Louisiana Law Review

Volume 80
Number 2 *Winter 2020*

Article 9

4-22-2020

LHWCA Section 905(b) and Scindia: The Confused Tale of a Legal Pendulum

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> "Opinion is like a pendulum and obeys the same law. If it goes past the centre of gravity on one side, it must go a like distance on the other; and it is only after a certain time that it finds the true point at which it can remain at rest." — Arthur Schopenhauer[1]

TABLE OF CONTENTS

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1. 1 ARTHUR SCHOPENHAUER, PARERGA AND PARALIPOMENA: A COLLECTION OF PHILOSOPHICAL ESSAYS 48 (T. Bailey Saunders trans., Cosimo, Inc. 2007).

INTRODUCTION—A PENDULUM SWINGS

This Article is about a pendulum swing. It is about the shift in the liability of a vessel[2] to a longshore worker[3] injured while working on or around the vessel. The Longshore and Harbor Workers' Compensation Act (LHWCA), originally passed in 1927, gives maritime workers, who are not seamen,[4] workers' compensation claims against their employers. The LHWCA worker, however, has the right to sue the vessel on which he or she worked in tort. For many years, the pendulum swung in favor of the longshore worker by providing the worker with a strict liability claim for injuries caused by the vessel's unseaworthy condition.[5] In 1972, Congress swung the pendulum back the other way when it enacted 33 U.S.C.A. § 905(b), eliminating the unseaworthiness claim[6] for a longshore worker

2. In a later Part, we will discuss who the potential defendants might be in such a case. They include the vessel owner, a bareboat or demise charterer, a time charterer, a voyage charterer, and an owner pro hac vice. *See* 33 U.S.C. § 902(21) (2018). The vessel may also be liable in rem. Thus, throughout, we will refer to the "vessel" as the defendant.

3. When we use the phrase "longshore worker" or "LHWCA worker," we mean someone covered by the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901–50.

4. 33 U.S.C. § 902(3)(G).

5. Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 164 (1981) (citing Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946)) ("Prior to 1972, a longshoreman injured while loading or unloading a ship could receive compensation payments and also have judgment against the shipowner if the injury was caused by the ship's unseaworthiness or negligence.").

6. A seaworthy vessel is one that is reasonably fit for its intended use. To be seaworthy, the vessel must be a reasonably fit place to live and work. Concomitantly, an unseaworthy vessel is one that is not reasonably fit for its intended use. Thus, unseaworthiness is a condition of the ship—the condition of not being reasonably fit. *See, e.g.*, FRANK L. MARAIST, THOMAS C. GALLIGAN, JR., CATHERINE M. MARAIST, & DEAN A. SUTHERLAND, ADMIRALTY IN A NUTSHELL 239 (7th ed. 2017). It is a type of strict liability. *Id.* at 240. The defendant need not have actual or constructive knowledge of the condition. A

covered by the LHWCA.[7] In doing so, Congress took away the worker's strict liability unseaworthiness claim, but it replaced it with a negligence ("vessel negligence") action against the vessel.[8]

With the passage of § 905(b), Congress expressly provided the longshore worker with a cause of action against the vessel for "negligence."[9] Thereafter, district courts and circuit courts across the

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vessel may be unseaworthy because it is in disrepair, because it lacks necessary equipment, Webb v. Dresser Indus., 536 F.2d 603 (5th Cir. 1976), or if the owner provides improper equipment. Vargas v. McNamara, 608 F.2d 15 (1st Cir. 1979). An incompetent crew may render a vessel unseaworthy. Szymanski v. Columbia Transp. Co., 154 F.3d 591 (6th Cir. 1998). A bellicose seaman may result in a finding of unseaworthiness. *See, e.g.*, Miles v. Apex Marine Corp., 498 U.S. 19 (1990). Any condition that renders the vessel unfit for ordinary use can render it unseaworthy.

7. Although some argue that the 1972 LHWCA passage of § 905(b) totally eliminated *Sieracki* seamen, the Fifth Circuit has held that a pocket of *Sieracki* seamen still exist—those workers injured on an unseaworthy vessel who are not covered by the LHWCA. Aparicio v. Swan Lake, 643 F.2d 1109 (5th Cir. 1981).

8. The claim can be in rem against the vessel, *see* Moore v. M/V Angela, 353 F.3d 376 (5th Cir. 2003), or against those responsible for the vessel in personam, Parker v. South Louisiana Contractors, Inc., 537 F.3d 113 (5th Cir. 2008). Since this Article is about the substance of the claim, when we refer to a claim against the vessel we are referring to both a possible in rem claim as well as in personam claims against responsible parties.

9. 33 U.S.C. § 905(b) provides, in part:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title . . . .

Negligence is defined as the failure to exercise reasonable care under the circumstances. U.S. FIFTH CIRCUIT PATTERN JURY CHARGE, § 4.11 (B)(4) (2011) (defining negligence under the turnover duty as the failure to exercise reasonable care under the circumstances). A person's duty is to exercise that degree of care that a reasonable person would exercise under the circumstances to protect against foreseeable risk—a risk of which the person either knew or should have known. *Negligence*, BLACK'S LAW DICTIONARY (10th ed. 2015). The court (or law) provides or states the duty to the fact-finder who, in turn, determines whether there is a breach of the duty—did the defendant, in fact, exercise reasonable care under the circumstances? To the extent that the court says more about the duty owed (thereby putting some condition on the general duty to exercise reasonable care), it creates overly detailed legal rules and encroaches on the fact-finder's role of deciding breach. There may be good policy reasons for such encroachment in certain categories of cases, such as negligent infliction of emotional distress or negligence causing economic loss without any accompanying personal injury or

country interpreted that term—"negligence"—differently and, in so doing, conflated the questions of duty (what duty did the vessel owe?) and breach (did the vessel breach the relevant duty?). Thus, in § 905(b) cases, the issue was: what duty did the vessel owe to LHWCA workers,[10] the classic definition of negligence—reasonable care under the circumstances—or some narrower duty?

The first § 905(b) case to come before the Supreme Court was *Scindia Steam Navigation Co., Ltd. v. De Los Santos*.[11] *Scindia* involved a longshore worker, employed by a stevedoring company (not the vessel), who was injured during the loading of a ship. Justice Byron White, writing for the Court, initially defined the duty generally: "[T]he vessel owes . . . the stevedore and his longshoremen employees the duty of exercising due care 'under the circumstances.'"[12] The Court could have stopped there because its decision would have mirrored Congressional intent and been consistent with the accepted definition of "negligence." But Justice White continued and added language conditioning or narrowing the § 905(b) vessel negligence duty for particular types of § 905(b) cases. In doing so, the Court allowed the vessel to essentially rely upon the expertise of the LHWCA worker's employer—the stevedore—in planning and carrying out the loading work. Justice White created a set of "sub"[13]-duties: (1) the turnover duty; (2) the active control duty; and (3) the duty to intervene.[14] As discussed below, courts and leading commentators have opined that

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property damage. That is, even though one normally has a duty to exercise reasonable care to protect against foreseeable risk, there may be sound reasons based in policy, such as a concern courts and juries cannot reliably determine causation for emotional distress or a concern for liability leading to administrative overload. But those reasons apply to broad categories of cases, not just to particular cases arising before a court. Of course, whenever the court conditions the basic duty to exercise reasonable care, it makes law and alters the fact-finder's role. The law it makes becomes part of the instruction to the jury defining the duty that the defendant owed.

10. *See* 33 U.S.C. § 902(21).

11. Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156 (1981).

12. *Id.* at 166 (citing Fed. Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404, 415 (1969)).

13. We use the phrase "sub"-duties to mean particularized or detailed elaborations or supposed refinements on the general duty to exercise reasonable care. We also mean to convey that the particularization or detailed elaborations are limitations on the otherwise applicable general duty to exercise reasonable care.

14. Howlett v. Birkdale Shipping Co., 512 U.S. 92, 98 (1994) (citing *Scindia*, 451 U.S. at 167).

Justice White's categories actually break down into six separate duties.[15] In articulating "sub"-duties that were narrower than the general duty to exercise reasonable care, the Court favored the vessel and disfavored the worker, thereby pushing the liability pendulum past a general negligence standard.

The *Scindia* Court was apparently concerned that articulating the vessel's duty as the general duty to exercise reasonable care—the traditional negligence standard—might allow strict liability to sneak back onto the scene through imputed negligence or the imposition of non-delegable duties.[16] Perhaps the Court's conditional or narrowing language was hortatory—urging lower courts not to resurrect strict liability through legal niceties. That is, it is possible to read Justice White's discussion of "sub" (or restricted) duties in *Scindia* as merely dicta[17] or simply part of a general discussion of liability in the case before the Court. In admiralty, absent some independent basis for federal jurisdiction, the court hears the case as fact-finder.[18] Thus, judges, when analyzing negligence in admiralty cases, may not always clearly separate the duty and breach discussions as precisely as they must when there is a jury because they traditionally decide both duty and breach. Although one might read Justice White's *Scindia* opinion as part of that tradition,[19] that is not what courts have done.

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15. *See infra* text accompanying notes 51–79. The six separate sub-duties stem from: turnover, which includes the sub-duties of: (1) turnover and (2) warn; active control, comprised of: (3) active involvement and (4) active control; and the duty to intervene, consisting of the sub-duties of: (5) inspection and supervision and (6) intervention.

16. *Scindia*, 451 U.S. at 169 ("[C]reation 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 Congress sought to eliminate by amending section 905(b)."") (quoting Hurst v. Triad Shipping Co., 554 F.2d 1237, 1249–50, n.35 (3d Cir. 1977); Evans v. S.S. "Campeche," 639 F.2d 848, 856 (2d Cir. 1981)).

17. The case essentially seemed to involve only the question of whether the vessel should have intervened in the operations of the stevedore.

18. There is no right to a jury trial in admiralty unless there is an independent basis for jurisdiction.

19. *See, e.g.*, United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947). There, Judge Learned Hand both articulated and applied his famous formula for negligence—is $B < P \times L$? That is, is the burden (or cost) (B) of avoiding an accident beforehand less than the beforehand probability (P) of the anticipated loss (L) if the accident occurs? If so, the defendant is negligent; if not, the defendant is not negligent. In articulating the formula, Judge Hand articulated the duty owed. In applying it, he decided breach, which was all perfectly fine because it was not a jury trial.

Indeed, the Supreme Court itself treated the *Scindia* sub-duties as settled rules of law when it next considered a vessel's § 905(b) duty to a longshore worker in *Howlett v. Birkdale Shipping Co., S.A.*[20] Thus, the six sub-duties have displaced a general duty to exercise reasonable care, even though § 905(b) uses the single, simple word "negligence." The state of the law today is that the vessel's duties to the stevedore worker are defined by the three *Scindia* categories. The duty is not simply to exercise reasonable care under the circumstances; the vessel's duty is defined differently in different contexts, and the stevedore's expertise and the obviousness of the risk are key factors in defining the vessel's obligation. This reality can create serious problems in a case tried to a jury where the instructions must incorporate the confusing and complex *Scindia*/*Howlett* verbiage. It is also a problem because conflating the duty and breach questions turn case specific breach decisions into arguable duty decisions. The breach question is a mixed question of fact and law with no predictive force for the next case. A duty decision is a legal decision with potential precedential value. Thus, a "no duty" decision can form the basis for future jury charges or a motion for summary judgment. Although jury charges are only an issue when a jury is hearing the case, mixed questions (breach) masquerading as legal questions (no duty) are an issue in any case and may prompt summary judgment motions arguing the plaintiff has no legal claim where the real issue is breach. Conflation of duty and breach can, in short, lead to judges deciding cases on the basis of no duty where the real issue is breach.

Although the *Scindia*/*Howlett* sub-duties have proven problematic enough in the stevedore context, lower courts have exacerbated the problem by going beyond the Supreme Court's § 905(b) decisions and applying the *Scindia* analytical construct beyond the factual situation in which it arose: the vessel's duty to a longshoreman loading a ship and employed by an independent stevedore. Lower courts have applied the *Scindia* duties to various categories of workers who are covered by the LHWCA but have no relation to the loading or unloading of cargo on vessels, including dual capacity cases.[21] For instance, in dual capacity cases, an employer engaged in a maritime construction project that uses its own vessels in doing the work will wear two hats: as an employer of construction workers and as the owner–operator of vessels on navigable waters. There, the LHWCA worker sues the employer in its capacity as vessel owner and not in the employer capacity. There, the work the employee does on the vessel may have absolutely nothing to do with

20. Howlett v. Birkdale Shipping Co., 512 U.S. 92 (1994).

21. Morehead v. Atkinson-Kiewit, J/V, 97 F.3d 603 (1st Cir. 1996); Castorina v. Lykes Bros. S.S. Co., 758 F.2d 1025 (5th Cir. 1985).

loading and unloading vessels, and yet courts still apply the *Scindia* analytical schemata.

The pendulum has radically swung in the vessel's favor. With *Scindia* and its progeny, the pendulum's pro-vessel swing has gone beyond the simple and articulated negligence standard. The restricted, narrowed *Scindia* sub-duties make the plaintiff's burden heavier than it would be in an ordinary negligence suit. In fact, in some instances, the lower courts' application of the sub-duties has made it virtually impossible for the injured worker to recover.

It is time for the courts to push the pendulum back to where Congress intended—negligence. Today, 46 years after the passage of § 905(b), there is little danger of a surreptitious return to the days when the vessel was strictly liable to the worker under the doctrine of unseaworthiness. Moreover, the weight of *Scindia*'s pointillist sub-duty scheme constrains and confuses what should be much simpler negligence cases. Conditioning and limiting the duty of reasonable care inevitably makes duty determinations more dependent on factual analysis. As noted, that reality leads to motions for summary judgment where factual issues are cast as legal issues. Further, the narrower duties alter the role of the fact-finder, decreasing its authority and increasing the authority of the court. For these reasons, it is time to simplify the law and apply it as Congress intended. It is time for the pendulum to swing back and find its resting place in the middle where the vessel owner is not strictly liable to the LHWCA worker, but it is liable if it is negligent, that is, if it fails to exercise reasonable care under the circumstances.

The Court should replace the *Scindia* duties with a general duty to exercise reasonable care under which the expertise of the stevedore and the obviousness of the injury-causing conditions are all factors relevant to a breach determination, rather than limits on the defendant's duty. In the meantime, lower courts should be wary of granting summary judgment based on stevedore expertise or anticipation and on obviousness of the risk because in the maritime employment setting, those issues are fact specific, often demand expert testimony, and are beyond the knowledge of the typical judge. Separating the duty determination from the breach determination will bring clarity to the law, whether the case is a jury case or tried to the court.

In Part I, we describe the legal landscape before Congress passed § 905(b). In Part II, we discuss and parse the five sentences of § 905(b). Part III analyzes *Scindia* and its articulated sub-duties. Parts IV, V, and VI discuss the subsequent development and critique the turnover, active control, and intervention duties. Part VII deals with the potential defendants

in a § 905(b) action, and Part VIII offers our recommendations and conclusions.

I. LEGAL BACKGROUND—A PAGE OR TWO OF HISTORY

In *The Osceola*,[22] the U.S. Supreme Court recognized as "settled"[23] that "the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship." Despite that fact, Gilmore and Black wrote that "[u]ntil the mid 1940s the seaman's right to recover damages for injuries caused by unseaworthiness of the ship was an obscure and little used remedy."[24] In the 1940s, two significant developments brought unseaworthiness to center stage.

First, in 1944, the Court expanded the concept of unseaworthiness to include any unreasonably dangerous condition of the vessel, and the Court made clear that the liability for unseaworthiness was strict liability.[25] And unseaworthiness was not based on any particular act of vessel negligence. Liability did not depend upon the negligence or knowledge of the vessel.[26] If the ship was not reasonably fit for its purposes—if some condition of the ship rendered it unreasonably dangerous—the vessel was liable. The condition might be with the vessel itself if it had an inadequate crew or a defective engine. The condition might arise from inadequate equipment being provided or from an unqualified crew member. The condition might even arise because of a bellicose crew member. Although negligence was not required to establish unseaworthiness, there was a significant overlap because negligence could be one of the ways in which the vessel became unseaworthy.[27]

The second major 1940s development in the law of unseaworthiness was the Supreme Court's decision in *Seas Shipping Co. v. Sieracki*.[28] In *Sieracki,* the Court held that the vessel owner's duty to provide a vessel that was not unseaworthy extended to a longshore worker who was injured

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22. 189 U.S. 158 (1903).

23. *Id.* at 175.

24. GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 383 (2d ed. 1975).

25. Mahnich v. S. S.S. Co., 321 U.S. 96 (1944); *see also* Walter I. Lanier, Jr., *The Doctrine of Unseaworthiness in the Law of Maritime Personal Injuries*, 21 La. L. Rev. 755 (1961).

26. Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960).

27. *See* GILMORE & BLACK, *supra* note 24, at 22; *cf.* Usner v. Luckenbach Overseas Corp., 400 U.S. 494 (1971).

28. Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

while unloading its vessel, even though the worker was not employed by the vessel owner. The Court extended the duty because the worker was "doing a seaman's work and incurring a seaman's hazards."[29] *Sieracki* led to a plethora of suits by longshore workers injured while loading or unloading vessels. These workers became known as "*Sieracki* seamen."[30] *Sieracki* also led to the Court's decision in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp*.[31]

Ryan recognized a vessel's right to recover from the stevedore—often the injured longshore worker's employer—for the damages it paid to the longshore worker injured by the vessel's unseaworthy condition when the condition was created by the stevedore.[32] Specifically, *Ryan* held that the stevedore, by virtue of its contract with the vessel owner, impliedly warranted its workmanlike performance to the shipowner.[33] Consequently, the shipowner was entitled to full indemnity if the plaintiff's employer breached this implied warranty.[34] This right to indemnity, arising out of the implied warranty of workmanlike performance, was commonly referred to as "*Ryan* indemnity."

In short, the longshore worker, who qualified as a *Sieracki* seaman, could recover his or her tort damages from the vessel if the injury was the result of an unseaworthy condition. In turn, the vessel could then recover indemnity from the longshore worker's employer whose only direct liability to the worker was for LHWCA workers' compensation benefits. In other words, the employer essentially and effectively would have to pay its injured employee unseaworthiness tort damages despite its statutory immunity under the LHWCA.

Thereafter, pushing the pendulum even further in the worker's favor, the Supreme Court, in *Reed v. The Steamship Yaka*,[35] considered the case where the *Sieracki* seaman was employed by the vessel itself—that is, the plaintiff's employer was the vessel defendant.[36] In *Reed,* the Court allowed the *Sieracki* seaman to sue his own employer for unseaworthiness.[37] Allowing the worker to recover from the employer in tort, despite the

29. *Id.* at 99.
30. *See* GILMORE & BLACK, *supra* note 24, at 441.
31. Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956).
32. *Id.* at 126.
33. *Id.* at 133–34.
34. *Id.* at 133.
35. Reed v. S.S. Yaka, 373 U.S. 410 (1963).
36. In *Reed*, the employer was a charterer of the vessel, and that was the capacity in which the employee sued it.
37. *Id.* at 412.

exclusive remedy provisions of the LHWCA, sidestepped the tort immunity the LHWCA employer would otherwise enjoy.

After *Sieracki*, *Ryan*, and *Reed*, the pendulum had swung radically in the longshore worker's favor. When injured by an unseaworthy condition, the longshore worker could recover LHWCA benefits from the employer *and* full tort damages from the vessel. Vessel defendants were unhappy because they were exposed to strict liability for unseaworthiness to non-seamen. They were also unhappy because their own employees could sue them in tort if the court determined the employees were *Sieracki* seamen. Of course, the vessel was relieved of its unseaworthiness liability to a non-employee *Sieracki* seaman under *Ryan* because it could recover indemnity from the otherwise immune employer of the injured longshore worker. In turn, the employer found itself effectively liable for full tort damages, even though the longshore worker's exclusive remedy against it, as the statute itself stated, was workers' compensation benefits.[38] At the end of the day, the only person certain to be content with the post-*Reed* legal landscape was the *Sieracki* seaman[39] who was injured by an unseaworthy condition. Then, Congress entered the fray in 1972, and the pendulum swung the other way.

II. SECTION 905(B)—FIVE FRUSTRATING AND FLABBERGASTING SENTENCES

In 1972, Congress decided to increase LHWCA benefits, to extend coverage for those benefits landward, and to change the law described above. It changed the jurisprudence described in the previous Part by passing 33 U.S.C.A. § 905(b), which it then partially amended in 1988.[40] Today, the statute provides:

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38. The vessel would not be relieved of liability, however, if the direct employer was insolvent or, as noted, if the vessel itself directly employed the injured worker, as in *Reed*. In the latter case, the worker could still recover full damages from the vessel/employer even though, as employer, the statute expressly limited its liability to LHWCA benefits.

39. And the worker's attorney.

40. The 1988 amendments to § 905(b) amended the third sentence to provide, as set forth above:

> If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer.

> 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 33 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.[41]

An initial parsing of the statute will prove beneficial and, frankly, essential.

The first sentence grants the LHWCA worker a "negligence" claim against the vessel. Read literally, the LHWCA worker should recover from the vessel if the vessel was negligent—in common parlance, if the vessel

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The original version of the statute provided:

> If such person was employed by the vessel to provide ship building, or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel.

Under the original version, the shipbuilder or ship repairer had no negligence action against the owner if his or her injury was caused by the negligence of someone engaged to provide shipbuilding or ship repair services, just as the stevedore was denied a negligence action if his or her injuries were caused by someone engaged to perform stevedoring services. Under the 1988 version of the statute, the shipbuilder, ship repairer, or ship breaker has no action against the vessel owner, in any capacity, no matter what or who caused the injury. The stevedore has greater rights, as discussed herein.

41. 33 U.S.C.A. § 905(b) (West 2018).

failed to exercise reasonable care under the circumstances. The first sentence also grants the negligence claim against the vessel "as a third party" claim, meaning that even if the vessel owner is also the LHWCA worker's employer, the worker can still recover tort damages against his or her employer in its vessel capacity. To that extent, some of the spirit of *Reed* lives on—the LHWCA worker has a tort action against his or her employer in its vessel capacity, albeit for negligence, but not unseaworthiness, as discussed in the next paragraph. In this regard, the LHWCA worker has rights that many land-based workers do not have, since land-based workers' compensation schemes frequently provide the employer with immunity from employee negligence actions that arise in the course and scope of employment.[42]

While the first sentence of § 905(b) giveth the LHWCA worker a negligence action against a vessel, including when the vessel is also the worker's employer, the fourth sentence taketh away. It provides: "The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred." The fourth sentence takes away the LHWCA worker's right to recover against the vessel for unseaworthiness (strict liability). It overrules *Sieracki*, at least for workers covered by the LHWCA.[43]

So, what about *Ryan* indemnity? The first sentence does away with it: "[T]he employer shall not be liable to the vessel for such damages [that the LHWCA worker recovers in the vessel negligence action provided in this section] directly or indirectly and any agreements or warranties to the contrary shall be void." Thus, the *Ryan* indemnity based on the warranty of workmanlike performance is gone, at least in actions brought by LHWCA workers.[44] Also, the first sentence of § 905(b) provides that any

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42. *See, e.g.*, LA. REV. STAT. § 23:1032 (2018). Interestingly, the legislative history of § 905(b) states that Congress wanted to place the longshore worker: "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, at 10 (1972) [hereinafter Rep.] (H.R. REP. NO. 92-1441 (1972), U.S. Code Cong. & Admin. News 1972, 4698, is in all relevant respects identical to the Senate Report.). Of course, by giving the longshore worker a negligence action against the employer, Congress still left the longshore worker in a better position than the land-based worker.

43. Some courts have concluded that *Sieracki* lives on for workers who are injured by a vessel but who are neither seamen nor LHWCA workers (because of an exclusion from coverage). *See, e.g.*, Aparicio v. Swan Lake, 643 F.2d 1109 (5th Cir. 1981).

44. *See supra* note 43.

agreement providing for the vessel to indemnify a third-party tortfeasor for damages recovered in a § 905(b) action is also void.

The second sentence of § 905(b) limits the right of an injured stevedore to recover for vessel negligence if the injury was caused by the negligence of others engaged in providing stevedoring services to the vessel. The goal of the sentence seems clear: if the stevedore's injuries are caused by a co-employee stevedore, the vessel is not liable in negligence.[45] The third sentence of § 905(b) expressly deprives the shipbuilder, ship repairer, and ship breaker of any vessel negligence action against his or her employer. Finally, the last sentence states that the remedies against the vessel provided in § 905(b) are exclusive. In the next Part, we turn to how the Supreme Court has interpreted and applied the five sentences that make up § 905(b)—albeit, solely in the context of stevedores hired to load and unload cargo from vessels—pushing the pendulum past negligence and further in the pro-vessel direction.

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45. But one may wonder if the sentence goes too far. As Professor Maraist and one of your authors wrote concerning the second sentence of § 905(b):

> The second sentence of § 905(b) limits an employee's right to recover for vessel negligence if the employee was injured by someone providing stevedoring services to the vessel. The sentence clearly applies where the shipowner hires an independent contractor stevedore and an employee of the stevedore injures another employee of the stevedore. However, under such circumstances, the vessel owner ordinarily would not be liable under general tort principles. If the vessel owner employs its own employees as stevedores and one employee injures another, the sentence indicates that the injured employee would not have a vessel negligence claim against the employer-vessel owner. *What is not so clear is the result when a longshore worker is employed by an independent contractor but is injured by a longshore worker employed directly by the vessel owner.*

FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., PERSONAL INJURY IN ADMIRALTY 147 (LEXIS Publishing 2000) (emphasis added). In reference to the last quoted sentence, it is not apparent under general tort vicarious liability principles why the vessel owner, acting as stevedore (in part), would not be liable for its employee's fault in causing injury to a third-party longshore worker. In such a case, the vessel owner is liable as stevedore, not as vessel owner, and the protection (immunity) that a literal reading of the statute would provide seems gratuitous and unintended.

III. *SCINDIA STEAM NAVIGATION CO., LTD. V. DE LOS SANTOS*—THE PENDULUM KEEPS SWINGING AWAY FROM LHWCA WORKER RECOVERY

As previously noted, § 905(b) gives the longshore worker a cause of action for negligence against the vessel owner. The statute does not, nor need not, define negligence. The clearest and simplest way to explain the concept of negligence is to say that one has a duty to exercise reasonable care to protect another from foreseeable risk.[46] To apply that elegantly simple concept to the § 905(b) vessel negligence action, the courts could have said the vessel owner owed the independent longshore worker a duty to exercise reasonable care. Such a pure articulation of the vessel's duty would have been consistent with the plain language of § 905(b) and general maritime tort law doctrine.

For instance, in its landmark 1959 general maritime negligence decision, *Kermarec v. Compagnie Generale Transatlantique*,[47] the Court eschewed common law and Restatement (Second) of Tort rules governing the negligence liability of owners and occupiers of land. Instead, the Court succinctly stated: ". . . the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case."[48] Ten years later, in *Federal Marine Terminals v. Burnside Shipping Co*.,[49] the Court once again set forth the duty in concise, economic, and simple terms, holding that "federal maritime law does impose on the shipowner a duty to the stevedoring contractor of due care under the circumstances . . . ."[50]

Articulating the vessel's duty under § 905(b) in clear, common, and concise basic negligence terms would have been sensible and consistent with basic tort doctrine and the language of the statute. As mentioned above, the duty for negligence is to exercise reasonable care to protect against foreseeable risk. Whether the defendant fulfilled that duty or breached it is a mixed question of fact and law for the fact-finder. Duty in negligence is a legal issue. The duty is relatively straightforward, and the

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46. WILLIAM L. PROSSER, LAW OF TORTS § 30 (2d ed. 1955).

47. Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959).

48. *Id.* at 632.

49. Fed. Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404 (1969).

50. *Id.* at 416–17. The Court proceeded to hold that the stevedore had a "direct action in tort against the shipowner to recover the amount of compensation payments occasioned by the latter's negligence." *Id.* at 417. In so holding, the Court recognized a claim for negligently inflicted pure economic loss. *Cf.* Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927); Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985).

duty to exercise reasonable care applies to broad categories of cases, not just the case before the court.[51] It is in determining breach of the duty to exercise reasonable care that the fact-finder considers the details of the particular case; this is a messier determination. A breach determination in one case has little or no predictive value for the results in future cases. When a court, especially the Supreme Court, articulates the relevant duty in a more case specific manner, it runs the risk of creating overly focused or picayune rules. In such instances, the Court runs the risk of invading the fact-finder's realm. This invasion is precisely what has happened in § 905(b) vessel negligence cases.

In *Scindia*, Lauro de los Santos worked as a stevedore for Seattle Stevedore Co. Seattle contracted with Scindia Steamship Navigation Company to load its cargo of wheat into the hold of Scindia's ship, the M/S Jalaratna. The stevedores used a winch, which was a part of the ship's gear, to lower wooden pallets containing 50-pound sacks of wheat into the hold. The stevedore operator of the winch could not see when to stop and start lowering pallets into the hold, and so he relied on a co-employee—the hatch tender—to signal him when to do so. Santos was in the hold removing sacks of wheat and stowing them. For two days prior to the incidents giving rise to the lawsuit, the braking mechanism on the winch was not functioning properly—it would not immediately stop a loaded pallet, but would continue to drop several feet before coming to a stop.

Then, on the third day, the hatch tender signaled the winch operator to stop the lowering of a particular pallet. Despite the winch operator's response to the signal and because of the winch's malfunctioning, the pallet did not stop. Instead, it struck an object and spilled about half its load. The operator then raised the load 15 feet, and the hatch tender allowed Santos and his co-workers to clear away the spilled sacks. Unfortunately, either because the loaded pallet above the workers was still swinging—like a pendulum—or because the winch brake slipped again

51. Pitre v. La. Tech Univ., 673 So. 2d 585, 596 (La. 1996) (Lemmon, J., concurring) ("The statement that 'the defendant had no duty,' as noted in Professor David W. Robertson et al., *Cases and Materials on Torts* 161 (1989), should be reserved for those 'situations controlled by a rule of law of enough breadth and clarity to permit the trial judge in most cases raising the problem to dismiss the complaint or award summary judgment for defendant on the basis of the rule.' Thus, a 'no duty' defense generally applies when there is a categorical rule excluding liability as to whole categories of claimants or of claims under any circumstances. In the usual case where the duty owed depends upon the circumstances of the particular case, analysis of the defendant's conduct should be done in terms of 'no liability' or 'no breach of duty.'").

three or four times, Santos was hit by additional sacks falling from the pallet above. He sued Scindia, claiming § 905(b) vessel negligence.

To determine Scindia's duty to Santos, the district court relied upon Restatement (Second) of Torts §§ 343 and 343A (1965),[52] addressing the duty owed by a landowner to an invitee. Interestingly, in *Kermarec*, the Court had refused to apply the land-based analysis of a landowner's duty to someone on his or her property in the context of analyzing the duty of care a vessel owner owed to a visitor.[53] The Ninth Circuit in *Scindia* disagreed with the trial court because it believed those Restatement sections improperly incorporated notions of contributory negligence and assumption of the risk, which are inapplicable in maritime law because maritime law has a pure comparative fault regime.[54] Instead, the Ninth Circuit articulated the standard of care as follows:

> 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

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52. RESTATEMENT (SECOND) OF TORTS: DANGEROUS CONDITIONS KNOWN TO OR DISCOVERABLE BY POSSESSOR § 343 (AM. LAW INST. 1965).

> 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
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> (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.
>
> * * *
>
> § 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.

53. *Kermarec*, 358 U.S. at 630–32.

54. *See* United States v. Reliable Transfer Co., 421 U.S. 397 (1975).

> to protect the longshoremen against the danger.[55]

That statement was a relatively straightforward and clear articulation of the general duty in a negligence case—reasonable care under the circumstances. It was also consistent with what the Court said in *Kermarec* and in *Burnside Shipping.* The Supreme Court granted certiorari and wrote a detailed opinion, interpreting § 905(b) for the first time.

The simplest and clearest course for the Supreme Court was to adopt the clear and consistent standard the Ninth Circuit had articulated and applied in the case and hold that the vessel owner had a duty to exercise reasonable care in a § 905(b) vessel negligence action. In fact, that is what Justice Brennan, joined by Justices Marshall and Blackmun, said in a concurrence, essentially arguing for a general duty to exercise reasonable care.[56] That interpretive route would also have been consistent with the plain meaning rule—giving the word negligence in the statute its accepted meaning. Although that would have been the simplest and perhaps most useful definition of negligence, the Court, in Justice White's opinion, focused on other considerations. First, because Congress had just done away with the *Sieracki* unseaworthiness action,[57] the Court was concerned that a simple statement that the vessel owner owed a duty to exercise reasonable care might effectively revive *Sieracki*.[58] That is, courts might allow a type of strict liability to creep back into the law under the guise of

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55. De Los Santos v. Scindia Steam Navigation Co., 598 F.2d 480, 485 (9th Cir. 1979), *aff'd and remanded*, 451 U.S. 156 (1981).

56. Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 179–80 (1981) (Brennan, J., concurring).

57. *Sieracki* survives, in part, for workers who are not covered by the LHWCA.

58. *Scindia*, 451 U.S. 156.

> [W]e 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 by the negligence or other defaults of the stevedore. . . . It would 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.

Id. at 168–69.

negligence through the imposition of duties—perhaps nondelegable duties—to discover or know of risks on board or associated with the ship. This concern is clearly apparent in Justice Powell's concurrence, in which Justice Rehnquist joined. Justice Powell wrote:

> 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 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.[59]

Second, and relatedly, the Court concerned itself with the general truth that the stevedore was an expert vis-à-vis the task it was performing: loading and unloading. On that score, the § 905(b) standard of care question is:

> [A] most difficult issue: what duty does a vessel owner owe to the employee of an independent contractor (the stevedore) who has contracted to provide services to the vessel and who has assumed control over part of the vessel? This is similar to the difficulties encountered when a landowner surrenders control of a portion of his premises to a repair person whom he has engaged to repair the premises, and the repair person or his employee is injured as a result of the condition of the premises. Many courts hold that, although the landowner may owe some duty to the repair person, the landowner is entitled to rely upon the expertise of the repair person to do the work safely and encounter anticipated defects cautiously.[60]

Of course, the shipowner is not a landowner, and the Court rejected treating a shipowner as a landowner in *Kermarec.*

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59. *Id.* at 181 (Powell, J., concurring).

60. MARAIST & GALLIGAN, *supra* note 45, at 148–49. Prior to the passage of § 905(b) and *Scindia*, the Court dealt with the repairperson issue. In *West v. United States*, 361 U.S. 118 (1959), the Court considered whether the defendant shipowner should be exonerated because the defect in the vessel was not hidden and the vessel owner was under no duty to protect the employee "from risks that were inherent in the carrying out of the contract" to repair the vessel. *West*, 361 U.S. at 123.

In *Scindia*, Justice White, speaking for the Court, did initially note that, in *Burnside Shipping*, the Court held the shipowner owed to the stevedore and his employees the duty to exercise reasonable care.[61] He went on, however, to say more—much more—and, in saying more, he limited the duty the vessel owner owed to the stevedore worker. Justice White limited the vessel's general obligation to exercise reasonable care and articulated sub-duties, or conditional or restricted duties.[62] He said, in part:

> This [§ 905(b)] duty extends at 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. . . . 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.[63]

Courts have come to call the duties Justice White described above as the "turnover duty." The turnover duty has two parts: (1) a duty to exercise reasonable care to turn over to the stevedore a reasonably safe ship; and (2) a duty to warn of risks of which the shipowner is or should be aware.[64] Both the sub-duties, however, have major limiting factors, as will be discussed below.

After articulating the turnover duty, the Court continued:

> It is also accepted that the vessel may be liable if it actively

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61. *Scindia*, 451 U.S. at 166.

62. *Id.* at 166–79.

63. *Id.* at 166–67.

64. THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 7–10 (5th ed. 2011).

> 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.[65]

This became known as the "active control" duty—the duty to exercise ordinary care to protect a longshore worker from a foreseeable risk in an area under the vessel's active control. Professor Schoenbaum breaks the active control duty into two separate sub-duties: (1) the active involvement duty; and (2) the active control duty.[66] The former applies where the vessel participates or takes control of cargo operations.[67] The latter involves situations where the stevedore worker is harmed by a risk in an area still under the active control of the vessel and might include "physical areas on or near the ship, . . . equipment, or . . . the work of independent contractors."[68]

Interestingly, the active control sub-duties are somewhat different than the turnover duties because the active control duties describe the circumstances under which a duty to exercise reasonable care arise: active involvement in the work and control. Alternatively, the turnover duties condition or restrict the general duty to exercise reasonable care. That said, the Court missed a simpler opportunity, in the involvement and control contexts, to say there were occasions in which the general duty to exercise reasonable care applies. The labeling adds little analytical content.

Finally, the Court articulated and considered the vessel owner's obligation to intervene in the work of the stevedore. The Court said:

> [A]bsent contract provision, positive law, or custom to the contrary, . . . 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.[69]

Therefore, there is no general duty to inspect or supervise the cargo operations—but what happens when the vessel owner learns an apparently dangerous condition exists or has developed in the cargo operations that may cause injury to a maritime employee and the stevedore is also aware

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65. *Scindia*, 451 U.S. at 167.

66. SCHOENBAUM, *supra* note 64, at 636.

67. This is akin to an actor assuming a duty where he or she might not otherwise have had a duty to act.

68. SCHOENBAUM, *supra* note 64, at 637.

69. *Scindia*, 451 U.S. at 172.

of the condition? According to Justice White, the vessel owner normally may rely on the stevedore's judgment that the condition does not present an unreasonable risk of harm, but the owner may have a duty to intervene if the stevedore employer's judgment is "so obviously improvident that . . . [the vessel owner], if it knew of the defect and that . . . [the stevedore] was continuing to use it, should have realized the . . . [situation] presented an unreasonable risk of harm to the longshoremen . . . ."[70]

Once again, Professor Schoenbaum breaks this duty to intervene into two prongs, or sub-duties: (1) the duty to supervise and inspect (triggered by a contract provision, positive law, or custom);[71] and (2) the duty to intervene (triggered by the vessel's knowledge of the stevedore's obviously improvident judgment).[72]

Consequently, Justice White in *Scindia* managed to extrapolate six separate duties[73] from one word in the statute—negligence. They are, to recap: turnover, which includes the sub-duties of: (1) turnover and (2) warn; active control, comprised of: (3) active involvement and (4) active control; and the duty to intervene, consisting of the sub-duties of: (5) inspection and supervision and (6) intervention. The reader, at first blush, may conclude that six is better for the plaintiff than one. After all, why would a person not prefer to have another person owe them six duties rather than one? Practically, however, by imposing six sub-duties, conditional duties, or restricted duties, instead of recognizing one overarching concept of a duty to exercise reasonable care, the Court actually narrowed the available field of relief for the plaintiff worker because the six together are narrower than the single general duty to exercise reasonable care.

In the next Part, we will analyze how the jurisprudence has developed under the six duties and further narrowed the LHWCA worker's rights. First, however, let us ask why Justice White seemingly ignored § 905(b)'s imposition of vessel liability to a longshore worker for "negligence," instead turning that word into six sub-categories of fault.

First, as noted at the outset, Congress desired to do away with the LHWCA worker's unseaworthiness (*Sieracki*) claims against the vessel, and it wanted to do away with that field of strict liability to the LHWCA

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70. *Id.* at 175–76.

71. The contract provision, positive law, or custom may trigger a duty to exercise reasonable care under the circumstances.

72. SCHOENBAUM, *supra* note 64, at 637–40.

73. Or four if the active control categories are viewed as occasions when there is a general duty to exercise reasonable care, and three if the duty to intervene triggered by contract provision, positive law, or custom is a general duty to exercise reasonable care.

worker.[74] It seems that in *Scindia,* Justice White and the Court were concerned that simply articulating a general duty of reasonable care posed a risk of lower courts reverting to some type of strict-ish liability.[75] Yet negligence is a familiar term to all lawyers and judges, and all know the difference between liability based upon negligence and liability without fault, that is, strict liability. Moreover, Justice White's compendium of particularities and pointillist duties flies in the face of Congress's use of the single word "negligence" in the statute.[76] Articulating a general duty of care would not only have been consistent with the language of the statute, but it also would have been simpler and clearer.[77]

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74. The legislative history reveals Congress's desire to do away with liability based "unseaworthiness, non-delegable duty, and the like."

75. *See supra* text accompanying note 60.

76. As noted, Justice Powell, in his concurrence, which Justice Rehnquist joined, expressed a concern that the risk of too general a standard of care was that a jury would too quickly find liability and then the stevedore employer, who was predominantly at fault, recovering all of the LHWCA benefits it had paid from the vessel. He said:

> 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. 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.

Scindia Steam Nav. Co. v. De Los Santos, 451 U.S. 156, 181 (1981) (Powell, J., concurring).

77. In his concurrence, which Justices Marshall and Blackmun joined, Justice Brennan came very close to doing exactly what the text suggests. He wrote:

> 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

Additionally, Justice White and the Court were apparently influenced by the fact that the shipowner, when it hires a stevedore, is hiring a so-called expert to do work for it.[78] Although the stevedore's level of expertise is indeed relevant, it is better thought of as a factor for a fact-finder to consider in deciding comparative fault, rather than a limitation on the duty owed. We will discuss this reality further in the next Part.

Finally, as noted above, it may be that Justice White and the Court had no intention that all the discussion about duty was law at all. It is possible Justice White was merely honoring the tradition that, in admiralty in federal court, there is no right to a jury trial absent an independent basis of jurisdiction. Consequently, absent a jury, the judge is the fact-finder. As fact-finder, the judge decides not only the legal duty issue, but also the breach issue—as fact-finder, not as lawgiver.[79] In that regard, one might view Justice White's entire *Scindia* opinion as a digression on breach, rather than an articulation of duties. Of course, that is not how the Supreme Court itself and the lower courts have read the opinion. In the following Parts, we discuss the post-*Scindia* evolution of the three particular duty categories and the six diminutive sub-duties.

IV. THE TURNOVER DUTIES

As said above, the *Scindia* turnover duty consists of two sub-duties: (1) a duty to exercise reasonable care to turn over to the stevedore a reasonably safe ship; and (2) a duty to warn of risks of which the shipowner is or should be aware. As we also noted, however, each sub-duty comes with a condition.

The condition on the first sub-duty—the duty to exercise reasonable care to turn over the vessel in a safe condition—is that the duty to exercise reasonable care requires the vessel owner 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

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

Id. at 179 (Brennan, J., concurring).

78. *Id.* at 166.

79. *See, e.g.*, United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947) (Judge Learned Hand articulating his famous negligence formula).

operations with reasonable safety."[80] To clarify, the duty is not reasonable care in general but reasonable care in turning the ship over to "an expert and experienced stevedore."[81] That condition is a recognition that the vessel is employing an expert loader and unloader, and the expert can be expected to anticipate certain dangerous conditions in what is, by its nature, dangerous work. Although there is nothing per se wrong with that realization, it merits comment, if not criticism.

Is the "expert and experienced stevedore" condition really a statement of duty, or is it a recognition of a factor that is relevant to the breach determination? Perhaps the difference is semantic;[82] however, whether the "expert and experienced stevedore" condition is a duty statement or a breach factor, the reality is that a judge normally cannot decide whether the shipowner turned over the vessel in a condition that would allow an "expert and experienced stevedore" to do its work safely. This is because a judge is neither an expert in vessel maintenance and operation nor an expert in stevedoring. Instead, deciding what conditions on a vessel an expert stevedore should expect requires the testimony of experienced stevedores. If reasonable experts disagree, or if a fact-finder could draw different inferences from the testimony, then what conditions the stevedore would expect is a decision properly reserved for the fact-finder. A judge who decides, as a matter of law—as part of the duty determination—what conditions an "expert and experienced stevedore" should expect is going beyond his or her legal expertise.

Additionally, in deciding whether a vessel exercised ordinary care in turning over the ship, the decision maker may take note of the fact the stevedore is an expert. That does not mean the stevedore assumes the risk of injury or that his contributory negligence bars his recovery. Rather, the stevedore's expertise is a factor in determining comparative fault. Just as the courts are concerned about re-introducing strict liability concepts, they should be equally careful not to allow the defenses of assumption of the

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80. *Scindia*, 451 U.S. at 166. The Court actually made a similar statement in *Burnside Shipping*. Fed. Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404, 416–17 (1969).

81. *Scindia*, 451 U.S. at 166.

82. In this regard, the issue is similar to the so-called emergency doctrine. When one says one has a duty to exercise reasonable care in an emergency, not of one's own making, is that a statement of duty? Or, is it preferable to say that one has a duty to exercise reasonable care under the circumstances, and one of the circumstances the fact-finder may consider is an emergency not of the defendant's own making? Either way, the issue of whether the emergency was of the defendant's own making and whether the defendant acted reasonably in the emergency are questions for the fact-finder if reasonable minds could disagree.

risk or contributory negligence to sneak into maritime law under the guise of the judge or jury making a no duty or no breach decision.[83]

The condition on the second turnover duty—the duty to warn—might justly be termed a convolution, not just a condition. The vessel has a duty to warn:

> [T]he 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.[84]

Of course, the vessel should have a duty, as part of its general duty to exercise reasonable care, to warn of defects of which it knows or should know. But the last clause, however, not only conditions, but also convolutes that duty.

The vessel—despite the duty to warn seemingly imposed by the first clause—does not have a duty to warn of an obvious condition or of a condition that the (expert) stevedore would anticipate. Literally, then, if there is a dangerous condition on the vessel of which the vessel is aware or should be aware, the vessel is not liable if the unreasonably dangerous condition was obvious or should have been anticipated by the stevedore, even if the vessel fails to warn the stevedore of this condition. That means the careless—we would normally say negligent—vessel that failed to warn of an unreasonably dangerous condition of which it knew or should have known is not liable to an injured longshore worker. The vessel had no duty, since the condition was obvious or should have been anticipated. Stated otherwise, stevedore knowledge or expertise negates the vessel's duty and results in no recovery. The law uses the expertise to bar recovery in a manner reminiscent of assumption of the risk or contributory negligence, despite the fact maritime law recognizes neither of those defenses.[85]

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83. It is simpler to give such advice than it may be to apply it. It is, of course, the concern that assumption of the risk or contributory negligence would inform results in § 905(b) cases that motivated the Second Circuit to reverse the District Court in *Scindia*.

84. *Scindia*, 451 U.S. at 167.

85. Perhaps, relying on *Sofec*, the defendant could argue that the longshore worker's actions are a superseding cause, but that is a proximate cause argument, not a no duty determination, and doing so would ignore a long line of maritime cases that refuse to recognize the assumption of the risk defense in the personal injury case. Another analogous "defense" doctrine that seems equally spurious

Moreover, and just as problematically, what is "obvious" is not self-explanatory nor self-defining. Obviousness is a heavily fact-intensive question. What is obvious in one case is not true for all cases and for all time—it depends upon the particular facts and situation. Once again, with all due respect for the judiciary, a judge has little or no basis for deciding what is or is not obvious in the ship loading and unloading process or for gauging what is obvious to a longshore worker in his or her workplace. That analysis requires an examination of the particular facts and may require the testimony of expert vessel owners or operators and expert stevedores. What is obvious is exactly the type of issue that fact-finders, not lawgivers, should decide. Thus, where there is a jury, the jury should make the decision of whether the shipowner breached its turnover duty to exercise reasonable care. If there is no jury, the court should be cognizant of the different issues it decides and should clearly separate those issues—duty and breach—in the opinion.

Making obviousness part of a duty determination invites courts to think that it is their job to decide, as a matter of law, what is obvious and what is not. That determination, however, requires a detailed factual inquiry best left to fact-finders in individual cases where reasonable minds could differ, rather than to judges as matters of law. Further, to the extent a court believes it has the power to decide what is obvious as part of a legal duty determination, it invites summary judgment motions that will force the parties into detailed, case specific factual analyses posing as legal duty questions.

Moreover, it bears emphasis that maritime law has abandoned the "open and obvious" defense in tort cases.[86] Courts have held that the open and obvious defense or condition on the general duty to exercise reasonable care is inconsistent with the abolition of contributory

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here is the "primary duty" doctrine, which occasionally but rarely raises its head to bar a seaman's recovery for personal injury. The doctrine holds that an employee may not recover the damages he or she suffers that result from the breach of his or her employment contract. The doctrine has been limited to high-level employees and to duties they "consciously assumed as a term of . . . employment." Kelly v. Sun Transp. Co., 900 F.2d 1027, 1030 (7th Cir. 1990) (citing Walker v. Lykes Bros. S.S., 193 F.2d 772, 773 (2d Cir. 1952)). As Maraist and Galligan wrote: "The rule generally has met with disfavor in recent jurisprudence, which apparently limits it to cases in which the employer's breach of duty was willful and was the sole cause of the injury." MARAIST & GALLIGAN, *supra* note 45, at 112–13.

86. *See, e.g.*, Davis v. Portline Transportes Mar. Internacional, 16 F.3d 532, 544 (3d Cir. 1994).

negligence and assumption of risk as bars to recovery in negligence cases.[87] The same holds true for most American jurisdictions.[88]

Davis v. Portline Transportes Maritime Internacional[89] exemplifies how a court should properly handle the "open and obvious" issue in a § 905(b) case. In *Davis*, a stevedore slipped and fell on grease and ice on the ship's deck while offloading a cargo of cement.[90] The district court granted summary judgment in favor of the vessel, finding that it had not breached any of the *Scindia* duties because, in large part, the condition was "open and obvious."[91] In reversing, the Third Circuit provided a very thorough and detailed analysis of the impropriety of applying obviousness as a bar to recovery:

> The parties and the district court all presumed that the preliminary question with respect to the active operations duty is whether the hazard was obvious or known to the longshore worker. . . . But we noted in *Kirsch* that the obviousness determination is generally for the jury to make.
>
> * * *
>
> Rather than setting up a bar to recovery, as the district court presumed, the obviousness of a danger, or the injured worker's actual knowledge of it, is pertinent with respect to the active operations duty only insofar as it evinces the worker's comparative fault.
>
> * * *
>
> When the active operations duty is involved, the Act adjusts the vessel's liability for obvious dangers or those dangers the longshore worker knows of only by the worker's comparative fault. The legislative history of the 1972 amendments clearly and unequivocally provides that:
>
> > the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in

87. *Id.*

88. *See, e.g.*, Pitre v. La. Tech Univ., 673 So. 2d 585, 596 (La. 1996); Beach v. City of Phoenix, 667 P.2d 1316, 1319 (Ariz. 1983). The possibility that the defect or hazard is "open and obvious" is a factor to be considered in determining whether the possessor's failure to remedy the hazard or provide a warning was unreasonable and therefore breached the standard of care; it is not a factor to be used in determining the very existence of the duty, which is a precondition for the exercise of the standard of care.

89. *Davis*, 16 F.3d 532 (3d Cir. 1994).

90. *Id.* 534–36.

91. *Id.* at 538.

> cases where the injured employee's own negligence may have contributed to causing the injury. Also, the Committee intends that the admiralty rule which precludes the defense of "assumption of risk" in an action by an injured employee shall also be applicable.[92]

Turning to the turnover duty to warn, everything just said about obviousness applies to the vessel's turnover duty to warn. That is, under the turnover duty to warn, the vessel does not have a duty to warn of an unreasonably dangerous risk of which it knows or should know if the stevedore would anticipate the risk. This limits the duty to warn of unreasonably dangerous risks even further than the obviousness limitation because even if the risk is not obvious, there is still no duty to warn if the stevedore should anticipate the risk. Again, how does a judge know what risks a reasonable stevedore would anticipate? Additionally, those risks would seem to depend heavily on the particular factual setting which, in turn, would seem to require extensive testimony from those involved and from someone, perhaps an expert, familiar with stevedoring. Furthermore, the determination is one for a fact-finder, not for a lawgiver. Predictably, the turnover duty and its sub-duties have spawned further litigation, explanation, extrapolation, and confusion.

In *Howlett v. Barksdale Shipping Co.*,[93] the plaintiff, Albert Howlett, was injured while unloading a ship when he jumped down about three feet from the cargo and slipped and fell on a sheet of clear plastic that was placed under the cargo. All parties agreed that the use of plastic was improper and that the vessel had supplied the plastic to the stevedore who had loaded the ship in Ecuador.[94] Yet in granting the vessel's motion for summary judgment, the district court held that Howlett had the burden of proving the vessel had actual knowledge of the condition, and he had not sustained the burden of establishing a material issue of fact on that point.[95] According to the court, proving the vessel provided the plastic and the vessel's crew was present during the loading did not give rise to an inference that the vessel had actual knowledge of the improper use of the plastic.[96] Moreover, the court held that Howlett had the burden of

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92. *Id.* at 539–40, 544 (quoting H.R. REP. NO. 1441, 92 Cong., 2d Sess. 8 (1972)). *Davis* is an active operations case, but what it says about open and obvious, duty, assumption of risk, and comparative fault is true in turnover cases as well.

93. Howlett v. Birkdale Shipping Co., 512 U.S. 92 (1994).

94. *Id.* at 94.

95. *Id.* at 95.

96. *Id.*

establishing the condition—the plastic—was not open and obvious, and he failed to carry that burden because the plastic was apparent to the crew, so ". . . it readily transpires that this was an open and obvious condition."[97] It is noteworthy that the district court did not consider facts or testimony in reaching its open and obvious conclusion. The Court of Appeals affirmed without opinion, and the Supreme Court granted certiorari "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."[98]

The Court, in an opinion by Justice Kennedy, noted that the turnover duty could apply to latent hazards in the cargo stow. He said, however, the duty was a "narrow one."[99] That is a very apt way to put it, especially vis-à-vis the generally applicable duty to exercise reasonable care. Latent hazards are those that are not obvious and that a competent stevedore would not anticipate. The Court reiterated that the vessel needs to have actual knowledge of the hazard: "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."[100] Borrowing from the *Scindia* Court's decision not to impose a duty to inspect in the duty to intervene context, the Court refused to impose a duty to inspect the completed stow in the turnover context.

The Court, however, remanded for further proceedings, finding that it was premature to conclude it was undisputed the vessel did not have actual knowledge:

> 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 alternative 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

97. *Id.* at 95 (citing Derr v. Kawasaki Kisen K. K., 835 F.2d 490 (Ca. 1987), *cert. denied*, 486 U.S. 1007 (1988)).

98. *Id.*

99. *Id.* at 105.

100. *Id.* at 100.

Howlett was injured.[101]

Justice Kennedy noted, however, that summary judgment in the vessel's favor might still be appropriate if Howlett failed to establish that the condition—the plastic—was not obvious or a competent stevedore would not have anticipated the condition.[102] The opinion is a refinement of *Scindia* and a logical application of that decision. As a logical refinement of *Scindia*, it solves none of the problems *Scindia* created. *Howlett* is full of undertones of assumption of the risk and contributory negligence. The opinion assumes a judge can determine what is and what is not obvious or what is or is not anticipated by a competent stevedore. In so assuming, the opinion improperly combines the duty and breach determinations, and it places the burden of proving that the condition was neither obvious nor anticipated on the plaintiff.

Predictably, the obviousness exception to the turnover duty to warn has created significant turmoil. As anticipated, some courts ruled against longshore workers injured by what the courts believed was an obvious condition.[103] Other courts have been sensibly flexible in dealing with the draconian obvious or anticipated exceptions. In *Hill v. Reederei*,[104] the Third Circuit Court of Appeals indicated a shipowner might still be liable even if a longshore worker was injured by an open and obvious condition if avoiding the hazard would be "impractical" for the longshore worker and the vessel should have known the worker would encounter the

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101. *Id.* at 105–06.

102. *Id.* at 106.

103. *See* Kirksey v. Tonghai Mar., 535 F.3d 388 (5th Cir. 2008) (open and obvious exception extends to a defect in the cargo stow where there is no evidence the shipowner negligently created a dangerous condition in the stow; rough seas caused the cargo to move); *see also* Manuel v. Cameron Offshore Boats, Inc., 103 F.3d 31 (5th Cir. 1997). There, the claimant was working for an independent contractor aboard the defendant's vessel. Claimant and his supervisor knew that a shorn mooring line was lying on the deck, and they repeatedly worked around it without incident. Claimant was injured when he tripped over the line. The Fifth Circuit held that the district court did not err in concluding that the vessel owner did not violate its "turnover" duty and was entitled to rely upon the contractor to exercise ordinary care by "simply moving the rope out of their way." *Manuel*, 103 F.3d at 34. The district court made its decision after a bench trial. *See* Meyers v. M/V Eugenio C., 919 F.2d 1070 (5th Cir. 1990) (shipowner does not have a duty to warn of an open and obvious condition if the one asserting the duty to warn was in a better position, by virtue of training or experience, to appreciate the danger).

104. 435 F.3d 404 (3d Cir. 2006); *see also* Teply v. Mobil Oil Corp., 859 F.2d 375 (5th Cir. 1988); Thomas v. Newton Int'l Enters., 42 F.3d 1266 (9th Cir. 1994).

hazard.[105] The Court explained, "if the longshoreman's only alternatives are to leave the job or face trouble for delaying the work—then the shipowner had a duty to warn of or mitigate the hazard . . . even if it was open and obvious."[106] The *Hill* approach is a sensible realization that sometimes it is impossible to avoid an "obvious" or "anticipated" hazard and still do one's job. This approach is also a recognition of the fact-intensive nature of the inquiry into obviousness, anticipation, and reasonable care. A 2017 United States Fifth Circuit Court of Appeals decision exemplifies this very practical approach to interpreting and applying the turnover duty and the importance of particular facts to outcomes in individual cases.

In *Manson Gulf, L.L.C. v. Modern American Recycling Service, Inc.*,[107] Manson, in the business of decommissioning oil-drilling platforms, acquired one such platform. Manson extracted the 50-foot tall, four-leg platform and put the structure on a chartered barge. To facilitate moving the structure, Manson ordered four, two-foot by two-foot holes cut in the platform's grating adjacent to each of the four support legs. Manson did not cover or mark the holes. Modern American Recycling Service ("MARS") agreed to purchase and scrap the platform. Manson warned MARS of oil on the platform's surface but did not warn of the holes. A MARS foreman, Smith, boarded the platform. Later, after all Manson personnel were gone from the site, J.J. LaFleur, an independent contractor hired by MARS, joined him. While discussing the oil issue with Smith, LaFleur stepped into one of the holes and fell 50 feet to the barge's deck. He died from his injuries. Manson filed a complaint seeking exoneration or limitation. LaFleur's surviving spouse filed claims against Manson and MARS, relying on § 905(b).[108] The district court granted the defendants' motions for summary judgment on all aspects of § 905(b), including the turnover duty.[109] On the turnover duty, the district court held that Manson

105. *Hill*, 435 F.3d at 410.

106. *Id*. The Third Circuit also pointed out that the doctrine of superseding cause must be applied with heightened vigilance in LHWCA cases in order to avoid undermining the remedial scheme created by the Act. *Id.* at 412.

107. 878 F.3d 130 (5th Cir. 2017).

108. For both the limitation proceeding and the § 905(b) action itself, it is not obvious from the Fifth Circuit's decision why the structure was a vessel. Originally, it had been a platform, not a vessel. Arguably, the fact that it was on a barge at the time of the accident made it a vessel, but that is not entirely clear.

109. *Manson Gulf*, Nos. 15-3627, 15-6860, 2016 WL 3020843 (E.D. La. May 26, 2016). The case was set for trial by the judge; thus, in granting summary judgment, the district court had relied on *Nunez v. Superior Oil Co.*, 572 F.2d 1119 (5th Cir. 1978), which held that where a party made a summary judgment

was not liable because the hole was both open and obvious and could be anticipated by a competent stevedore.[110] The Fifth Circuit reversed, concluding there were factual questions arising from the testimony of MARS' foreman, Smith.[111]

The court reviewed and summarized the evidence. Smith had testified that there was nothing obstructing LaFleur's view of the hole; if LaFleur had looked, he would have seen the hole from four to eight feet away; if he were in LaFleur's shoes he would not have fallen; and he would expect a decommissioned structure to contain holes.[112] On the other hand, he also testified that the platform's grating can play tricks on the eyes; the hole was not easily seen until one was right on top of it; and he did not see the hole until LaFleur fell through it.[113] He also said that uncovered holes were commonly roped off.[114] After reviewing the evidence, the court noted that the pictures submitted as evidence confirmed that the hole could play tricks on the eyes.[115] The *Manson* court properly held that questions of obviousness are fact dependent and are best answered after a full trial because reasonable minds could differ on the obviousness of the hazard or condition.

On remand,[116] the district court decided that the hole was not open and obvious and was "a danger that a reasonably competent stevedore would anticipate encountering."[117] The court said that neither the decedent nor Smith noticed the hole; that Smith testified that the hole looked like solid grating; that the detective who investigated the death did not see the hole until it was pointed out to him; that shadows made the hole difficult to see because the grating could play tricks on one's eyes; and that holes on platforms are not uncommon but are usually covered.[118] The court

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motion in a case that was to be tried by the bench "the court may conclude on the basis of the affidavits, depositions, and stipulations before it, that there are no genuine issues of material fact, even though [the] decision may depend on inferences to be drawn from what has been incontrovertibly proved." *Id.* at 1123–24. The court, however, may exercise this inference-drawing function only when "the evidentiary facts are not disputed" and "there are no issues of witness credibility." *Id.*

110. *Manson Gulf*, 878 F.3d at 135.
111. *Id.* at 136–37.
112. *Id.* at 135–36.
113. *Id.* at 136.
114. *Id.*
115. *Id.*
116. No. 2:15-cv-06860, 2018 WL 4002137 (E.D. La. Aug. 22, 2018).
117. *Id.* at *5.
118. *Id.*

awarded $4,210,756 in damages.[119] The Fifth Circuit affirmed on § 905(b) liability[120] and other critical points, albeit vacating the district court's prejudgment of interest on future damages.[121]

In sum, whether there is a violation of the turnover duty, what conditions are "open and obvious," and what a reasonable stevedore would expect on a vessel are not legal decisions. They are fact dependent, and courts should be wary to grant summary judgment if doing so involves the judge making decisions on key issues beyond judicial expertise and dependent upon the nuanced context of the environment on board or around the relevant vessel.

V. THE ACTIVE CONTROL DUTIES

Recall that the active control duty consists of two separate sub-duties: (1) the active involvement duty; and (2) the active control duty.[122] The active involvement duty arises where the vessel participates in or takes control of cargo operations. The active control duty involves situations where the stevedore worker is harmed by a risk in an area still under the active control of the vessel. Both prongs essentially devolve into a duty to exercise reasonable care in the described situations. Giving the duty a special name adds little or no substance, but perhaps is necessary, given the manner in which the *Scindia* Court undermined the general duty of care under § 905(b). There is much less confusion associated, or potentially associated, with the active control duties than with the turnover duties, especially the duty to warn.

Notably, unlike with the turnover duties, the obviousness of a hazard is not a complete bar to shipowner liability under the active control duties.[123] Also, unlike in the turnover duty to warn, if cargo operations have begun, and the shipowner is actively involved in the operations, the vessel may be held liable to a stevedore worker if it has constructive—not just actual—knowledge of the hazard.[124] In essence, the active control and operations sub-duties are basically duties to exercise reasonable care under the circumstances without limitation or restriction.

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119. *Id.* at *6.
120. Manson Gulf, LLC v. LaFleur, 784 Fed. Appx. 233 (5th Cir. 2019).
121. *Id.*
122. SCHOENBAUM, *supra* note 64, at 636.
123. Serbin v. Bora Corp., 96 F.3d 66 (3d Cir. 1996).
124. Lampkin v. Liberia Athene Transp. Co., 823 F.2d 1497 (11th Cir. 1987).

VI. THE DUTY TO INTERVENE

The duty to intervene, like the turnover and active control duties, also consists of two sub-duties: (1) the duty to supervise and inspect, which is triggered by a contract provision, positive law, or custom; and (2) the duty to intervene, which is triggered by the vessel's knowledge of the stevedore's obviously improvident judgment. One will recall that Justice White in *Scindia* considered the duty to intervene the most vexing. The fact that the vessel has hired the stevedore, who is an expert in loading and unloading, seems a most relevant factor to consider when deciding whether the failure to intervene is a breach of the vessel's duty. A vessel should be able to rely upon the stevedore to do its work properly, and it is perhaps for this reason the Court in *Scindia* said that absent contract provision, positive law, or custom to the contrary, the vessel owner has no duty generally to inspect or supervise the cargo operations. Post-*Scindia* jurisprudence had rarely applied the custom exception.

The second sub-duty to intervene, according to the *Scindia* Court, arises when the stevedore employer's judgment is:

> [S]o obviously improvident that [the vessel owner], if it knew of the defect and that [the stevedore] was continuing to use [the dangerous work method or equipment], should have realized the [condition] presented an unreasonable risk of harm to the longshoremen.[125]

This is a difficult burden to overcome, and perhaps that is as it should be, as a vessel should normally be able to rely upon the stevedore to do its work in the way it chooses. Is it better, however, to have that guideline—that the vessel should normally be able to rely upon the stevedore to do its work the way it chooses—as a part of the statement of duty (law) or as a factor for the fact-finder in determining breach?

Courts have held that mere knowledge of a dangerous condition—which the stevedore created—does not normally trigger the duty to intervene.[126] An important consideration, then, is when does vessel knowledge shift from mere knowledge of a dangerous condition to knowledge of a dangerous condition and of the stevedore's "obviously improvident" [127] judgment in continuing to work around the hazard. The

125. Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 175–76 (1981).

126. Singleton v. Guangzhou Ocean Shipping Co., 79 F.3d 26 (5th Cir. 1996).

127. The use of the word "obviously" here is obviously ironic.

answer to this question clearly appears to depend upon the facts of each case, and therefore is a question of breach, not duty per se.[128]

Notably, in *Scindia*, the Court itself cited a number of Safety and Health Regulations for Longshoring[129] in discussing, without deciding, whether the vessel had an obligation to repair the winch. Importantly, and consistent with the theme of this Article, Justice White said: "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."[130] The quote indicates the Court's understanding that even while it may have been conditioning or narrowing the general duty to exercise reasonable care, decisions about breach of duty were for the fact-finder where reasonable minds could disagree.

In the next Parts, we will address some general issues that have arisen in interpreting § 905(b) and then conclude with some recommendations for courts going forward.

VII. POTENTIAL DEFENDANTS IN A SECTION 905(B) ACTION

Section 905(b) begins: "In the event of injury to a person covered under this chapter caused by the negligence of a vessel . . . ."[131] In many cases, the defendant in the § 905(b) action will be the vessel's owner; however, the statute is not limited to the owner. The action extends to anyone with a sufficient relationship to a vessel. Thus, an injured LHWCA worker may have an action against someone other than the owner of the vessel. He or she may have an action against a bareboat charterer, who will normally be treated like the owner.[132] He or she may have an action against a time charterer; however, in that case, the court must be careful to define the obligations owed consistently with the obligations of a time charterer, which are less extensive than those of an owner or bare boat charterer.[133]

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128. *See, e.g.*, O'Hara v. Weeks Marine, Inc., 294 F.3d 55 (2d Cir. 2002) (the plaintiff raised factual issues precluding summary judgment on the duty to intervene concerning whether the defendant had actual knowledge of a risk created by a dangerous condition and a high probability that the stevedore would not exercise reasonable care to protect its employees).

129. *Scindia*, 451 U.S. at 176.

130. *Id.*

131. 33 U.S.C.A. § 905(b) (West 2018).

132. Jones v. Sanko S.S. Co., 148 F. Supp. 3d 374 (D.N.J. 2015).

133. Kerr-McGee Corp. v. Ma-Ju Marine Servs., 830 F.2d 1332 (5th Cir. 1987).

The same is true if the "vessel" defendant is sued in some capacity other than owner or bare boat charterer.[134]

A. Dual Capacity Employers

A LHWCA worker may sue his employer in tort in its vessel capacity, that is, owner, bareboat charterer, time charterer, voyage charterer, owner pro hac vice, et cetera.[135] That is, the § 905(b) vessel negligence claim trumps the exclusive remedy provisions of the LHWCA, and the LHWCA worker may bring a vessel negligence claim against his or her employer in its vessel capacity, independent of any workers' compensation claim.[136] Of course, the second and third sentences of § 905(b) limit the availability of the § 905(b) vessel negligence action against the employer. The second sentence arguably limits the § 905(b) vessel negligence action against the employer where the employer is doing its own stevedoring services and the employee stevedore is injured by his or her co-employee stevedores.[137] The third sentence more clearly provides that shipbuilders, ship repairers, and ship breakers have no vessel negligence claims against their employers in any capacity. Other LHWCA workers—stevedores outside the scope of the second sentence and construction workers, oil field workers, and others covered by § 905(b)—may bring a vessel negligence action against their employers. In any case, where the action is allowed, it is against the employer in its vessel owner capacity, not in any other capacity, as in an employer capacity,[138] although it may be extremely difficult to determine the capacity in which the employer–defendant committed the tort at issue.

B. Scindia *Extended*

Scindia, of course, interpreted and applied § 905(b) vis-à-vis stevedores loading a ship and, like any court decision, it arose out of particular facts. The three (or six) articulated duties all dealt with that context: what obligation does a vessel have when it turns over the vessel to an expert stevedore? How is the vessel's obligation affected if it involves itself in operations after the turnover or if the stevedore is injured by something still under the vessel owner's control? When should the vessel intervene in the stevedore's operations? All the duties relate to stevedores. All LHWCA workers, however, are not stevedores, and many LHWCA workers who are

134. Such as a voyage charterer.
135. 33 U.S.C. § 902(21) (2018).
136. Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523 (1981).
137. *See supra* note 45.
138. *See* Morehead v. Atkinson-Kiewit, J/V, 97 F.3d 603 (1st Cir. 1990).

not stevedores also have the right to bring a § 905(b) vessel negligence action. Yet the lower courts have greatly expanded *Scindia* to cover many classes of workers and many situations to which *Scindia*'s framework clearly has no application, a fact that is evidenced by the tortured analysis in some of those decisions.

The LHWCA worker may be a construction worker who is injured during the course and scope of employment on navigable waters.[139] The worker may be an oil field worker who is covered because he or she works on navigable waters but does not attain seaman status.[140] The worker may be a construction worker or repairperson engaged in manufacturing or working on equipment or facilities essential to the loading and unloading process but is not actually engaged in the loading and unloading process.[141] There may still be others.

What is the obligation of the vessel to these non-stevedore LHWCA workers? That is, what duty does the vessel owe to a non-stevedore LHWCA worker? It should be reasonable care under the circumstances. After all, as we said above, that is what negligence is. Applying the *Scindia* framework is problematic because the *Scindia* Court articulated all of its "duties" in a case involving an expert stevedore hired to load and unload ships. Different considerations may be, and often are, at stake in different factual settings. Once again, this is a reason to apply overarching concepts of reasonable care rather than the particularized *Scindia* sub-duties. Pointedly, the Supreme Court has never applied the *Scindia* framework outside of the limited context of stevedores loading and unloading cargo from ships. Thus, there is no high court authority for applying *Scindia* when the claim does not involve stevedores.

Especially irksome are those decisions applying *Scindia* to the dual capacity suit. That is, several circuits have stated that *Scindia* provides the analytical framework when any LHWCA worker sues his or her employer for vessel negligence.[142] It is troublesome because, logically, the employer has not turned over the vessel to a third-party stevedore whose employee is injured. It has maintained control of the vessel itself, which then automatically implicates the active control duty. Additionally, the duty to intervene seems inapposite because the employer is the one supervising the injured worker in the first place. The courts should not apply *Scindia*

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139. *See* Office of Workers' Comp. Programs v. Perini N. River Assocs., 459 U.S. 297 (1983); Bienvenu v. Texaco, Inc., 164 F.3d 901 (5th Cir. 1999).

140. *See, e.g.*, Smith v. Seacor Marine LLC, 495 F.3d 182 (5th Cir. 2007).

141. Chesapeake & Ohio Ry. Co. v. Schwalb, 493 U.S. 40 (1989).

142. *See Morehead*, 97 F.3d 603; Fanetti v. Hellenic Lines, Ltd., 678 F.2d 424 (2d Cir. 1982).

to dual capacity cases; they should impose a general duty of reasonable care under the circumstances.

VIII. RECOMMENDATIONS AND CONCLUSION—STOP THE PENDULUM

Scindia interpreted the single word "negligence" in § 905(b) of the LHWCA and turned the relatively straightforward duty to exercise reasonable care under the circumstances into three duty headings with six sub-duties. It is all too complex. By narrowing the general duty of due care, the Court improperly expanded the duty inquiry—a question of law—and, in turn, reduced the role of the fact-finder. This is particularly troublesome when the inquiry turns on fact-specific situations, as it often does. Duty determinations that are too fact-specific create ambiguous and unnecessary "law." Even in cases where the judge will be the fact-finder, the clear articulation of what the judge is deciding—duty or breach—is important because a judge deciding a motion for summary judgment who believes the question is duty may be too quick to grant the motion where there are factual disputes. It is also important because misstatements about duty in cases tried to a judge may be relied upon in jury cases for authority concerning the proper allocation of decision-making authority.

Scindia is also troublesome because the six sub-duties it created are not so neatly categorical because they overlap. For instance, in *Scindia*, the evidence was that the winch, which was part of the ship's gear, was malfunctioning. If it had been malfunctioning at the time the stevedore first came on board, would that be a violation of the turnover duty? It would seem to be a violation of the turnover duty even if the vessel expected that the stevedore would notice the defect. Moreover, while the stevedore was operating the winch, if the vessel owner still had the right to exercise control over the winch and repair it, would that trigger the active control duty because the winch was essentially subject to the control of both the vessel and the stevedore? Finally, whatever one concludes from the previous questions, is a breach of the duty to intervene easier for the LHWCA worker to prove when the defective equipment the stevedore used belongs to the vessel, was in disrepair at turnover, and was not repaired by the vessel either before turnover or during the stevedoring operations? It seems that it should be, and the combination of fault described above constitutes a failure to exercise due care under the circumstances. Breaking the basic duty issue into subparts or sub-duties distracts one from the overall combined negligence of the vessel. The focused or pointillist analysis does not clarify; it obfuscates.

Consequently, our first and most basic recommendation would be to jettison *Scindia* and replace it with a general duty of reasonable care under the circumstances. This would be consistent with the language of the statute—"negligence"—and would simplify things because judges and juries clearly are familiar with "negligence," the general duty to exercise due care. Moreover, our recommendation makes clear that the issue of whether or not a vessel exercised reasonable care is a fact-intensive, case specific determination. As such, the decision is a mixed question of fact and law for the fact-finder. The duty is simple—reasonable care under the circumstances—and the breach decision is for the fact-finder.[143]

In addition, some of the *Scindia* sub-duties, particularly the turnover duty, the duty to warn, and the duty to intervene, use language that is inherently vague and requires factual inquiries and possibly expert testimony. First, the turnover duty to provide a safe ship ensures that a vessel has an obligation 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."[144] A court does not know what condition an expert and experienced stevedore requires to be able to do its work safely. This, at its core, is a factual determination, and one that usually requires expert testimony. It is not a duty determination that a court can make without looking at the particular factual context and hearing the expert testimony, considerations that are improper at the summary judgment stage.

The duty to warn hinges on the condition neither being obvious to nor anticipated by the longshore worker. Once again, what is obvious or anticipated requires a detailed factual analysis.[145] It is a breach question, not a duty or law question. The court cannot decide it based on rule and policy, and its decision about whether a particular hazard is obvious or anticipated is not applicable to a broad range of other cases and situations. Further, the inquiry into what is obvious or anticipated will often require expert testimony.

Finally, the duty to intervene is only triggered if the stevedore's judgment about its method of operations is "obviously improvident."[146] What is obviously improvident, once again, depends upon the facts of the particular case. It is not a legal decision, such as the scope of a statute.

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143. Of course, in many admiralty cases, the fact-finder will be the judge because in federal court, absent an independent basis for federal jurisdiction, such as diversity of citizenship, there is no right to a jury trial.

144. Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 167 (1981).

145. *See, e.g.*, Davis v. Portline Transportes Mar. Internacional, 16 F.3d 532, 540 (3d Cir. 1994).

146. *Scindia*, 451 U.S. at 175.

Whether someone is being obviously improvident in a particular case is limited to that situation. Additionally, like the knowledge of an expert stevedore, the obviousness of a risk, or whether a risk should be anticipated, will often require expert testimony. It is not a matter of legal analysis; it is a matter of factual analysis. Therefore, summary judgments should be rare.

In addition, any possibility that recognizing a general duty of due care would bring *Sieracki* strict liability in through the back door has long passed. A LHWCA worker has not had an unseaworthiness action against a vessel for 46 years. There is little risk a court would reinvigorate the unseaworthiness claim today through liberal interpretations of "negligence." Moreover, negligence is a common and well understood concept. There is little risk that a court would be misled into turning it into strict liability in the vessel context.

Naturally, there is only one Court that could jettison the overly detailed duty dynamic instituted in *Scindia*. Until the day when the United States Supreme Court decides to revisit *Scindia*, we concede that its three-part/six-part duty dissection will continue to govern. The pendulum has not only swung far from *Sieracki* strict liability; it has swung far past the negligence standard Congress articulated.

In the meantime, courts can and should do several things when deciding § 905(b) cases. Following the recommendations set forth below will be consistent with § 905(b) "negligence," avoid doctrinal confusion, more appropriately articulate decision-making responsibility, and avoid improper summary judgments based on a no duty conclusion where the issue is really breach and there are factual questions. All of our recommendations urge courts to be cognizant of the fact-specific nature of § 905(b) cases and of the fact-dependent decisions inherent in making determinations about the applicability of many of the *Scindia* duty conditions or qualifiers.

First, in interpreting and applying the turnover duty to provide a reasonably safe ship, courts should be careful not to make hasty "no duty" decisions. Courts should not be too quick in deciding what condition of a vessel and its equipment allows an "expert and experienced stevedore" through "the exercise of reasonable care to carry on its cargo operations with reasonable safety."[147] Taking into consideration the fact that the stevedore is an expert is appropriate, since common sense indicates that when someone retains an expert to do anything, they can rely on that expert's ability to know what they are doing and how to do it and thereby minimize risk. At the same time, the contours of the acceptable condition of the vessel for the expert and experienced stevedore is beyond the knowledge and experience of the judge. What constitutes an acceptable

147. *Id.* at 167.

condition is a fact-specific issue, and one that will often require testimony from both eyewitness and often experts. Thus, a determination that the ship was or was not in an acceptable condition for an expert and experienced stevedore is a case specific, factual question for the fact-finder. It is not a purely a legal decision for a judge. Consequently, courts should be hesitant to grant "no duty" summary judgment motions on the basic turnover duty unless reasonable minds could not differ about what is an acceptable condition to allow an expert and experienced stevedore to reasonably and safely conduct its work.

Similar observations apply to the turnover duty to warn. When deciding what risks are "obvious" or should be "anticipated" by an experienced stevedore, courts should be cognizant of the reality that obviousness and the risk expectations of the stevedore are fact-specific matters that will vary widely from case to case and risk to risk.[148] There are also matters beyond the knowledge of the typical judge and that may require expert testimony. Consequently, once again, judges should be wary of granting summary judgment motions concluding the defendant does not owe the plaintiff a duty to warn because a condition was obvious or anticipated. Those decisions turn on the facts, may require expert testimony, and are best reserved for the fact-finders. The Fifth Circuit's decision in *Manson Gulf, L.L.C.* is a fine example of a court that carefully considered the evidence before it and properly determined that there were factual questions on whether the risk—the holes in the platform floor—was obvious or should have been anticipated.

The active control duties are perhaps the most straightforward, since both are basically the duty to exercise reasonable care under the circumstances. The duty to intervene is more akin to the turnover duty. What is or is not "obviously improvident" stevedore judgment is not a broad, policy-based legal question. It is fact-based and dependent upon context and, as such, not typically well-suited for resolution on a motion for summary judgment.

Courts should also be wary of inflexibly applying the *Scindia* analytical framework beyond the stevedore setting in which it arose. The *Scindia* Court framed all of the articulated duties in terms of what duty the vessel owed an expert stevedore hired to load or unload a ship. Other LHWCA workers, such as construction workers and oil field workers, while experts in construction or natural resources exploration and development, may be much less familiar than a stevedore with vessels qua vessels, that is, vessels as vessels. What vessel conditions are obvious to or anticipated by these non-stevedore experts, or what constitutes obviously improvident judgment by them, may be very different from what is obvious to, anticipated by, or obviously improvident judgment by a stevedore.

148. *Id.*

Judge Morgan's decision in *Rhodes v. Genesis Marine, LLC of Delaware*[149] is a fine example of the approach we articulate. There, the plaintiff, an electrician, was employed by a contractor to repair the defendant's barge. To do his work, he had to go below deck, which required him to "remove a grated opening to enter the bilge of the barge. The opening consisted of a cut-off piece of the grating."[150] That is, the grating, or hatch cover, was unhinged. Thus, every time the plaintiff sought to go below deck, he had to remove the grating, or hatch cover, begin to climb down a ladder, and in the process replace the grating above him. While climbing down the ladder on the day in question, the grating got caught in some welding cables, and the hatch cover fell into the hole, causing the plaintiff to fall and suffer serious injuries. The plaintiff filed suit against the defendant, alleging vessel negligence under § 905(b). The defendant moved for summary judgment on all of the relevant *Scindia* duties. Judge Morgan denied the motion.[151]

On the turnover duty, Judge Morgan held that there were factual issues whether the defendant violated the duty to "remove a grated opening to enter the bilge of the barge."[152] As to the active control duties, Judge Morgan determined that there were factual questions whether defendant had maintained active control of the area. And, finally, Judge Morgan held that there were factual questions concerning the duty to intervene and what knowledge the defendant had.[153] In so holding, the court carefully reviewed deposition testimony and displayed sensitivity to the nuances of the factual context within the industry.

In conclusion, with the passage of § 905(b), a pendulum, which after *Sieracki* had swung very much in favor of the worker, swung back in favor of vessels. With the failure of the *Scindia* decision to define vessel negligence as reasonable care under the circumstances, and instead as six particularized sub-duties under three duty headings, the pendulum has swung too far in the vessel's favor. It is time for the pendulum to find its resting place in the middle—a place where the vessel owes the LHWCA worker a general duty to exercise reasonable care under the circumstances. Until the Supreme Court brings the pendulum swing to a stop, courts are urged to remember that facts and industry expertise, rather than cold logic, drive the results under *Scindia*, and, as a result, courts should exercise great caution in granting summary judgments finding no duty in § 905(b) actions.

149. No. 18-746, 2019 WL 3081699 (E.D. La. June 15, 2019).
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*