Admiralty Law - 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act - Shipowner's Duty Toward Longshoreman is Same as Land-Based Employer's Duty Toward Employees of Independent Contractor

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THIRD CIRCUIT REVIEW

Admiralty

ADMARALTY LAW — 1972 AMENDMENTS TO THE LONGSHOREMEN’S AND
HARBOR WORKERS’ COMPENSATION ACT — SHIPOWNER’S DUTY TOWARD
LONGSHOREMAN IS SAME AS LAND-BASED EMPLOYER’S DUTY TOWARD
EMPLOYEES OF INDEPENDENT CONTRACTOR.

Hurst v. Triad Shipping (1977)

Plaintiffs longshoremen Hurst and Minus were injured by their
employer’s negligently maintained stevedoring equipment while unloading
cargo from defendant’s ship in the Port of Philadelphia.¹ Both men filed
actions for damages in the United States District Court for the Eastern
District of Pennsylvania against the shipowner, Triad Shipping Company²
(Triad), under amended section 905(b) of the Longshoremen’s and Harbor-
workers’ Compensation Act (Act).³ The complaints alleged that Triad should
be held liable for the negligence of the stevedore, on the theory that the
ship’s officer knew or should have known of the dangerous condition of the

¹ Hurst v. Triad Shipping Co., 554 F.2d 1237, 1240 (3d Cir.) cert. denied, 98 S. Ct.
188 (1977). The ship was located on the navigable water of the United States, 554 F.2d
at 1240. The longshoremen were using a shore-based crane owned and operated by
their employer, the Lavino Shipping Company, a stevedoring concern. Id. The crane’s
cargo hook lacked a vital safety catch, as a result of which a pair of 30-foot loading
cables slipped off the hook, falling into the hatch and injuring the plaintiffs. Id. The
parties stipulated that operation of the crane without the safety catch was
unreasonably dangerous. Id.

² Triad in turn filed suit against the stevedore for indemnification. 554 F.2d at
1240; see notes 29 & 30 and accompanying text infra. The stevedore is engaged by the
shipowner or, in this case, by the time charterer of the ship, to provide the necessary
manpower and equipment to unload the ship. See 554 F.2d at 1240. Longshoremen —
plaintiffs in this action — are the employees of the stevedore. Id.

³ 33 U.S.C. § 905(b) (Supp. V 1975). The Act was amended in 1972. Longshore-
Amendments]. The 1972 Amendments provide, in pertinent part:

In the event of injury to a person covered under this [Act] caused by
the negligence of a vessel, then such person . . . may bring an action against such
vessel as a third party . . . 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. . . . 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 . . . .


(766)
stevedoring equipment. Holding that Triad was not under an absolute duty to provide longshoremen a safe place to work, the district court granted Triad's motion for a directed verdict, because of the absence of proof that the ship's chief officer actually knew of the unsafe condition of the stevedoring equipment.

The Third Circuit affirmed, holding that the vessel's liability under section 905(b) should be determined in accordance with uniform land-based principles of negligence applicable to independent contractors, and that the shipowner could not be held vicariously liable on a negligence claim which was based on the theory that the chief officer "should have known" of the unsafe condition.

Hurst v. Triad Shipping, 554 F.2d 1237 (3d Cir. 1977).

During most of the nineteenth century, longshoring was regarded as a nonmaritime activity; nevertheless, longshoremen could recover damages for the shipowner's negligent failure to provide a safe place to work. In 1882, the Supreme Court held that longshoremen could invoke federal admiralty jurisdiction for their personal injury claims. Negligence suits against shipowners continued, while Congress and the courts endeavored repeatedly to determine the appropriate standard by which a shipowner might be adjudged "negligent."

4. 554 F.2d at 1241. Originally, the complaints had also alleged that the vessel was unseaworthy, but in view of the express elimination of the unseaworthiness remedy by the 1972 Amendments, those allegations were stricken from the complaint by the district court before trial. Id. at 1240. See notes 20-27 and accompanying text infra. For the pertinent text of the 1972 Amendments, see note 3 supra.

5. 554 F.2d at 1241.

6. The case was heard by Judges Hunter, Adams and Kalodner. The opinion was written by Judge Hunter.

7. 554 F.2d at 1253.

8. See The Augustine Kobbe, 37 F. 696 (S.D. Ala. 1888); Paul v. The Ilex, 18 F. Cas. 1246 (C.C.D. La. 1876) (No. 10,842); M'Dermott v. The Owens, 16 F. Cas. 15 (C.C.E.D. Pa. 1849) (No. 8,748); Cox v. Murray, 6 F. Cas. 681 (S.D.N.Y. 1848) (No. 3,304).


11. See, e.g., Keliber v. The Nebo, 40 F. 31 (S.D.N.Y. 1889) (latent danger known to ship's officers, but not communicated to invitee, gave rise to tort claim); The Max Morris, 24 F. 860 (S.D.N.Y. 1885) (same); The Helios, 12 F. 732 (S.D.N.Y. 1882) (same).

Congress' first and major excursion into the area of longshoreman suits came in 1927, with the promulgation of the original version of the Act. The workmen's compensation program contained in the 1927 Act ostensibly benefited longshoremen as well as their stevedore-employers: injured longshoremen were guaranteed compensation at fixed levels, while stevedores acquired a ceiling on their liability for longshoremen injuries as well as an end to the sea of related litigation. In the event that compensation levels under the Act should afford the injured longshoreman only imperfect redress—as was usually the case—the Act preserved the longshoreman's right to sue third parties, such as shipowners, outside the framework of the compensation system. Third-party actions, however, were seldom resorted to by injured longshoremen.

Eventually, the United States Supreme Court transformed third-party suits into a viable means of securing to longshoremen compensation beyond the meager limits of the Act, by recycling an old maritime doctrine of "unseaworthiness." In its original form the unseaworthiness doctrine held the shipowner liable to seamen for injuries caused by the shipowner's negligent failure to keep his vessel and its appliances in a "seaworthy" condition. But in Seas Shipping Co. v. Sieracki, the Court extended the doctrine's protection to longshoremen and elevated the shipowner's higher standard was once interpreted by the Supreme Court as follows: "[T]he test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury ...." Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 523 (1957), quoting Rogers v. Missouri Pac. R.R., 352 U.S. 500, 506 (1957) (emphasis added). To date, the Jones Act standard has not been applied to any case tried under § 905(b).

15. Id. § 904.
16. Id. § 905.
17. See Steinberg, The 1972 Amendments to the Longshoremen's and Harborworkers' Compensation Act: Negligence Actions by Longshoremen Against Shipowners — A Proposed Solution, 37 Ohio St. L. Rev. 767 (1976). In 1927, the maximum weekly compensation under the Act was fixed at $25.00 per week. Act of March 4, 1927, ch. 509, § 6, 44 Stat. 1426 (codified in 33 U.S.C. § 906 (1970)). In spite of occasional adjustment, the maximum compensation at the time of the 1972 Amendments was $70.00 per week, while the average longshoreman's weekly salary was $200.00. S. Rep., No. 1125, 92d Cong., 2d Sess. 4 (1972) [hereinafter cited as SENATE REPORT]; H.R. Rep. No. 1441, 92d Cong., 2d Sess. 2-3 (1972). Since the pertinent sections of both the House and Senate Reports are substantially identical, subsequent citations will be made only to the Senate Report.
19. Id. § 6-4, at 278. See 554 F.2d at 1242.
20. See The Osceola, 189 U.S. 158 (1903) (creation of seaman's cause of action based on warranty of seaworthiness).
22. See The Osceola, 189 U.S. 158, 175 (1903).
24. Id. at 99.
standard of care from negligence to "a species of liability without fault." The expanded unseaworthiness doctrine, shipowners were held vicariously liable for injuries to longshoremen resulting from the ship's unseaworthiness, even if the unseaworthy condition was caused by the negligence of fellow employees or the stevedore. It was not necessary, therefore, that the dangerous condition be caused by, or even known to, the shipowner or any crew member. This liability, however, inflicted an almost intolerable burden on the shipowner. Consequently, in *Ryan Stevedoring Co. v. Pan Atlantic S. S. Co.*, the Supreme Court permitted the shipowner to seek indemnification from the stevedore when the latter's negligence was at least partially responsible for the hazardous condition. This decision had the unfortunate consequences, however, of exposing stevedores to liability far in excess of the limits considered appropriate by Congress, and of transforming longshoremen suits into complicated, expensive, and time-consuming exercises in the apportionment of liability among shipowner, stevedore and longshoreman.

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25. *Id.* at 94. The Court stated in *Sieracki* that seaworthiness was not "limited by conceptions of negligence . . . It is a form of absolute duty owing to all within the range of its humanitarian policy." *Id.* at 94–95 (citations omitted). The Court felt that a longshoreman was "a seaman because he is doing a seaman's work and incurring a seaman's hazards." *Id.* at 99. Seaworthiness was a nondelegable duty, so that the shipowner could not escape liability by hiring an independent contractor through whom he could delegate responsibility for stevedoring activities. *Id.* See 554 F.2d at 1241 n.3.

26. See *Rogers v. United States Lines*, 347 U.S. 984 (1954) (shipowner held liable when longshoreman was struck by a tub being hoisted by another employee); *Grillea v. United States*, 232 F.2d 919 (2d Cir. 1956) (vessel held responsible for unsafe condition created by both longshoreman and his fellow employee).


30. *Id.* at 132–34. The owner's theory of recovery against the stevedore was based on the breach of an express or implied "warranty of workmanlike performance." *Id.* at 133. See Senate Report, *supra* note 17, at 9.

It has been suggested that the creation of the *Ryan* indemnification doctrine was probably attributable to three factors: 1) The insufficient compensation levels under the Act as originally promulgated; 2) sympathy for the ill-compensated injured longshoreman and his family; and 3) recognition that injuries were more often occasioned by the negligence of the stevedore, than by that of the owner. Comment, *supra* note 12, at 252.

31. See Senate Report, *supra* note 17, at 9. The congressional committees considering the 1972 Amendments found that a major defect of such circuitous indemnification actions was that "much of the financial resources which could better
In enacting the 1972 Amendments to the Act (1972 Amendments), Congress scuttled both the seaworthiness theory and the Ryan indemnification doctrine. Instead, the longshoreman was accorded expanded coverage and increased benefits from his employer, in addition to a separate action against the shipowner as a third party, based only upon "the negligence of [the] vessel." The Senate Report evaluating the 1972 Amendments elaborated on this standard, by declaring that the rights and liabilities of the parties in a longshoremen's action should be determined as if the injury had occurred on land. The Senate Report also emphasized the need for uniformity in the area of third-party suits and reaffirmed the traditional admiralty rule precluding the defense of assumption of risk.

be utilized to pay improved compensation benefits were now being spent to defray litigation costs." Id. See Lucas v. "Brinknes" Schifffahrts Ges., 379 F. Supp. 759, 767 (E.D. Pa. 1974).

32. See note 3 and accompanying text supra.

33. See generally Senate Report, supra note 17, at 8-12.


35. See 33 U.S.C. §905(b) (Supp. V 1975); note 3 supra. The Third Circuit has construed this phrase of §905(b) to present "a new negligence third party cause of action against the vessel." Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31, 40 (3d Cir. 1975), cert. denied, 423 U.S. 1054 (1976). The vagueness of §905(b) in this respect may be attributable to mere oversight on the part of draftsmen who were more concerned with eliminating an obsolete remedy than with describing in particular the standard of care applicable to the new remedy. Alternatively, Congress may simply have intended that the definitions of §905(b) negligence should be left to the courts, subject only to the congressional requirement of uniformity. See Napoli v. [Transeapacif Carriers Corp. & Universal Cargo Carriers Inc.] Helenic Lines, Ltd., 536 F.2d 505 (2d Cir. 1976); text accompanying note 38 infra.

36. Senate Report, supra note 17.

37. Id. at 11. The Senate Report states:

The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position vis a vis his rights against the vessel as a third party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in nonmaritime pursuits liable under similar circumstan-

Id.

38. Id. at 12. The Supreme Court has observed that article III, section 2 of the United States Constitution requires federal supremacy in maritime affairs through the application of uniform federal maritime law: It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states. The Lottawanna, 88 U.S. 558, 575 (1874). See Brown v. Ivarans Rederi A/S, 545 F.2d 854 (3d Cir. 1976); Anuszewski v. Dynamic Mariners Corp., 540 F.2d 757 (4th Cir. 1976), cert. denied, 429 U.S. 1098 (1977); Frasca v. Prudential-Grace Lines, Inc., 394 F. Supp. 1092 (D. Md. 1975); Birkir v. Flota Mercante Grancolombiana, 386 F. Supp. 1105 (D. Or. 1974); Hite v. Maritime Overseas Corp., 380 F. Supp. 222 (E.D. Tex. 1974).

39. Senate Report, supra note 17, at 12. The Senate Committee also recommended application of the rule of comparative negligence in admiralty actions, rather than the complete defense of contributory negligence. Id.
This legislative intent as expressed in the Senate Report has usually been treated with deference. For example, federal courts immediately accepted the Senate Report's central recommendation that land-based principles of negligence should determine the ship's standard of care in third-party suits under section 905(b). Some courts went even further, in keeping with the suggestion of uniformity, and endorsed specific sections of the Restatement (Second) of Torts (Restatement) as the national expression of land-based negligence law.

A fundamental division of responsibilities between shipowner and stevedore thus emerged. Under the Act, the duty to provide the longshoreman with a reasonably safe place to work rests with the shipowner, while the responsibility for safe stevedoring equipment and methods lies with the stevedore. But many recent decisions interpreting amended section 905(b),

40. Cases dealing with amended § 905(b) refer repeatedly and at great length to the Senate's views, prompting at least one writer to protest that the "legislative history is receiving unusually heavy emphasis." Robertson, Negligence Actions by Longshoremen Against Shipowners Under the 1972 Amendments to the LHWCA, 6 J. MAR. L. 447, 450 (1976). This extra measure of deference may be a result of the need for uniformity and the simultaneous recognition of Congress' "paramount power to fix and determine the maritime law which shall prevail throughout the country." Southern Pac. Co. v. Jensen, 244 U.S. 205, 215 (1917). But see Gilmore & Black, supra note 12, § 6-57, at 455. See also Frasca v. Prudential-Grace Lines, Inc., 394 F. Supp. 1092 (D. Md. 1975) (shipowner's duty to exercise reasonable care to provide safe place to work held nondelegable to an independent contractor hired to remedy the defect); Streatch v. Associated Container Transp., Ltd., 388 F. Supp. 935 (C.D. Cal. 1975) (applying a strict products liability theory where the shipowner supplied a vehicle for the stevedore's cargo operations).


42. Restatement (Second) of Torts (1965).


44. See 33 U.S.C. § 941 (1970 & Supp. V 1975). Section 941 provides: "Every employer shall furnish . . . places of employment which shall be reasonably safe." Id. But the shipowner is not required to take every possible precaution to insure the safety of the longshoreman; he is required only to exercise ordinary care to turn a reasonably safe ship over to the stevedore, so that no danger to persons or property will confront the ordinarily careful stevedore. In other words, the ship need only be as safe as can be expected after an arduous ocean voyage, in the eyes of an experienced stevedore. Ramirez v. Toko Kaiun K.K., 385 F. Supp. 644, 651-53 (N.D. Cal. 1974). See Napoli v. [Transpacific Carriers Corp. & Universal Carriers, Inc.] Hellenic Lines, Ltd., 536 F.2d 505 (2d Cir. 1976); Slaughter v. Ronde, 390 F. Supp. 637 (S.D. Ga. 1974). Cf. Croshaw v. Koninklijke Nedloyd, 398 F. Supp. 1224, 1230 (D. Or. 1975) (shipowner's responsibility ends when he relinquishes control or possession of the ship to stevedore).

Even before the 1972 Amendments, the stevedore's responsibility for its stevedoring activities was relevant for purposes of apportioning liability, when the shipowner sought indemnification from the stevedore. See Italia Societa per Azioni Di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315 (1964). The Court stated in Italia
however, have further limited the vessel's responsibility, by utilizing section 343A of the Restatement, which provides that "[a] possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." 

that "[l]iability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury. Where, as here, injury-producing and defective equipment is under the supervision and control of the stevedore, the shipowner is powerless to minimize the risk; the stevedore is not." Id. at 324. Furthermore, the Senate Committee stated unequivocally that "[t]he vessel will not be chargeable with the negligence of the stevedore." Senate Report, supra note 17, at 11. See Brown v. Ivarane Rederi A/S, 545 F.2d 854 (3d Cir. 1976); Ramirez v. Toko Kaiun K.K., 385 F. Supp. 644 (N.D. Cal. 1974); Lucas v. "Brinknee" Shiffahrts Ges., 379 F. Supp. 759, 768 (E.D. Pa. 1974). Other courts have held that the shipowner's liability ceases once the control of the ship or a portion thereof has been relinquished to the stevedore. See Frasca v. Prudential-Grace Lines, Inc., 394 F. Supp. 1092 (D. Md. 1975); Fitzgerald v. Compania Naviera La Molinea, 394 F. Supp. 413 (E.D. La. 1975). But see Ferrante v. Swedish Am. Lines, 331 F.2d 571 (3d Cir.), cert. denied, 379 U.S. 801 (1964). See generally 1A E. JHIRAD, BENEDICT ON ADMIRALTY § 114, at 6-14 (7th ed. 1973) (test of a shipowner's responsibility is possession and control).

45. Restatement (Second) of Torts § 343A (1965). Comment (a) to § 343 states that §§ 343 and 343A must be read together. Section 343 provides:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
(c) fails to exercise reasonable care to protect them against the danger.

Id. § 343. Section 343A embodies the so-called "modern trend." See Gay v. Ocean Transp. & Trading, Ltd., 546 F.2d 1233, 1240-41 (5th Cir. 1977). In contrast, the "traditional rule" simply relieves the shipowner of all liability for injuries caused by dangers known or obvious to the invitee, regardless of whether the shipowner should have anticipated the harm despite such knowledge or obviousness. See id. Use of the traditional rule has been specifically rejected by both the Second and the Fifth Circuits, because of the incorporation therein of the doctrine of assumption of risk. See Gay v. Ocean Transp. & Trading, Ltd., 546 F.2d 1233, 1241-42 (5th Cir. 1977); Napoli v. [Transpacific Carriers Corp. & Universal Carriers, Inc.] Hellenic Lines, Ltd., 536 F.2d 505, 508-09 (2d Cir. 1976). But see Cummings v. "Sidarma" Soc., 409 F. Supp. 869 (E.D. La. 1976); Fedison v. Vessel Wislica, 382 F. Supp. 4 (E.D. La. 1974); Hite v. Maritime Overseas Corp., 380 F. Supp. 222 (E.D. Tex. 1974). Curiously, the Second and Fifth Circuits found no similar flaw in § 343A, embodiment of the so-called "modern trend," which both circuits had adopted; those courts apparently concluded that the addition of the phrase "unless the possessor should anticipate the harm despite such knowledge or obviousness" in § 343A(1) removes any element of assumption of risk from the rule, rendering it fit for application at admiralty law. See 554 F.2d at 1250 n.35; Gay v. Ocean Transp. & Trading, Ltd., 546 F.2d 1233, 1241-42 (5th Cir. 1977); Napoli v. [Transpacific Carriers Corp. & Universal Carriers, Inc.] Hellenic Lines, Ltd., 536 F.2d 505, 508-09 (2d Cir. 1976). But it is clear that § 343A does still incorporate an active element of assumption of risk, in that the invitee is required to assume the risk of those known or obvious dangers as to which the reasonable shipowner need not anticipate harm despite the invitee's knowledge or the obviousness of the danger. 554 F.2d at 1250 n.35. See text accompanying notes 72 & 73 infra. In fact, Comment (e) to § 343A clearly states: "The possessor of the land may reasonably assume that the invitee will protect himself [from known or obvious dangers] by the exercise of ordinary care or that he will voluntarily assume the risk of harm if he does not succeed in doing so." Restatement (Second) of Torts § 343A, Comment (e) (1965) (emphasis added).
Section 343A has been applied in the Second, Fourth, and Fifth Circuits. However, as the Hurst decision demonstrates, the Third Circuit is not similarly inclined.

The Hurst court first discussed the diverse factors leading to the creation and adoption of section 905(b), including the Sieracki and Ryan doctrines and the problems that these doctrines had created. The court then addressed the contention of the appellants that Congress' elimination of the longshoreman's unseaworthiness remedy was unconstitutional. In rejecting this argument, the court held that article III, section 2 of the Constitution prohibits only the most "egregious meddling" in traditional substantive maritime remedies. 554

46. See Napoli v. [Transpacific Carriers Corp. & Universal Carriers, Inc.] Helenic Lines, Ltd., 536 F.2d 505 (2d Cir. 1976) (dispute as to whether obvious danger was created by the crew or the longshoreman).


48. See Gay v. Ocean Transp. & Trading, Ltd., 546 F.2d 1233 (5th Cir. 1977) (stevedore's negligence in failing to provide a blower for carbon monoxide fumes in the cargo hold).

49. See 554 F.2d at 1250 n.35. Prior to Hurst, the Third Circuit had not specifically addressed the question of the applicable standard of care under the 1972 Amendments. See Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31 (3d Cir. 1975), cert. denied, 423 U.S. 1054 (1976) (stevedore was also owner pro hac vice and was held liable for its own nonstevedoring negligence). In Griffith, the Court simply recognized the differing viewpoints as to the shipowner's standard of care, but did no more than "suggest that there is a problem." 521 F.2d at 45. See also Brown v. Ivarans Rederi A/S, 545 F.2d 854 (3d Cir. 1976). In Brown, the court focused primarily on the duties of the stevedore rather than those of the owner. Id. at 80-61. In dictum, however, the court suggested that "the principles of the law of negligence, as adopted in the admiralty field during the history of our country, are to form the basis of any recovery against shipowners insofar as such principles are not inconsistent with § 905(b)." Id. at 863 (footnote omitted). Of course, the court retreated somewhat from this view when it concluded in Hurst that land-based negligence law, rather than rules of maritime law, should govern third-party suits. 554 F.2d at 1246; see notes 54 & 55 and accompanying text infra.

50. 554 F.2d at 1241-43.

51. Id. at 1241. Specifically, appellants contended that article III, section 2 of the United States Constitution contemplates and incorporates a general body of maritime law, uniform throughout the country, and unalterable by legislation. 554 F.2d at 1254, citing Panama Ry. v. Johnson, 264 U.S. 375 (1924). In Panama, a statute extending to seamen the protection of certain laws already applicable to railway workers was held not to be an objectionable withdrawal of subject matter from the reach of maritime law. 264 U.S. at 388, citing 46 U.S.C. § 688 (1970). The court stated that "there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without." 264 U.S. at 386.

52. 554 F.2d at 1245. Appellant's constitutional objection was rejected for three reasons. First, the court found it unlikely that the seaworthiness doctrine, created in 1946, merited inclusion within the body of maritime law that had been contemplated by the Framers. Id. at 1244. Second, it was noted that other legislation similarly affecting other major aspects of admiralty law had been upheld by the Supreme Court, notwithstanding the dictum in Panama Ry. v. Johnson, 264 U.S. 375 (1924); see note 51 supra. 554 F.2d at 1244. Cf. Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924); Knickerbocker Ice Co., v. Stewart, 253 U.S. 149 (1920). Finally the court concluded that the Panama dictum "places boundaries on federal power to expand and contract admiralty jurisdiction, not on its power to arrange and rearrange substantive maritime remedies." 554 F.2d at 1244-45, quoting Lucas v. "Brinknes" Shiffahrts Ges., 387 F. Supp. 440, 443 (E.D. Pa. 1974).
admiralty matters, and that it is well within Congress' power "to alter maritime jurisdiction and reformulate substantive rules of liability." 53

Proceeding to the issue of the standard of the shipowner's duty of care under section 905(b), the court found that the application of land-based negligence principles was unanimously recommended by both judicial precedent 54 and legislative history, 55 and that the national repository of those principles is the Restatement. 56

The court began its discussion of the Restatement with an examination of section 318, which deals with the duty of a landowner to control the conduct of licensees upon his property, 57 and rejected the use of this section for two reasons. The court stated initially that a duty to control a licensee's conduct translates, in the maritime context, into a nondelegable duty of constant supervision over the activities of the stevedore and his employees. 58

The court observed that it had been precisely this kind of nondelegable duty that the 1972 Amendments were designed to eliminate, 59 for the Senate Report had stated that "[t]he vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore." 60 Secondly, the court concluded that, according to Restatement definitions, a longshoreman is not a licensee, 61 but an invitee, 62 and his employer — the stevedore —

53. 554 F.2d at 1245-46.
54. Id. at 1247-48. See text accompanying note 41 supra.
55. 554 F.2d at 1247. The Senate Report states:
The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, 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.
SENATE REPORT, supra note 17, at 10.
56. 554 F.2d at 1248.
57. Id. Section 318 of the Restatement reads:
If the actor permits a third person to use land or chattels in his possession otherwise than as a servant, he is, if present, under a duty to exercise reasonable care so to control the conduct of a third person as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if the actor
(a) knows or has reason to know that he has the ability to control the third person, and
(b) knows or should know of the necessity and opportunity for exercising such control.
RESTATEMENT (SECOND) OF TORTS § 318 (1965).
58. 554 F.2d at 1248-49.
The court further added that the inadvisability of applying a § 318 standard to shipowners was confirmed by the fact that no court had ever done so. 554 F.2d at 1248 n.29.
60. SENATE REPORT, supra note 17, at 11.
61. 554 F.2d at 1249, citing RESTATEMENT (SECOND) OF TORTS § 330 (1965).
62. 554 F.2d at 1249. The Restatement definition of invitee encompasses one "who is invited to enter or remain on land for a purpose directly or indirectly connected with
must be regarded as an independent contractor. The court then noted that the employer's responsibility for the conduct of an independent contractor was specifically addressed elsewhere in the Restatement, so that, if the section dealing with licensees were applied to independent contractors as well, the section dealing with independent contractors would be "rendered nugatory."

The court next examined sections 343 and 343A, which deal with a landowner's duty toward invitees, and refused to apply them for three reasons. First, the application of these sections would again "render nugatory" other pertinent sections of the Restatement, such as sections 409 through 429, which deal with independent contractors. Secondly, the court felt that use of sections 343 and 343A would create in the shipowner a nondelegable duty to supervise stevedoring operations, in contravention of the clear congressional intent. The court noted that Congress clearly limited the circumstances under which it could be said that the vessel "should have known" about a defect. The court referred to the congressional statement that "nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition." However, because of the illustration that followed the above sentence, the Third Circuit concluded that "this responsibility relates to the condition of the ship itself, not the activities of the stevedore.

343 and 343A were relegated to a footnote because appellants, inexplicably, did not raise the pertinence of these sections on appeal, despite their having done so before the district court. 554 F.2d at 1249 n.35.


66. Id. at 1250 n.35. For the text of these sections, see note 45 and accompanying text infra. The court's discussion of §§343 and 343A was relegated to a footnote because appellants, inexplicably, did not raise the pertinence of these sections on appeal, despite their having done so before the district court. 554 F.2d at 1249 n.35.

67. 554 F.2d at 1249 n.35. See notes 77-84, 89-93 & 100-103 and accompanying text infra.

68. 554 F.2d at 1249 n.35. See notes 37 & 59-60 and accompanying text supra.

69. 554 F.2d at 1250 n.35, citing Senate Report, supra note 17, at 10.

70. 554 F.2d at 1250 n.35 quoting Senate Report, supra note 17, at 10 (emphasis added).

71. 554 F.2d at 1250 n.35. In recognizing this distinction, the court felt compelled to reject the reasoning of Slaughter v. Ronde, 390 F. Supp. 637 (S.D. Ga. 1974), to the extent that Slaughter interpreted this language of the Senate Report to apply to stevedoring activities as well as to conditions on the ship. 554 F.2d at 1250 n.35. See 390 F. Supp. at 640-41. The Senate Report's illustration concerned a longshoreman who slipped on an oil spill on a ship's deck. See Senate Report, supra note 17, at 10-11. In order to
343 and 343A in the maritime context because of their possible incorporation of the forbidden doctrine of assumption of risk.72 The court in fact speculated that for this reason, all previous applications of those sections may have been in error.73

The court did note, however, that sections 343 and 343A had been applied to several cases where the injury had resulted from a defect in the condition of the ship, rather than from unsafe methods of stevedoring.74 The Hurst court recognized, moreover, that sections 343 and 343A on occasion had even been applied to cases involving the stevedore's negligence.75 Nevertheless, the court accepted the results, but not the reasoning of those cases.76

The Third Circuit then endorsed Restatement section 409, which deals with independent contractors, as the appropriate standard in longshoremen's third-party suits.77 Section 409 provides in pertinent part that "the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants."78

The court felt that this rather stark absolution of liability properly reflected the congressional mandate that shipowners "shall not be liable in damages for acts or omissions of stevedores or employees of stevedores . . . ."79

The only question then remaining before the court was whether any of the many recognized exceptions to section 409 precluded its application to the instant case.80 The court considered only one such exception to be

collect damages for his injuries from the shipowner, the longshoreman had to show either that the vessel was directly responsible for the existence of the dangerous oil spill, or that the oil spill had been there for so long that a reasonably careful shipowner would have discovered and removed it. Id. 72. 554 F.2d at 1249-50 n.35. See notes 39 & 45 and accompanying text supra. 73. 554 F.2d at 1249-50 n.35. 74. 554 F.2d at 1249 n.35. See, e.g., Croshaw v. Koninklijke Nedlloyd, 398 F. Supp 1224 (D. Or. 1975) (boat's deck block in an unsafe condition when ship was turned over to stevedore). In such cases, where an unsafe condition is clearly attributable to the shipowner's failure to provide a safe place to work, rather than the stevedore's negligence, the court apparently would not hesitate to define the shipowner's duties in accordance with §§ 343 and 343A. Thus, the Third Circuit's current disapproval of use of those sections is arguably limited to the facts of Hurst. See 554 F.2d at 1249-50 n.35. But see note 87 infra. 75. 554 F.2d at 1249-50 n.35. See, e.g., Gay v. Ocean Transp. & Trading Co., 546 F.2d 1233 (5th Cir. 1977) (stevedore's improper method of unloading); Cummings v. "Sidarma" Soc., 409 F. Supp. 869 (E.D. La. 1976) (same); Ramirez v. Toko Kaiun K.K., 385 F. Supp. 644 (N.D. Cal. 1974) (same). 76. 554 F.2d at 1249-50 n.35. The court criticized these cases for their "evasive readings of §§ 343 and 343A [which] in fact reflect the approach toward independent contractors embodied in § 409. A more direct approach would be simply to apply the independent contractor sections from the start." Id. 77. Id. at 1250. 78. Restatement (Second) of Torts § 409 (1965). 79. 554 F.2d at 1250, quoting Senate Report, supra note 17, at 10. 80. 554 F.2d at 1250. The exceptions to § 409 are presented in §§ 410-29 of the Restatement. The Third Circuit pointed out, however, that in the maritime context, only §§ 410-415 are arguably applicable, since the remaining sections are stated to be rules of vicarious liability, in conflict with the clear congressional intent. 554 F.2d at
relevant — that a person who entrusts work to an independent contractor, yet retains control over the work, may be liable for “failure to exercise his control with reasonable care.” 81 The Third Circuit held this exception to be inapplicable, however, noting that the concept of retained control did not encompass the “general right to order that work be stopped or resumed” 82 or the “general right of inspection and supervision;” 83 it consisted only of control as to “methods of work or as to operative detail.” 84

Until Hurst, the Third Circuit had not committed itself to a specific standard of care for shipowners under amended section 905(b). 85 Two related factors make the court’s choice a significant one. First, Congress clearly intended that, regardless of the standard chosen by the courts, that standard should be applied uniformly throughout the country. 86 Furthermore, the Hurst court’s rejection of sections 343 and 343A appears to be quite unequivocal. 87 The result is a decision arguably incompatible with decisions in three other circuits 88 and therefore a major setback for Congress’ avowed goal of uniformity in the area of longshoremen’s third-party negligence suits. Thus, the question inevitably arises whether the court’s adoption of section 409 is to any avail.

Because section 409 applies only to an independent contractor or his servants, the appropriateness of its use in section 905(b) actions initially depends on whether it is proper to classify a stevedore as an independent

1250–51. Sections 410–15 deal with the following subjects: contractor’s conduct in obedience to employer’s negligently given directions (§ 410); negligence in selection of contractor (§ 411); failure to inspect work of contractor after completion (§ 412); duty to provide for taking of precautions against dangers involved in work entrusted to contractor (§ 413); negligence in exercising control retained by employer (§ 414); duty of possessor of land to prevent activities and conditions dangerous to those outside of land (§ 414A); and duty to supervise equipment and methods of contractors or concessionaires on land held open to public (§ 415). RESTATEMENT (SECOND) OF TORTS §§ 410–415 (1965). See Teofilovich v. d’Amico Mediterranean/Pacific Lines, 415 F. Supp. 732 (C.D. Cal. 1976) (§§ 413 and 416 both held to impose vicarious liability, impermissible under § 905(b) of the Act).

81. 554 F.2d at 1251, quoting RESTATEMENT (SECOND) OF TORTS § 414 (1965).
82. 554 F.2d at 1251, quoting RESTATEMENT (SECOND) OF TORTS § 414, Comment (c) (1965).
83. 554 F.2d at 1252, quoting Fisher v. United States, 441 F.2d 1288, 1291 (3d Cir. 1971).
84. 554 F.2d at 1251–52, quoting RESTATEMENT (SECOND) OF TORTS § 414, Comment (c) (1965).
85. See note 49 supra.
86. See note 38 and accompanying text supra.
87. See 554 F.2d at 1249 n.35. The court did endeavor to distinguish on their facts several earlier cases that had relied on §§ 343 and 343A. See notes 74–76 and accompanying text supra. But because the court’s two major objections to the application of §§ 343 and 343A — the possible imposition of a nondelegable duty and the possible incorporation of the doctrine of assumption of risk — were grounded in very substantial concerns of the congressional committees, it appears unlikely that the Third Circuit would apply §§ 343 and 343A under any circumstances, even if the injury-causing defect were in the ship itself instead of in the stevedoring operations. See SENATE REPORT, supra note 17, at 10–12. But see note 74 supra.
88. See notes 46–48 and accompanying text supra.
contractor. Comment (b) to section 409 presents the rationale for the general
rule:

Since the employer has no power of control over the manner in
which the work is to be done by the contractor, it is to be regarded as the
contractor's own enterprise, and he, rather than the employer, is the
proper party to be charged with the responsibility of preventing the risk,
and bearing and distributing it. 89

This view of the independent contractor's autonomy coincides exactly with
the current concept of the stevedore's responsibilities. 90 Moreover, the
stevedore's role as an independent contractor has been recognized, even by
those courts that have applied sections 343 and 343A. 91 It is submitted that
section 409 is, therefore, clearly applicable and that it would be difficult to
tailor an expression of the shipowner's standard of care more perfectly
responsive to the stated designs of the congressional committees that "a
vessel shall not be liable in damages for acts or omissions of stevedores or
employees of stevedores subject to this Act." 92 Furthermore, since section
409 relates only to the stevedore's acts or omissions, it does not diminish the
vessel's duty "to exercise the same care as a land-based person in providing
a safe place to work." 93

By contrast, the standard embodied in sections 343 and 343A appears to
be quite inappropriate in the maritime context. 94 It is suggested, however,
that the Hurst court's analysis of those sections is arguably flawed in one
major respect — the perception therein of a nondelegable duty imposed upon
the shipowner. 95 It is unclear what language in sections 343 and 343A the
Third Circuit referred to when it spoke of a nondelegable duty. If the court
was concerned with the imposition in section 343(a) of liability on the
shipowner when he "knows or by the exercise of reasonable care would
discover the condition," then it is suggested that the concern was misplaced,
because Congress itself used similar language in the Senate Report in
asserting the "vessel's responsibility to take corrective action where it
knows or should have known about a dangerous condition." 96 Moreover, if

89. RESTATEMENT (SECOND) OF TORTS § 409, Comment (b) (1965).
90. See note 44 and accompanying text supra.
91. See notes 74 & 75 and accompanying text supra. These cases have managed to bypass the Restatement section dealing with independent contractors, by calling the independent contractor's employee — the longshoreman — an invitee, and thereby invoking §§ 343 and 343A. For reference to some of these cases, see note 45 supra.
93. SENATE REPORT, supra note 17, at 10. See note 44 and accompanying text supra.
94. See notes 66–76 and accompanying text supra.
95. See note 68 and accompanying text supra.
96. SENATE REPORT, supra note 17, at 10 (emphasis added). See notes 68–71 and accompanying text supra. It should be noted also that the shipowner's duty to remain
the court's concern arose from the language of section 343A, it must be noted that Comment (a) to section 343 states that section 343A should be read "to limit," not to expand, the liability stated in section 343. Therefore, if section 343 indeed imposes no nondelegable duty, then it is submitted that section 343A can impose none.

Notwithstanding the arguable absence of a nondelegable duty, it is suggested that sections 343 and 343A remain inapplicable in the maritime context, because the incorporation of the defense of assumption of risk to any appreciable extent offends the stated congressional intent as well as traditional admiralty concepts.

It is apparent that the Hurst court attached some significance to the absence of proof indicating that the ship's chief officer knew of the unsafe condition. Yet under section 409 it is immaterial whether the shipowner or the crew knew of the defect because the shipowner is unconditionally relieved of responsibility for the acts or omissions of the stevedore. Therefore, in the instant case, even if the chief officer had known of the defect, Triad would not have been held liable — a seemingly inequitable result, but nevertheless consistent with settled principles of land-based tort law. Nor is the irrelevance under section 409 of the shipowner's knowledge of the danger created by the stevedore inconsistent with the Senate Report's statement that "nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition." Because the only sort of condition of which it can be said that the shipowner "should have known" is reasonably aware of conditions on his vessel is not affected by his nonliability for unsafe stevedoring activities under § 409 of the Restatement. See note 93 and accompanying text supra.

97. RESTATEMENT (SECOND) OF TORTS § 343, Comment (a) (1965).
98. For a discussion of the "traditional rule" and the "modern trend" of known or obvious dangers, see note 45 supra. It is there suggested that the "modern trend," as embodied in § 343A, does in fact incorporate an active element of assumption of risk. Id.
99. See Socony-Vacuum Co. v. Smith, 305 U.S. 424 (1939). Seamen have traditionally been afforded extra protection in the courts. The defense of assumption of risk is precluded at admiralty law because seamen are "often under the necessity of making quick decisions with little opportunity or capacity to appraise the relative safety of alternative course of action." Id. at 431.
100. See 554 F.2d at 1241, 1253.
101. See note 92 and accompanying text supra. But see note 80 and accompanying text supra, discussing the myriad exceptions to the general rule of § 409. However, the Third Circuit does not appear wholly committed to this position of nonliability of the shipowner. In dictum in Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31 (3d Cir. 1975), cert. denied, 423 U.S. 1054 (1976), the court indicated that a shipowner pro hac vice may have been liable where his crew foreman observed a danger, yet walked away without warning the longshoremen, even though the danger was created by stevedoring activities. 521 F.2d at 42. If the court pursues this line of reasoning in subsequent cases where the crew is proven to have knowledge of dangerous stevedoring methods, the standard of care of § 409 that was adopted in the Hurst decision may be endangered.
102. SENATE REPORT, supra note 17, at 10.
a condition inherent in the ship, his knowledge of a condition created thereon by the unsafe activities of the stevedore is immaterial.

Finally, the application of section 409 to the "new cause of action for negligence" under section 905(b) of the Act, while limiting the vessel's liability, will not diminish the overall scope of coverage available to the longshoreman: he may still recover under the Act for any work-related injury and for any injury caused by the negligence of the vessel.

The best reason to apply a section 409 standard, it is submitted, is its optimum responsiveness to congressional intent. The standard of care demanded of shipowners is now reverting to the simple negligence standard contemplated by the drafters of the original 1927 Act, which was bloated beyond recognition during the reign of the doctrine of seaworthiness. The reformation began with the 1972 Amendments and continues through the instant decision. But Hurst's impact on the question of the standard of care to be expected of shipowners is not all—encompassing. Hurst declares only that certain matters, such as the conduct of the stevedore, lie clearly outside the vessel's sphere of liability. But neither Hurst nor most of the substantial case law generated by amended section 905(b) has squarely addressed the question of what lies within the scope of the vessel's liability i.e., the extent to which the shipowner is responsible for defects inherent in the condition of the ship.

The soundness of the Third Circuit's choice of a section 409 standard of care, and the relative inadvisability of other standards, may soon prompt other courts to follow suit. The legitimizing stamp of uniformity has not yet been so firmly embo...
resolved by the United States Supreme Court — the judicial entity best qualified to pronounce the necessary uniform national standard.\textsuperscript{110}

The short-term effect of \textit{Hurst} may well be to frustrate the congressional recommendation of a uniform standard under amended section 905(b), but in the long run section 409 of the \textit{Restatement} could prove to be the most just and manageable standard within the framework of the stated congressional intent behind the 1972 Amendments.

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\textsuperscript{110} This possibility has been greeted with some trepidation by one writer. See Steinberg, \textit{supra} note 17, at 788. The author there stated: "Due to the fact that Congress inartfully drafted § 905(b), the Supreme Court will have a difficult challenge in construing the statute to fulfill the congressional intent." \textit{Id}.