

Decisions in 2021 offer insight into courts' treatment of longshore claims under § 905(b)

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Despite a seemingly clear articulation of what standard of negligence is imposed upon a vessel owner to a third-party longshoreman, judicial decisions in 2021 suggest a disconnect in applying the standard of care owed in these types of claims.

Section 905(b) — a brief history

As a general principle, the Longshore and Harbor Workers' Compensation Act (LHWCA) serves as a no-fault compensation scheme and bars negligence actions by employees against their employers and co-employees. Under certain circumstances, however, the injured employee retains the general maritime law right to sue a vessel owner for its negligence. The general maritime law has always allowed an action for injuries caused by a vessel owner's lack of reasonable care under the circumstances. The 1972 amendments to the LHWCA codified that general maritime law right for injured longshoremen to allow negligence actions, even though longshoremen no longer had the right to pursue an action for the unseaworthiness of a vessel.

33 U.S.C. § 905(b) provides:

"In the event of injury to a person covered under this Act 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 Act."

Therefore, when a longshore employer is also the owner of a vessel, a worker can bring an action against the employer in its "dual capacity" as a vessel owner, despite the exclusivity provision of the Act. However, the statute does not expand upon what acts or omissions constitute negligence in this niche area of the law.

In the pivotal case of *Scindia Steam Navigation Co. v. De Los Santos*, the U.S. Supreme Court addressed the appropriate standard and clarified what duties are owed by the vessel owner to a third-party longshoreman. (451 U.S. 156 (1981)). Under the facts of *Scindia*, a longshore worker, who was employed by a stevedoring company, was injured while loading a vessel owned by a third party.

In defining what standard of care was owed to the worker by the vessel owner, the Court articulated three general duties that the vessel owner owed: (1) the turnover duty, (2) the active control duty, and (3) the duty to intervene.

Subsequent commentators have surmised that the purpose of this articulation was to move away from the typical maritime negligence standard and limit the scope of when a vessel owner may be found liable to a third-party longshoreman. This appears to be a public policy decision, assuming that the stevedore employer is in the best position to protect its employees from harm.

Considering Scindia and its progeny, courts seem to have often endorsed conflicting standards of negligence contemplated under § 905(b).

As it is generally understood, the turnover duty contemplates that the vessel owner owes a duty to exercise ordinary care under the circumstances to turn over the ship and its equipment in such condition that an expert stevedore can carry on stevedoring operations with reasonable safety. The active control duty requires the vessel owner to exercise reasonable care in the areas of the ship under the active control of the vessel or its crew. The duty to intervene refers to the vessel owner's obligation concerning cargo operations in areas under the principal control of the stevedore when the vessel owner is actually aware of unsafe operations being conducted.

2021 — year in review of § 905(b) claims

Despite the Supreme Court's articulation of these duties, progeny of *Scindia* have struggled with understanding the application and limitation of § 905(b) claims. Decisions rendered in 2021 were no exception.

In *Washington v. Nat'l Shipping Co. of Saudi Arabia* — decided just before 2021 — the 11th U.S. Circuit Court of Appeals affirmed the decision of the district court and granted the vessel owner's motion for summary judgment on the grounds that it did not violate its turnover duty where the hazardous nature of the defective equipment was open and obvious to a reasonably prudent stevedore. 836 Fed. Appx. 846 (11th Cir. 2020).

In *Patil v. Amber Lagoon Shipbuilding GMBH*, the district court reached a similar result and found that the plaintiff failed to prove

that the vessel breached its *Scindia* duties. The 5th U.S. Circuit Court of Appeals affirmed this finding, No. 21-30004, 2021 WL 3889288 (5th Cir. Aug. 31, 2021). Similar to *Washington*, the court relied upon the crew's testimony that they had cleaned the area beforehand in finding that the area was turned over in a reasonably safe condition, free of any slipping hazards. The injured employee was an experienced surveyor who should have been aware of any potential hazards.

The decisions from the U.S. Circuit Courts of Appeals — albeit unpublished — suggest that courts are trending toward applying Scindia in the strictest sense.

Contrary to the court's decision in *Patil*, the same district court in *Howard v. Seaspan Corp.* declined to grant a vessel owner's motion for summary judgment. No. 18-4612, 2021 WL 2074151 (E.D. La. May 24, 2021). In *Howard*, a longshore worker was injured after grabbing an unsecured manhole, causing him to fall onto the deck below. The defendant-vessel owner argued that the vessel's records and the testimony of the chief officer indicated that the vessel had not removed the bolts of the manhole. It followed that the employee would be unable to show how the vessel owner breached its duty.

Notwithstanding, the court declined to grant the motion. The court found credence in the fact that the accident occurred 20 minutes after the longshore workers boarded the vessel, which according to the court, failed to suggest that the bolts were never improperly removed but rather suggested that the officer failed to inspect the vessel adequately.

On that same day, the district court in *Kiwia v. M/V Osla Bulk 9* held that the vessel violated its active control duty when a crew member closed the hatch cover on a longshore worker's hand as he was climbing up a ladder from the ship's hold. The crew member who operated the panel to close the hatch was unaware that the injured employee was there. Despite this, the court found that the operator had situational awareness of individuals in the vicinity. No. 20-96, 2021 WL 2155081 (E.D. La. May 24, 2021). The *Kiwia* decision is on appeal to the Fifth Circuit.

In the unpublished 11th Circuit case of *Brizo LLC v. Carbajal*, a diver was killed after a crew member activated the bow thruster of a yacht

while he was cleaning the hull. No. 20-11204, 2021 WL 5029390 (11th Cir. Oct. 29, 2021). Before the lower court, the vessel owners argued that the claim was subject to the limitations of *Scindia* and the vessel owner owed no duty to the diver, given that the diver failed to notify anyone of his presence at the time of the inspection.

The court agreed and ruled for the vessel owner. While the appeal before the 11th Circuit concerned the issue of whether the claim was covered under the LHWCA, the 11th Circuit affirmed the decision of the lower court.

How do we apply § 905(b) going forward?

Considering *Scindia* and its progeny, courts seem to have often endorsed conflicting standards of negligence contemplated under § 905(b). Just within these recent decisions, there appears to be a disconnect as to the proper application and limitations of § 905(b).

In *Howard*, the court rejected the evidence presented by the defendant and found that the officer failed to adequately inspect the vessel whereas in *Patil*, the court relied upon the testimony of the crew to find that the vessel was properly turned over before the employee began his work. In addition, the court in *Patil* looked to the fact that the surveyor was experienced and should have anticipated slip hazards. Under this articulation, the injured longshoreman in *Howard* should have been aware that the manhole could have a defect and should have proceeded with caution.

Moreover, looking to the decisions of *Brizo* and *Kiwia*, there appears to be a conflict where an employee has failed to announce their presence and been subsequently injured. Pursuant to the court's reasoning in *Kiwia*, it reasonably follows that the vessel in *Brizo* would have situational awareness of the presence of the diver given that the vessel knew a diver would be cleaning the hull at some point that week.

The decisions from the U.S. Circuit Courts of Appeals — albeit unpublished — suggest that courts are trending toward applying *Scindia* in the strictest sense. The application of the *Scindia* standards, more times than not, creates a heavy burden on plaintiffs to prove that a vessel was negligent. Notwithstanding the apparent conflicts in the above decisions, one thing remains clear: § 905(b) claims continue to be fact-intensive, with the slightest variations often altering the outcome of third-party negligence actions.

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