, 175 Colo. 537, 489 P.2d 308 (1971); *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). See generally *The Injured Longshoreman*, *supra* note 16, at 786-87.

89. See notes 21-38 *supra* and accompanying text.

90. Reliance by the courts, in their application of § 905(b), upon the concept of "open and obvious" has been characterized as a "left-handed application of of [sic] the doctrine of assumption of risk." *Shipowner Negligence & Stevedore Immunities*, *supra* note 16, at 532.

91. Section 343A provides that liability for "open and obvious" conditions will not arise "unless the possessor should anticipate the harm despite such knowledge or obviousness." RESTATEMENT (SECOND) OF TORTS, § 343A(1) (1965) (emphasis added). See also note 65 *supra*.

92. *Shipowner Negligence & Stevedore Immunities*, *supra* note 16, at 533.

93. *Id.* at 532-34.

94. *The Injured Longshoreman*, *supra* note 16, at 772.

95. See *House Report*, *supra* note 3, at 4705. ("the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury. Also . . . the admiralty rule which precludes the defense of 'assumption of risk' in an action by an injured employee shall also be applicable.")

96. See *The Injured Longshoreman*, *supra* note 16, at 781; *Shipowner Negligence &*

Reliance by courts upon the concepts of "control"⁹⁷ was also the subject of unfavorable commentary. In addition to being characterized as "confusing and metaphysical,"⁹⁸ the concept of "control" may present problems in its application. Occasionally, for example, the assistance of crew members is necessary in cargo operations.⁹⁹ Members of the crew may be needed to open hatches or otherwise assist the longshoremen.¹⁰⁰ Therefore, if an injury to a longshoreman occurs at a time when both crew members and longshoremen are in the work area, a determination as to whether the shipowner or the stevedoring company was in "control" at the time of the injury could prove difficult.¹⁰¹

III. The Emergence of "Reasonable Care Under the Circumstances"

The commentators, in criticizing the engrafting of traditional real property concepts onto the standard of care for shipowners, argued for a standard of care that was both free of these concepts¹⁰² and focused upon the conduct of the shipowner.¹⁰³ In *Gallardo v. Westfal-Larsen & Co.*,¹⁰⁴ such a standard of care was adopted. In *Gallardo*, the longshoreman was injured when he slipped and fell while working aboard the defendant's vessel.¹⁰⁵ The longshoreman contended that his injury was attributable to a "slippery substance" on the ship's deck¹⁰⁶ and that the presence of

Stevedore Immunities, *supra* note 16, at 533.

97. See notes 39-50 *supra* and accompanying text.

98. *The Injured Longshoreman*, *supra* note 16, at 792.

99. See *Cox v. Flota Merchante Grancolombiana*, 577 F.2d 798 (2d Cir. 1978), *cert. denied*, 439 U.S. 881 (1979).

100. In *Cox*, the assistance of the crew was needed for the opening of hatch covers. 577 F.2d at 800.

101. This difficulty in determining the issue of "control" would most often exist in the initial stages of a longshoring operation, where, for example, both the ship's crew and the longshoremen may be jointly engaged in the preparation of the vessel.

102. See *Shipowner Negligence & Stevedore Immunities*, *supra* note 16, at 536 (as a result of the "application of land-based occupiers' liability principles . . . it appears reasonably clear that waterfront safety is being adversely affected").

103. See *The Injured Longshoreman*, *supra* note 16, at 772. (the shipowner should be required "to take reasonable remedial action with respect to all unreasonably dangerous conditions of which it has actual or constructive knowledge").

104. 435 F. Supp. 484 (N.D. Cal. 1977).

105. *Id.* at 486.

106. *Id.*

this substance constituted negligence on the part of the defendant shipowner.¹⁰⁷

The *Gallardo* court, in granting summary judgment,¹⁰⁸ gave several reasons for its finding that the shipowner had not been negligent.¹⁰⁹ First, the court noted that the House Report on the 1972 Amendments, while containing the phrase "land-based," does not contain any specific references to terms such as "property" or "real property."¹¹⁰ Furthermore, the court said that the phrase "land-based" appears to be "no more than a descriptive label which connotes the opposite of 'sea-based' and which does not specifically mean 'property-based.'"¹¹¹ Regarding the classification of the longshoreman as an "invitee," the court expressed its disapproval by noting that there is no mention of this term in the House Report.¹¹² The *Gallardo* court concluded that Congress, in its reports on the 1972 Amendments, "simply provided a loose framework of variables from which to construct the standard of care required of vessel owners."¹¹³

Second, the court in *Gallardo* rejected the use of sections 343 and 343A in cases arising under section 905(b) of the LHWCA.¹¹⁴ Sections 343 and 343A placed undue emphasis upon the perceptions of the longshoreman and failed to place sufficient emphasis

107. *Id.* at 486-87. The plaintiff argued that the shipowner had failed to provide him with a work area that was reasonably safe or, in the alternative, that the shipowner had provided a reasonably safe work area but that the shipowner had subsequently learned of a hazardous condition and had failed to remedy it. *Id.*

108. *Id.* at 486.

109. See text accompanying notes 110-18 *infra*.

110. 435 F. Supp. at 492.

111. *Id.* This view is shared by at least two commentators. See *The Injured Longshoreman*, *supra* note 16, at 778 ("A fair reading of the [House] report suggests that the repeated references to land-based principles were intended merely to emphasize the congressional intent that no strict liability theory be developed to take the place of unseaworthiness."); *Shipowner Negligence & Stevedore Immunities*, *supra* note 16, at 529 (there has been "[u]ndue emphasis on this call for development of a body of shipowner negligence law by analogy to 'land-based' occupiers' principles").

112. 435 F. Supp. at 492. The court rejected any "resort to terminology which prevents inquiry into the reasonableness of conduct under the circumstances of a given case. Discussions relating to invitees, contractors, primary and secondary responsibilities, obviousness of dangers, and relinquishment of control all have the tendency to steer courts away from a balance of the risk of harm against the utility of the particular conduct in question." *Id.* at 496.

113. *Id.* at 492.

114. See text accompanying notes 115-117 *infra*.

upon the conduct of the shipowner.¹¹⁵ The court also said that sections 343 and 343A incorporate the concepts of assumption of risk and contributory negligence¹¹⁶ — concepts which Congress had barred from any consideration of shipowner liability.¹¹⁷

Third, in addressing the issue of "control," the *Gallardo* court said that any "analysis [of shipowner liability] based upon retention or relinquishment of control poses a potential for abuse by courts which view the commencement of cargo operations as extinguishing the liability of vessels for injuries subsequently sustained by longshoremen."¹¹⁸

The court in *Gallardo* proposed, as an alternative to reliance upon the concepts of "business invitee," "open and obvious," and "control," that a shipowner's standard of care should be "reasonable care under the circumstances."¹¹⁹ The court believed that its standard of care would be free of the rigidity which characterized previous decisions and that it would provide the flexibility which is needed in the determination of shipowner liability.¹²⁰

It should be noted, however, that while the court in *Gallardo* rejected reliance upon the concept of "control," the court did place an analogous limitation upon its own standard of "reasonable care under the circumstances." This limitation concerned the type of knowledge that would be required of the shipowner before liability on his part could arise. According to the *Gallardo* court, the shipowner would be required to exercise reasonable care when he had either *actual* or *constructive* knowledge of a dangerous condition arising *prior* to the commencement of a stevedoring operation.¹²¹

115. 435 F. Supp. at 494.

116. *Id.* See also notes 93-96 *supra* and accompanying text.

117. 435 F. Supp. at 492. See also note 95 *supra*.

118. 435 F. Supp. at 495. See also notes 97-101 *supra* and accompanying text.

119. 435 F. Supp. at 496. In adopting the standard of "reasonable care under the circumstances," the *Gallardo* court relied upon the Supreme Court's application of this standard in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 632 (1959), a case which pertained to a shipowner's duty toward social visitors aboard his vessel. See notes 87-88 *supra* and accompanying text.

120. 435 F. Supp. at 496. There have been at least two cases arising under § 905(b) in which a shipowner, rather than a stevedoring company, was the employer of the longshoremen. One court concluded that, in such an instance, a shipowner would be liable for failing to provide a longshoreman with a "reasonably safe place to work." *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505, 507 (2d Cir. 1976). See also *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 610 F.2d 116, 126 (3d Cir. 1979).

121. 435 F. Supp. at 497-98. It is widely accepted that the shipowner's actual or con-

As to a dangerous condition arising *after* the commencement of stevedoring operations, the court said that the shipowner would only be required to exercise reasonable care when he had *actual* knowledge of this condition.¹²²

The court in *Gallardo* concluded that the defendant shipowner had neither actual nor constructive knowledge of any conditions that may have existed prior to the commencement of the stevedoring operations.¹²³ The court also found that the shipowner lacked actual knowledge of any condition that may have arisen after the commencement of the stevedoring operations.¹²⁴ Accordingly, the court in *Gallardo* held that the absence of this knowledge on the part of the shipowner barred a finding of negligence.¹²⁵

In subsequent cases arising under section 905(b), several courts

structive knowledge of the injury-causing condition is needed before liability under § 905(b) can arise. See *House Report, supra* note 3, at 4704; *Johnson v. A/S Ivarans Rederi*, 613 F.2d 334, 348 (1st Cir. 1980); *Lawson v. United States*, 605 F.2d 448, 452 (9th Cir. 1979); *McCarthy v. Silver Bulk Ship, Ltd.*, 487 F. Supp. 1021, 1026 (E.D. Pa. 1980); *Garofalo v. Malaysia Overseas Export Lines, Inc.*, 470 F. Supp. 166, 170 (S.D.N.Y. 1979); *Murphy v. National Ship. Corp. of Pak.*, 459 F. Supp. 1173, 1178 (C.D. Cal. 1978).

122. 435 F. Supp. at 496. In adopting two different criteria regarding the type of knowledge required on the part of the shipowner before liability can arise, the court in *Gallardo* acknowledged that this part of its standard of care is not supported by the House Report on the 1972 Amendments to the LHWCA. *Id.* The House Report provides that "nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action when it knows or should have known about a dangerous condition." *House Report, supra* note 3, at 4704. Despite this language in the report, the *Gallardo* court said that "on the basis of the testimony at trial . . . a ship should remedy only those dangerous conditions arising after the longshoreman start work of which it has actual knowledge." 435 F. Supp. at 496. It should also be noted that the court in *Gallardo*, in making this distinction, relied upon an analysis in which the different criteria for the shipowner's knowledge was proposed. See *The Injured Longshoreman, supra* note 16, at 790-92.

123. 435 F. Supp. at 498.

124. *Id.*

125. *Id.* By determining that the shipowner had neither actual nor constructive knowledge of the injury-causing condition, the court found the shipowner to be free of negligence. In reaching this conclusion, the court avoided a strict application of its standard of care. According to this standard, the court should have initially determined when the injury-causing condition arose. Having made this determination, the court then should have considered the type of knowledge to be required of the shipowner. Since the injury-causing condition in *Gallardo* was a "slippery substance," the court may have been unable to determine when this condition arose, and it was, therefore, necessary for the court to make determinations under both parts of its knowledge requirement. This fact indicates a potential shortcoming of the *Gallardo* standard in that there will be instances when a court is unable to determine whether the injury-causing condition arose before or after the commencement of the stevedoring operations.

adopted the standard of care proposed in *Gallardo*.¹²⁶ These courts, in following *Gallardo*, also questioned the appropriateness of any standard of care for shipowners that relied upon the concepts of "open and obvious," "control," or upon sections 343 and 343A of the Restatement.¹²⁷

It should be noted, however, that the *Gallardo* standard, in requiring that the shipowner have *actual* knowledge of an injury-causing condition which arose *after* the commencement of the stevedoring operation, presents two potential difficulties in application. These potential difficulties are in determining when the injury-causing condition arose and in determining when the stevedoring operations commenced. As to the first difficulty, there have been instances, for example, in which a defective piece of equipment, aboard the vessel, caused the longshoreman's injury.¹²⁸ Where the defect in this equipment resulted from wear, it may be impossible to determine when this injury-causing condition arose—that is, whether the defect arose before or after the commencement of the stevedoring operation.¹²⁹

As to the second difficulty, there are instances in which the ship's crew will assist the longshoreman in preparing the vessel for cargo operations.¹³⁰ If, during this period of preparation, a dangerous condition arises and, as a result, a longshoreman is injured, then, according to the *Gallardo* standard, it is necessary to determine whether this condition arose before or after the commencement of the stevedoring operation.¹³¹ Consequently, a determination must be made as to whether the stevedoring operation

126. See *Espinoza v. United States Lines, Inc.*, 444 F. Supp. 405, 412 (S.D.N.Y.), *aff'd*, 586 F.2d 832 (2d Cir. 1978) (the court dismissed the longshoreman's complaint); *Davis v. Inca Compania Naviera S.A.*, 440 F. Supp. 448, 457 (W.D. Wash. 1977) (shipowner found to be negligent); *Darwin v. United States*, 435 F. Supp. 501, 509-12 (N.D. Cal. 1977) (shipowner found to be negligent).

127. See note 126 *supra*. In *Hickman v. Jugoslavenska Linijska Plovidba Rijeka, Zvir*, 570 F.2d 449 (2d Cir. 1977), the Second Circuit, although not applying the *Gallardo* standard, stated, in a *per curiam* opinion, that "[t]he dichotomy of latent and obvious defects referred to in the cases is not always controlling or pertinent in determining the liability of the shipowner." *Id.* at 451.

128. See, e.g., *Matthews v. Ernst Russ S.S. Co.*, 603 F.2d 676 (7th Cir. 1979) (defective ladder); *Santos v. Scindia Steam Navig. Co.*, 498 F.2d 480 (9th Cir. 1979) (defective winch).

129. Under the *Gallardo* standard, however, this determination is necessary to establish the knowledge to be required of the shipowner before liability on his part can arise.

130. See notes 99-100 *supra* and accompanying text.

131. 435 F. Supp. at 496-98.

commenced when the first longshoreman entered the work area, when the last crew member left the work area, or at some point in between. The outcome of this determination will decide, according to the *Gallardo* standard, the type of knowledge to be required of the shipowner.¹³²

Furthermore, the actual knowledge requirement of the *Gallardo* standard conflicts with Congress's intent in enacting the 1972 Amendments to the LHWCA.¹³³ Congress, through the 1972 Amendments, sought to establish circumstances in which a shipowner would be liable when he had either actual or constructive knowledge of an injury-causing condition.¹³⁴

Although its actual knowledge requirement has failed to gain wide acceptance,¹³⁵ the *Gallardo* standard is, nevertheless, a noteworthy step in the development of a standard of care for shipowners under section 905(b).¹³⁶ The *Gallardo* standard, by requiring

132. *Id.*

133. *See* note 122 *supra*.

134. *Id.*

135. In *Blackburn v. Prudential Lines, Inc.*, 454 F. Supp. 1302 (E.D. Pa. 1978), the court, in rejecting the *Gallardo* standard, said that despite a shipowner's actual knowledge of an injury-causing condition, liability on the part of that shipowner may, nevertheless, be precluded in certain instances. *Id.* at 1305-06. *Blackburn* concerned a longshoreman who, in his suit against a shipowner, alleged that his injuries resulted from the presence of oil and water on the deck of the defendant's vessel. *Id.* at 1303. In considering the defendant's motion for summary judgment, the *Blackburn* court stated that shipowner liability extends to "conditions" pertaining to the ship or its cargo and to circumstances in which the shipowner has "control" over the cargo operations. *Id.* at 1305-06. It is only in these instances, according to the *Blackburn* court, in which the shipowner's actual knowledge may give rise to liability. *Id.* at 1306. The *Blackburn* court said that the shipowner has no "duty to correct stevedore-caused conditions." *Id.* Accordingly, in such an instance, shipowner liability will not arise—regardless of the shipowner's actual knowledge of these conditions. *Id.* The *Blackburn* court noted, however, that a question did exist as to whether the shipowner, in this case, had "control" over the cargo operations. *Id.* at 1307. Consequently, the court declined to grant the defendant's motion for summary judgment. *Id.* at 1309.

Until recently, the *Blackburn* court's delineation of instances in which shipowner liability may arise characterized the approach by courts in the Third Circuit to the issue of shipowner liability. *See, e.g.*, *Rich v. United States Lines, Inc.*, 596 F.2d 541, 553 (3d Cir. 1979); *Hurst v. Triad Ship. Co.*, 554 F.2d 1237, 1248-49 (3d Cir. 1977); *Dougherty v. Haaland*, 457 F. Supp. 860, 865 (E.D. Pa. 1978), *aff'd*, 601 F.2d 574 (3d Cir.), *cert. denied*, 444 U.S. 992 (1979).

Recently, however, the Third Circuit has stated that in regard to shipowner liability "[t]he sounder approach . . . imposes on vessel owners the . . . duty to exercise 'reasonable care under the circumstances of each case.'" *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 610 F.2d 116, 125 (3d Cir. 1979).

136. The standard of care proposed in *Gallardo*, that the shipowner exercise "reasonable

the shipowner to exercise "reasonable care under the circumstances," succeeds in focusing attention upon the conduct of the shipowner.

In *Santos v. Scindia Steam Navigation Co.*,¹³⁷ the Ninth Circuit adopted the requirement that the shipowner exercise "reasonable care under the circumstances."¹³⁸ The Ninth Circuit declined, however, to adopt the *Gallardo* requirement that the shipowner must have *actual* knowledge of an injury-causing condition arising *after* the commencement of a stevedoring operation.¹³⁹ In *Santos*, the plaintiff longshoreman was injured when several sacks of wheat fell from a pallet suspended above him.¹⁴⁰ The longshoreman attributed the fall of these sacks to a defective winch and contended that a defect in the winch constituted shipowner negligence.¹⁴¹ The district court granted the defendant shipowner's motion for summary judgment,¹⁴² and the plaintiff appealed.¹⁴³ In reversing the decision of the trial court and remanding the proceedings,¹⁴⁴ the Ninth Circuit noted that the winch had been malfunctioning over a period of two days and concluded that a question did exist as to whether the shipowner had actual or constructive knowledge of this condition.¹⁴⁵

The Ninth Circuit, following a review of the Congressional reports on the 1972 Amendments to the LHWCA, proposed that the following standard of care be utilized by the district court upon remand:

care under the circumstances," has subsequently been adopted by courts in a number of section 905(b) cases. See, e.g., *Johnson v. A/S Ivarans Rederi*, 613 F.2d 334, 348 (1st Cir. 1980); *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 610 F.2d 116, 125 (3d Cir. 1979); *Lawson v. United States*, 605 F.2d 448, 452 (9th Cir. 1979). See note 126 *supra*.

137. 598 F.2d 480 (9th Cir. 1979).

138. *Id.* at 485.

139. *Id.* The standard of care adopted by the court in *Santos* refers only to the actual or constructive knowledge of the shipowner; no distinction is made as to when the injury-causing condition arose. *Id.*

140. *Id.* at 482.

141. *Id.*

142. *Id.*

143. *Id.* at 483. The plaintiff argued that the district court had resolved "a number of disputed material facts against him." *Id.*

144. *Id.* at 491.

145. *Id.* at 489. The *Santos* court noted, for example, that members of the ship's crew had been "in the vicinity of the loading operation during the two days prior to the accident." *Id.*

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 longshoreman against the danger.¹⁴⁶

According to this standard of care, liability under section 905(b) can arise when the shipowner has either *actual* or *constructive* knowledge of a dangerous condition. Unlike *Gallardo*,¹⁴⁷ there is no provision in the *Santos* standard for an instance in which the shipowner's *actual* knowledge of the injury-causing condition is required before liability can arise.¹⁴⁸

In addition to proposing this standard of care, the court in *Santos* addressed the issue of "control." The court said that while the issue of "control" may be a valid consideration in determining whether the shipowner had the opportunity to know of the injury-causing condition,¹⁴⁹ "control" should not serve as a substitute for an examination of the shipowner's conduct.¹⁵⁰

Regarding sections 343 and 343A of the Restatement, the *Santos* court, in concurrence with the *Gallardo* decision, viewed as inappropriate the application of these Restatement sections in cases arising under section 905(b) of the LHWCA.¹⁵¹ These sections of the Restatement, according to the Ninth Circuit, are "inconsistent with Congress'[s] explicit direction to reject common law rules of contributory negligence and assumption of risk in favor of applying the admiralty concept of comparative negligence."¹⁵² In addition to its proposed standard of care, *Santos* is important because the court continued the trend, initiated in *Gallardo*, of eliminating reliance upon the concepts of "invitee" and "open and obvious" and of focusing, instead, upon the reasonableness of the shipowner's

146. *Id.* at 485.

147. See notes 121-22 *supra* and accompanying text.

148. See text accompanying note 146 *supra*.

149. 598 F.2d at 490.

150. *Id.*

151. *Id.* at 486-87.

152. *Id.* at 486.

conduct.¹⁵³

A shipowner can be liable under section 905(b) only upon a finding of negligence.¹⁵⁴ The *Gallardo* and *Santos* standards of care, which refer to both the shipowner's conduct and knowledge, fail to include one of the traditional elements of a negligence cause of action.¹⁵⁵ This element is proximate causation.¹⁵⁶ Although some courts in cases arising under section 905(b) have discussed proximate causation,¹⁵⁷ this element of negligence has generally been omitted from any standard of care.¹⁵⁸ In *Mattivi v. South African Marine Corp.*,¹⁵⁹ the Second Circuit did include the issue of proximate causation in the shipowner's standard of care.¹⁶⁰

In *Mattivi*, the plaintiff, a carpenter working aboard the defendant's vessel, slipped while walking on a "catwalk."¹⁶¹ The trial judge, despite finding that there was insufficient evidence to support the plaintiff's contention,¹⁶² permitted the jury to determine whether the shipowner had been negligent.¹⁶³ The jury returned a verdict for the plaintiff, and the defendant shipowner moved to have this verdict set aside.¹⁶⁴ The trial court granted the defendant's motion, and the plaintiff appealed.¹⁶⁵

153. Other courts have subsequently adopted the standard of care proposed by the court in *Santos*. See *Johnson v. A/S Ivarans Rederi*, 613 F.2d 334, 348 (1st Cir. 1980); *Lawson v. United States*, 605 F.2d 448, 450 (9th Cir. 1979).

154. See note 17 *supra*.

155. The traditional elements of a negligence cause of action are: duty, breach, proximate cause, and harm. See PROSSER, *supra* note 24, § 30 at 143.

156. Proximate causation is defined as "[a] reasonable causal connection between the conduct and the resulting injury." *Id.*

157. See note 185 *infra*.

158. Both the *Gallardo* and *Santos* standards of care discuss the shipowner's knowledge and his conduct; neither standard, however, discusses the issue of proximate causation. See text accompanying notes 119-22 and 146-48 *supra*.

159. 618 F.2d 163 (2d Cir. 1980).

160. See text accompanying note 168 *infra*.

161. 618 F.2d at 165.

162. *Id.* at 166.

163. *Id.* While acknowledging the validity of the defendant shipowner's motion for summary judgment, the trial judge noted the reluctance of the Second Circuit to sustain such motions on review. *Id.*

164. *Id.*

165. *Id.* In granting the defendant shipowner's motion to set the verdict aside, the trial court gave several reasons for its decision. It noted first, the lack of evidence that the plaintiff had slipped on anything, second, the lack of evidence that the defendant shipowner had notice of any condition, third, the indication that the plaintiff would have been able to avoid this condition, and fourth, that someone other than the shipowner would have been respon-

The *Mattivi* court, in upholding the judgment of the trial court, acknowledged the "confusion left in the wake of the 1972 [A]mendments to the LHWCA"¹⁶⁶ and proposed its own standard of care for shipowners.¹⁶⁷ The Second Circuit stated that a longshoreman

cannot prevail on his personal injury claim unless he proves by a preponderance of the evidence: (1) that a dangerous condition actually existed on the ship; (2) that the defendant shipowner had notice of the dangerous condition (and should have reasonably anticipated the plaintiff might be injured by it); and (3) that if the shipowner was negligent, such negligence proximately caused the plaintiff's injuries.¹⁶⁸

The Second Circuit said that if the injured longshoreman "fails to establish any of these elements, then the verdict must be for the shipowner."¹⁶⁹ The court also said there was no evidence that the defendant had notice of the condition and that, even if the defendant shipowner had notice, the mere presence of "a couple of drops of oil" on a walkway did not constitute a dangerous condition.¹⁷⁰

A criticism can be made of the *Mattivi* standard in that it fails to mention the degree of care to be exercised by the shipowner. Thus, it is inconsistent with the current trend, as indicated by *Gallardo*¹⁷¹ and *Santos*,¹⁷² to include in the standard of care the requirement that the shipowner exercise "reasonable care under the circumstances." Despite this shortcoming, the standard of care proposed in *Mattivi* is noteworthy because it includes the issue of proximate causation. *Gallardo*, *Santos*, and *Mattivi* have all contributed to the development of a standard of care for shipowners;¹⁷³ however, a lack of consensus, in regard to this issue, continues to exist among the "maritime" circuits.¹⁷⁴

sible for remedying such a condition. *Id.*

166. *Id.* at 168.

167. See text accompanying note 168 *infra*.

168. 618 F.2d at 168.

169. *Id.* A benefit of the standard of care proposed in *Mattivi* is that each of the three requirements can be determined independently of the other two.

170. *Id.* at 169.

171. See notes 104-25 *supra* and accompanying text.

172. See notes 137-53 *supra* and accompanying text.

173. See notes 104-70 *supra* and accompanying text.

174. At present, the First, Third, and Ninth Circuits have as the basis for their standards of care that the shipowner exercise "reasonable care under the circumstances." See

IV. A Proposed Standard of Care

Based upon the language of section 905(b),¹⁷⁵ the related Congressional reports,¹⁷⁶ and the case law analyzed herein,¹⁷⁷ the following is offered as a proposed standard of care for shipowners.

To prevail in a negligence action against a shipowner, an injured longshoreman, alleging that his injury was the result of a condition¹⁷⁸ aboard a vessel,¹⁷⁹ must prove that: 1) the condition was the proximate cause of his injury; 2) the condition was unreasonably dangerous; 3) the shipowner had actual or constructive knowledge of the condition; and 4) the shipowner failed to exercise reasonable care under the circumstances. This proposed standard of care seeks to aid courts in their application of section 905(b) and to reflect traditional admiralty values of simplicity and practicality.¹⁸⁰

A. Proximate Causation

Cases frequently arise under section 905(b) in which an injured longshoreman contends that a particular condition aboard the defendant's vessel was the proximate cause of his injury. Such conditions include cargo in disarray,¹⁸¹ defective equipment,¹⁸² and slip-

Johnson v. A/S Ivarans Rederi, 613 F.2d 334, 348 (1st Cir. 1980); Griffith v. Wheeling-Pittsburgh Steel Corp., 610 F.2d 116, 125 (3d Cir. 1979); Lawson v. United States, 605 F.2d 448, 452 (9th Cir. 1979). The Second, Fourth, Fifth, and Seventh Circuits have for the most part continued to adhere to the reasoning of § 343A of the Restatement. See, e.g., Giglio v. Farrell Lines, Inc., 613 F.2d 429, 431-32 (2d Cir. 1980); Stockstill v. Gypsum Transp., 607 F.2d 1112, 1116 (5th Cir. 1979); Clemons v. Mitsui O.S.K. Lines, Ltd., 596 F.2d 746, 748-49 (7th Cir. 1979); Riddle v. Exxon Transp. Co., 563 F.2d 1103, 1111-12 (4th Cir. 1977).

175. See note 13 *supra*.

176. See *House Report*, *supra* note 3, at 4701-05; *Senate Report*, *supra* note 3, at 8-12.

177. See notes 21-174 *supra* and accompanying text.

178. The word "condition" is used here in a broad sense. Accordingly, it includes, but is not limited to, physical characteristics of the ship or its cargo and procedures undertaken by the shipowner or by the stevedoring company.

179. Since most cases arising under § 905(b) concern injuries occurring aboard vessels, the term "vessel" is used in the proposed standard. It is important to note, however, that coverage under § 905(b) of the LHWCA extends to those working on piers and similar adjoining areas. See note 20 *supra*.

180. See *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 631 (1959).

181. See *Lopez v. A/S D/S Svendborg*, 581 F.2d 319, 321 (2d Cir. 1978); *Briley v. Charente S.S. Co.*, 572 F.2d 498, 499 (5th Cir. 1978); *Valle v. Jugoslavenska Linejska Plovidba*, 434 F. Supp. 608, 609-10 (S.D.N.Y. 1977).

182. See *McCarthy v. Silver Bulk Ship, Ltd.*, 487 F. Supp. 1021, 1025 (E.D. Pa. 1980); *McGuire v. Lykes Bros. S.S. Co.*, 486 F. Supp. 1374, 1377 (E.D. Wis. 1979); *Castel v. Moller*,

pery decks.¹⁸³ A court may find that the proximate cause of the longshoreman's injury was not the condition alleged by the longshoreman and conclude that the shipowner was free of negligence.¹⁸⁴ In reaching such a conclusion, a court may have determined that the conduct of either the stevedoring company or a fellow longshoreman was the proximate cause of the plaintiff's injury.¹⁸⁵ Conversely, where a plaintiff longshoreman establishes that a particular condition was the proximate cause of his injury, the first part of the proposed standard of care would be satisfied.

B. Unreasonably Dangerous

Commentators,¹⁸⁶ Congress,¹⁸⁷ and courts¹⁸⁸ have acknowledged that cargo operations are dangerous. In applying section 905(b),

A.P., 441 F. Supp. 851, 853 (N.D. Cal. 1977).

183. See *Zielinski v. Companhia De Navegacao Maritima*, 460 F. Supp. 1179, 1182 (S.D.N.Y. 1978); *Murphy v. National Ship. Corp. of Pak.*, 459 F. Supp. 1173, 1175 (C.D. Cal. 1978); *Davis v. Inca Compania Naviera S.A.*, 440 F. Supp. 448, 450 (W.D. Wash. 1977).

184. See note 185 *infra*.

185. See *Clemente v. Farrell Lines, Inc.*, 465 F. Supp. 728, 730 (E.D.N.Y. 1979) (the proximate cause of the plaintiff's injury was found to be a fellow longshoreman's operation of a forklift); *Talliercio v. A/S D/S Svendborg*, 451 F. Supp. 949, 952 (S.D.N.Y. 1978) (stevedoring company's failure to use proper hooks was determined to be the proximate cause of the plaintiff's injury); *Kalogeros v. Brasileiro*, 446 F. Supp. 175, 177 (S.D.N.Y. 1978) (plaintiff's decision to hand-carry a 125 pound condenser down a flight of stairs was considered to be the proximate cause of the plaintiff's subsequent injury).

186. See *Steeg, The Exclusivity of Federal Longshoremen's Compensation after the LHWCA Amendments of 1972*, 10 J. MAR. L. & COM. 395, 395 (1978); *Theis, Amended Section Five of the Longshoremen's and Harbor Worker's Compensation Act*, 41 TENN. L. REV. 773, 773 (1974); *Comment, The Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: An End to Circular Liability and Seaworthiness in Return for Modern Benefits*, 27 U. MIAMI L. REV. 94, 95 (1972) ("Traditionally, longshoring has been one of the more hazardous occupations in the United States. This is probably due to the everchanging and unfamiliar work area in which the longshoreman does his daily labor—the ship.").

187. See *House Report, supra* note 3, at 4705 ("[L]ongshoring remains one of the most hazardous of occupations."); *Senate Report, supra* note 3, at 2 ("Longshoring . . . has an injury frequency rate which is well over four times the average for manufacturing operations.").

188. See generally *Anderson v. Iceland S.S. Co.*, 585 F.2d 1142, 1153 (1st Cir. 1978) ("A seagoing ship runs the constant risk of encountering severe weather. As a result, it is unlikely that cargo, no matter how carefully stowed, will emerge unscathed and unblemished from the journey. These conditions are known to exist and inhere in the very nature of seaborne commerce."); *Valle v. Jugoslavenska Linejska Plovidba*, 434 F. Supp. 608, 611 (S.D.N.Y. 1977) ("Shifting cargo . . . is a common experience that stevedores frequently and regularly encounter. They are well aware of the perils inherent in unloading cargo that may have moved during the voyage.").

courts have said, however, that for shipowner liability to arise the longshoreman's injury must have been the result of an *unreasonably* dangerous condition.¹⁸⁹

Although a determination as to whether a condition was unreasonably dangerous will generally be made on a case by case basis, courts should consider at least two criteria. First, the nature of the injury-causing condition should be examined,¹⁹⁰ and, second, the relative experience and skill of those working aboard the vessel should be ascertained.¹⁹¹

It should be emphasized that the second part of the proposed standard of care focuses exclusively upon the question of whether the injury-causing condition was unreasonably dangerous. Consequently, consideration of shipowner conduct in the second part of the proposed standard would be inappropriate. Shipowner conduct is the subject of the fourth part of the proposed standard of care.¹⁹²

189. See *Johnson v. A/S Ivarans Rederi*, 613 F.2d 334, 348 (1st Cir. 1980); *Lawson v. United States*, 605 F.2d 448, 452 (9th Cir. 1979); *Anderson v. Iceland S. S. Co.*, 585 F.2d 1142, 1149 (1st Cir. 1978); *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505, 508 (2d Cir. 1976); *Zielinski v. Compania De Navegacao Maritima*, 460 F. Supp. 1179, 1182 (S.D.N.Y. 1978); *Dougherty v. Haaland*, 457 F. Supp. 860, 865 (E.D. Pa. 1978), *aff'd*, 601 F.2d 574 (3d Cir.), *cert. denied*, 444 U.S. 992 (1979); *Espinoza v. United States Lines, Inc.*, 444 F. Supp. 405, 414 (S.D.N.Y.), *aff'd*, 586 F.2d 832 (2d Cir. 1978); *Darwin v. United States*, 435 F. Supp. 501, 511 (N.D. Cal. 1977).

190. In *Clemons v. Mitsui O.S.K. Lines, Ltd.*, 596 F.2d 746 (7th Cir. 1979), a longshoreman was injured when he stepped backwards into an open hatch. *Id.* at 747. The Seventh Circuit reversed the decision of the trial court and entered a judgment notwithstanding the verdict for the defendant shipowner. *Id.* at 750-51. In a case of this nature, the second part of the proposed standard would require the court to determine whether this open hatch constituted an unreasonably dangerous condition. In making this determination, a court could note, for example, the degree of illumination existing in the work area, the presence or absence of safety devices, and similar considerations.

At present, there is uncertainty as to the extent to which regulations promulgated pursuant to the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §§ 651-78 (1976), can be used in the determination of shipowner negligence. For a case which discusses this issue, see *Bachtel v. Mammoth Bulk Carriers, Ltd.*, 605 F.2d 438, 444-46 (9th Cir. 1979).

191. For example, while the presence of toxic fumes in the hold of a vessel may constitute an unreasonably dangerous condition in regard to a longshoreman, the presence of these fumes may not necessarily constitute an unreasonably dangerous condition to a sufficiently skilled individual who has been hired for the specific purpose of removing these fumes from the vessel's hold. See *Hess v. Upper Miss. Towing Co.*, 559 F.2d 1030, 1036 (5th Cir. 1977).

192. See notes 197-205 *infra* and accompanying text.

C. Actual or Constructive Knowledge

Courts are in agreement that a shipowner must have either actual or constructive knowledge of an injury-causing condition before liability on his part can arise.¹⁹³ In addition, the House Report on the 1972 Amendments to the LHWCA states that "nothing in this 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."¹⁹⁴

The proposed standard's requirement of actual or constructive knowledge on the part of the shipowner is twofold. First, the shipowner must know or should have known of the existence of the injury-causing condition. Second, the shipowner must know or should have known that this condition presented an unreasonable risk of harm to those working aboard his vessel.¹⁹⁵

If, for example, a shipowner knows that a stevedoring company is loading cargo in a particular manner, this fact alone is insufficient to fulfill the knowledge requirement of the proposed standard. In addition, the shipowner must know or should have known that the loading procedure being utilized by the stevedoring company constituted an unreasonable risk of harm to the longshoremen. Regardless of the point at which the injury-causing condition arose,¹⁹⁶ the third part of the proposed standard of care is fulfilled

193. See *Anderson v. Iceland S.S. Co.*, 585 F.2d 1142, 1149 (1st Cir. 1978); *Samuels v. Empresa Lineas Maritimas*, 573 F.2d 884, 886 (5th Cir. 1978), *cert. denied*, 443 U.S. 915 (1979); *Wescott v. Impresas Armadoras*, 564 F.2d 875, 883 (9th Cir. 1977); *Ruffino v. Scindia Steam Navig. Co.*, 559 F.2d 861, 862 (2d Cir. 1977); *McCarthy v. Silver Bulk Ship. Ltd.*, 487 F. Supp. 1021, 1026 (E.D. Pa. 1980); *Garofalo v. Malaysia Overseas Export Lines, Inc.*, 470 F.2d 166, 168 (S.D.N.Y. 1979); *Murphy v. National Ship. Corp. of Pak.*, 459 F. Supp. 1173, 1179 (C.D. Cal. 1978). See also note 195 *infra*.

194. *House Report*, *supra* note 3, at 4704 (emphasis added).

195. Recently, courts have noted that shipowner knowledge is twofold in nature. See *Johnson v. A/S Ivarans Rederi*, 613 F.2d 334, 348 (1st Cir. 1980); *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 610 F.2d 116, 126 (3d Cir. 1979); *Lawson v. United States*, 605 F.2d 448, 452 (9th Cir. 1979); *Bachtel v. Mammoth Bulk Carriers, Ltd.*, 605 F.2d 438, 443 (9th Cir. 1978); *Santos v. Scindia Steam Navig. Co.*, 598 F.2d 480, 485 (9th Cir. 1979).

196. The *Gallardo* standard, by contrast, provides that when an injury-causing condition arises after the commencement of cargo operations, a shipowner can be liable only upon a finding that he had *actual* knowledge of this condition. See notes 121-22 *supra* and accompanying text.

It was noted both that this provision of the *Gallardo* standard has failed to gain wide acceptance and that it is inconsistent with the House Report on the 1972 Amendments to the LHWCA. See note 135 *supra* and accompanying text; notes 133-34 *supra* and accompa-

when a shipowner had either actual or constructive knowledge of this condition.

D. "Reasonable Care under the Circumstances"

Courts, in applying section 905(b) of the LHWCA, have generally included the requirement of "reasonable care under the circumstances" in the standard of care for shipowners.¹⁹⁷ This requirement was an essential feature of both the *Gallardo* and *Santos* standards of care.¹⁹⁸ In addition, the House Report on the 1972 Amendments to the LHWCA includes a reference to the shipowner's duty to exercise "reasonable care . . . under the circumstances."¹⁹⁹

Courts, in applying the standard of "reasonable care under the circumstances," have provided at least two justifications for this decision. First, it has been stated that this standard focuses attention upon the conduct of the shipowner.²⁰⁰ Second, courts have noted that this standard is free of the encumbrances of real property concepts such as "business invitee," "open and obvious," and "control."²⁰¹

Courts applying the standard of "reasonable care under the circumstances" have done so on a case by case basis.²⁰² Congress, in

nying text.

197. See *Johnson v. A/S Ivarans Rederi*, 613 F.2d 334, 348 (1st Cir. 1980); *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 610 F.2d 116, 125 (3d Cir. 1979); *Lawson v. United States*, 605 F.2d 448, 452 (9th Cir. 1979); *Anderson v. Iceland S.S. Co.*, 585 F.2d 1142, 1149 (1st Cir. 1978).

198. See notes 119-20 *supra* and accompanying text. See also note 146 *supra* and accompanying text.

199. *House Report*, *supra* note 3, at 4704.

200. See generally *Johnson v. A/S Ivarans Rederi*, 613 F.2d 334, 348 (1st Cir. 1980); *Lawson v. United States*, 605 F.2d 448, 452 (9th Cir. 1979); *Santos v. Scindia Steam Navig. Co.*, 598 F.2d 480, 490 (9th Cir. 1979); *Davis v. Inca Compania Naviera S.A.*, 440 F. Supp. 448, 454 (W.D. Wash. 1977).

201. See generally *Johnson v. A/S Ivarans Rederi*, 613 F.2d 334, 349 (1st Cir. 1980); *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 610 F.2d 116, 125 (3d Cir. 1979); *Santos v. Scindia Steam Navig. Co.*, 598 F.2d 480, 488 (9th Cir. 1979); *Espinoza v. United States Lines, Inc.*, 444 F. Supp. 405, 410 (S.D.N.Y.), *aff'd*, 586 F.2d 832 (2d Cir. 1978).

202. It is important to note that the fourth part of the proposed standard is fulfilled only when a shipowner *fails* to exercise reasonable care. Consequently, where a shipowner is unable to take remedial action regarding a condition aboard his vessel, this fact will not necessarily constitute a failure to exercise reasonable care.

The Second Circuit, in *Munoz v. Flota Merchante Grancolombiana, S.A.*, 553 F.2d 837 (2d Cir. 1977), observed that "[t]he shipowner had no duty to supervise the minute details of

its reports on the 1972 Amendments, established only broad guidelines for a determination as to whether a shipowner was negligent. These guidelines reflect Congress's intent to both remove from the shipowner the burden of absolute liability,²⁰³ which had been imposed by the standard of "unseaworthiness,"²⁰⁴ and to promote, at the same time, safety in the longshoring industry.²⁰⁵

V. Conclusion

The proposed standard of care comprises the four elements of negligence which have been traditionally recognized²⁰⁶ and thereby furthers Congress's objective of a uniformly applied standard of care for shipowners.²⁰⁷ The element of harm is present in any action under section 905(b) because such an action has, as its starting point, an injured longshoreman. The first part of the proposed standard encompasses the element of proximate causation. The second and third parts of the proposed standard determine whether a duty on the part of the shipowner has arisen. The fourth, and final part of the proposed standard determines whether the shipowner has, assuming this duty exists, breached that duty.

One of Congress's primary objectives in enacting the 1972 Amendments to the LHWCA was to decrease the number of actions by injured longshoremen against shipowners.²⁰⁸ While the 1972 Amendments may have served to reduce the number of these actions, there is reason to doubt whether this reduction has met Congress's goal.²⁰⁹ The application of different standards of care,

work totally entrusted to the competence of the stevedore. Indeed, commercial reality and applicable union regulations preclude a rule that would require a non-expert constantly to intrude on the work of a master stevedore in the deepest recesses of the ship." *Id.* at 840-41.

203. See *House Report, supra* note 3, at 4702.

204. See generally notes 8-9 *supra* and accompanying text.

205. See *House Report, supra* note 3, at 4703.

206. See generally note 155 *supra*.

207. See generally *House Report, supra* note 3, at 4705 (intent expressed by Congress that the negligence cause of action against shipowners be applied uniformly throughout the nation's ports).

208. *Id.* at 4703. It was noted that longshoremen, as a result of the "unseaworthiness" cause of action, "were being encouraged not to file claims for compensation or to delay their return to work in the hope of increasing their possible recovery in a third party action." *Id.*

209. Elimination of the "unseaworthiness" cause of action has, in all probability, reduced the number of cases brought by injured longshoremen against shipowners. A lack of consensus, however, among courts in regard to a shipowner's standard of care, may hinder

particularly within the same circuit,²¹⁰ has not furthered Congress's objective of reducing the number of actions brought by injured longshoremen against shipowners. Adoption of the proposed standard may, however, aid in reducing this caseload. The four parts of the proposed standard would apprise an injured longshoreman and a shipowner, prior to or at the outset of any action, of the requirements for a finding of shipowner negligence.

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additional reduction in this case load.

210. The Second Circuit, for example, has generally been unable to demonstrate consistency in defining a shipowner's standard of care toward longshoremen. *Compare* *Mattivi v. South African Marine Corp.*, 618 F.2d 163, 168 (2d Cir. 1980) (three requirements given for shipowner liability: a dangerous condition, shipowner notice, and proximate causation) *with* *Giglio v. Farrell Lines, Inc.*, 613 F.2d 429, 431-32 (2d Cir. 1980) (reliance placed upon the obviousness of the injury-causing condition, § 343A noted as providing the standard of care). For a thorough analysis of the Second Circuit's handling of § 905(b) cases see Comment, *Developing a Consistent Theory of Vessel Liability to Injured Longshoremen under the LHWCA*, 45 BROOKLYN L. REV. 731 (1979).