NEW SOUTH WALES COURT OF APPEAL

CITATION:
CSL Australia Pty Limited v Formosa [2009] NSWCA 363

FILE NUMBER(S):
40440/08

HEARING DATE(S):
24 June 2009

JUDGMENT DATE:
11 November 2009

PARTIES:
CSL Australia Pty Ltd (First Appellant, First Cross Respondent on Cross Claim)
Inco Ships Pty Ltd (Second Appellant, Second Cross Respondent on Cross Claim)
John Paul Formosa (Respondent, Cross Appellant on Cross Claim)

JUDGMENT OF:
Allsop P Basten JA Handley AJA

LOWER COURT JURISDICTION:
District Court

LOWER COURT FILE NUMBER(S):
73/2007

LOWER COURT JUDICIAL OFFICER:
Delaney DCJ

LOWER COURT DATE OF DECISION:
3 October 2008

COUNSEL:
R Sheldon (Appellants)
H Kelly SC, T McKenzie (Respondent)

SOLICITORS:
HWL Ebsworth (Appellant/Cross Respondent)
Barry F Cosier & Associates (Respondent/Cross Appellant)

CATCHWORDS:
FEDERAL JURISDICTION – Federal jurisdiction exercised by State Courts – Admiralty and maritime jurisdiction – matter arising under a law of the Parliament
NEGLIGENCE – duty of care – duty of ship owner and operator to stevedore – duty to exercise care in respect of the safety of stevedores coming on board ship in order

to undertake loading and unloading – nature and scope of duty - relationship between obligations under the Occupational Health and Safety (Maritime Industry) Act 1993 (Cth) and the common law duty of care – no statutory cause of action – impact on duty of care of delegated legislation imposing conformable obligations on another person – Marine Orders Part 32 under Navigation Act 1912 (Cth) – Marine Orders do not terminate the duty of care
NEGLIGENCE – breach of duty - breach in failing to sweep the iron ore slurry from the deck – breach in failure to direct use of other side of the deck - breach not a failure to warn - evidence before primary judge supported finding of breach
Admiralty Act 1988 (Cth) s 4(3)(c)
Judiciary Act 1903 (Cth) – s 79 – s 80
Navigation Act 1912 (Cth) – Marine Orders Part 32
Occupational Health and Safety Act (Maritime Industry) 1993 (Cth) – s11 – s13

LEGISLATION CITED:
The Constitution s77(iii)
Acts Interpretation Act 1901 (Cth)
Admiralty Act 1988 (Cth)
Civil Liability Act 2002 (NSW)
Judiciary Act 1903 (Cth)
Longshoremen's and Harbour Workers' Compensation Act (33 USCA §905(b))
Navigation Act 1912 (Cth)
Occupational Health and Safety (Maritime Industry) Act 1993 (Cth)
Supreme Court Act 1981 (UK)
Workers Compensation Act 1987 (NSW)

CATEGORY:
Principal judgment

CASES CITED:
Agtrack (NT) Pty Ltd v Hatfield [2005] HCA 38; 223 CLR 251
Anderson v Eric Anderson Radio & TV Pty Ltd [1965] HCA 61; 114 CLR 20
ASP Ship Management Pty Limited v Administrative Appeals Tribunal [2006] FCAFC 23; 149 FCR 261
Archer v Hall [1967] 1 NSWR 107
Australian Safeway Stores Pty Ltd v Zaluzna [1987] HCA 7; 162 CLR 479
Bates v Parker [1953] 2 QB 231
Blunden v The Commonwealth [2003] HCA 73; 218 CLR 330
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258
Cameron v Nystrom [1893] AC 308
Christmas v General Cleaning Contractors Ltd [1952] 1 KB 141
Cremin v Thomson (1941) 71 Ll L Rep 1
Crimmins v Stevedoring Committee [1999] HCA 59; 200 CLR 1
Compania Mexicana de Petroleo El Aguila SA v Essex Transport & Trading Company Ltd (1929) 33 Ll L Rep 202
Federal Marine Terminals Inc v Burnside Shiping Co Ltd 394 US 404 (1969)
Felton v Mulligan [1971] HCA 39; 124 CLR
Grant v Sun Shipping Company Limited [1948] AC 549
Henwood v Municipal Tramways Trust (South Australia) [1938] HCA 35; 60 CLR 438
Hillen and Pettigrew v ICI (Alkali) Limited [1936] AC 65

Karuppan Bhoomidas v Port of Singapore Authority [1978] 1 WLR 189
Kermarec v Campagnie Generale Transatlantique 358 US 625 (1959)
Moragne v States Marine Lines Inc 398 US 375
Ombudsman v Moroney [1983] 1 NSWLR 317
O'Connor v S P Bray Limited [1937] HCA 18; 56 CLR 464
Papatonakis v Australian Telecommunications Commission [1985] HCA 3; 156 CLR 7
Pinborough v Minister for Agriculture (1974) 7 SASR 493
Schiffahartsgesellschaft Leonhardt & Co v A Botacchi SA De Navigacion 773 F 2d 1528
Scindia Steam Navigation Co Ltd v De Los Santos 451 US 156 (1981)
Sibley v Kais [1967] HCA 43; 118 CLR 424
Sydney Water Corporation v Abramovic [2007] NSWCA 248; 5 DDCR 570
The 'Gaetano and Maria' (1882) 7 PD 137
The 'Lottawanna' 88 US 558
The 'Tolten' [1946] P 135
Tucker v McCann [1948] VLR 222
Tarabay v Leite [2008] NSWCA 259
Tisand Pty Ltd v The Owners of the Ship MV Cape Moreton [2005] FCAFC 68; 143 FCR 43
Wright (WH) Pty Ltd v Commonwealth [1958] VR 318

TEXTS CITED:
Australian Law Reform Commission Report Civil Admiralty Jurisdiction (1986) ALRC 33
J R Brown "Admiralty Judges: Flotsam on the Sea of Maritime Law" (1993) 24 Journal of Maritime Law and Commerce 249
D J Cremean Admiralty Jurisdiction (Federation Press 2008)
R Force Admiralty and Maritime Law (Federal Judicial Centre 2004)
S Hetherington Annotated Admiralty Legislation (Law Book Co 1989)
D Pearce R Geddes Statutory Interpretation in Australia (6th Ed LexisNexis 2006)
L Zines Cowen and Zines's Federal Jurisdiction in Australia (Federation Press)

DECISION:
1. Appeal and cross-appeal dismissed.
2. Appellants pay 75 per cent of the costs of the respondent of the appeal and cross-appeal.

JUDGMENT:

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

40440/08

ALLSOP P

BASTEN JA
HANDLEY AJA

Wednesday 11 November 2009

CSL AUSTRALIA PTY LIMITED & ANOR v JOHN PAUL FORMOSA

Headnote

The respondent, Mr Formosa, was a stevedore working on loading the MV "*Iron Chieftain*" at the Port Kembla Coal Terminal. The ship was owned by the first appellant, CSL Australia Pty Ltd and was under the control and management of the second appellant, Inco Ships Pty Ltd.

The respondent slipped and fell on a slurry composed of fine iron ore dust and water when walking on the deck of the ship and injured his knee in a not insignificant way. The slurry developed on the deck as a result of the water spray dust suppression system used in process of unloading iron fines from the ship.

At the time of the accident the respondent was employed by Port Kembla Coal Terminal Limited as a "Foreman Supervisor" and was responsible for directing and supervising the loading of the vessel with coal. He was also aware of the potential for the deck to be slippery, having previously complained to his employer about the problem.

The respondent bought a claim in negligence in the District Court of NSW against the first and second appellants. No distinction was drawn between at trial or on appeal between the liability of the appellants. The respondent's employer was not a party to the action.

The primary judge found in favour of the respondent, concluding that the owner and operator of the ship had breached their duty of care to the respondent by failing to sweep a path on the deck to remove the slurry and failing to instruct the respondent not to walk in the area where the filings were likely to be wet. Reductions in damages were made for contributory negligence and apportionment to the employer under *Workers Compensation Act 1987* (NSW), s151Z.

The issue on appeal was whether the trial judge erred in finding that the appellants owed the a duty of care to the respondent in circumstances where it had been found that the respondent was the person in charge of the system of unloading the ship and the injury occurred in circumstances intrinsic to respondent's employment as a stevedore. The respondent cross-appealed as to contributory negligence and the apportionment of liability to his employer. A notice of contention was also submitted by the respondent.

Held, dismissing the appeal and cross-appeal

The Court (Allsop P, Basten JA and Handley AJA)

1. There was a failure to address the initial question of jurisdiction. The Court was exercising Federal jurisdiction because:
    i) the facts as pleaded made the claim a general maritime claim under the *Admiralty Act 1988* (Cth), s4(3)(c) or (d) and therefore the matter was one of Admiralty and maritime jurisdiction;
    ii) relevant to the disposition of the claim was the meaning and effect of section 9 of Part 32 of the Marine Orders promulgated under the *Navigation Act 1912* (Cth), s 425 and the matter was therefore one arising under a law made by the Parliament.

2. The owners and operators of the ship owe a duty to exercise reasonable care in respect of the safety of stevedores coming on board ship in order to undertake their tasks in respect of loading:
    i) The shipowner is required to exercise reasonable care to avoid exposing a stevedore coming on to his ship to risk of injury which reasonable care would see eliminated or ameliorated whether attending to it physically or by warning: [69].
    ii) The duty of care and its discharge must reflect the reality of the functions being undertaken on board ship during loading and unloading: [71]

iii) Delegated legislation imposing conformable obligations on another person such as the stevedore does not dissolve the duty of care of the shipowner and operator. Part 32 of the Marine Orders promulgated under the *Navigation Act 1912* (Cth) do not deprive the Maritime OH & S Act of relevance and do not terminate the existence of any common law duty of care that might otherwise have been owed by the appellants to the stevedores: [83] – [84].

3. There was a breach of the duty of care owed to the stevedore:
   i) There was ample material before the primary judge to support his conclusion that the appellants had breached their duty in failing to have the port deck swept: [99]
   ii) The breach of duty was the failure to remove the danger and provide a reasonably safe access to the holds or to advise of a safer way of getting to the forward holds that was known to the appellants: [101].

4. There was no basis on which to interfere with the primary judge's assessment as to contributory negligence or the respective proportions of responsibility between the respondent's employer and the appellants: [103] – [105].

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

40440/08

ALLSOP P
BASTEN JA
HANDLEY AJA

Wednesday 11 November 2009

CSL AUSTRALIA PTY LIMITED & ANOR v JOHN PAUL FORMOSA

Judgment

1 **THE COURT:**

Background

2 On 8 February 2005, the respondent, Mr Formosa, slipped on iron ore slurry composed of fine iron ore dust and water when walking on the deck of the MV "*Iron Chieftain*" in order to check loading of coal in hatch number 3. He suffered a not insignificant injury to his right knee.

3 The ship, owned by the first appellant, CSL Australia Pty Ltd ("CSL"), was under the control and management of the second appellant, the operator of the ship, Inco Ships Pty Ltd ("Inco"). No distinction was drawn between the liabilities of the owner and the operator respectively, either at trial or on the appeal. Shortly before the events which gave rise to the accident, the ship had unloaded a cargo of iron ore fines at a berth in Port Kembla Harbour. The unloading having been completed, the ship was moved to the Bluescope Steel coal berth at Port Kembla, where it commenced loading coal.

4 The respondent was an experienced stevedore working on the ship in the employment of Port Kembla Coal Terminal Limited ("PKCTL"), for which company he had worked since 1980. At the time of the accident he was "Foreman Supervisor" and was responsible for directing and supervising the loading of the vessel with coal. The respondent was familiar with the task being undertaken and was familiar with working on *Iron Chieftain*. As will be seen, he was also aware of the potential for the deck to be slippery, having previously complained to his employer (PKCTL) about the problem.

The ship

5 *Iron Chieftain* is a 50,587 dead weight tonne self-unloading bulk carrier. She was employed in coastal trade between Whyalla, South Australia and Port Kembla, New South Wales. Iron ore fines were loaded on the vessel at Whyalla, and discharged at Port Kembla. For the return voyage, coal was

loaded in Port Kembla and discharged at Whyalla. This was the ship's regular run, described by one witness as the "black and tan run".

6 The ship was equipped with a system of conveyors and other machinery to allow self-unloading of bulk cargo. When unloading iron ore fines a water spraying system was used to suppress the iron ore dust in the course of unloading in order to prevent the escape into the wider environment of fine ore dust. Despite the water system some iron ore dust would escape and settle on the deck in a thin film. The water spray meant that the dust became wet and would produce slurry, which was slippery. The respondent slipped on this slurry during the loading of coal.

The claim

7 The respondent brought a claim in negligence in the District Court of New South Wales against the first appellant, as the owner of the ship and the second appellant as the operator of the ship. He sought damages in the amount of $750,000.00 including net weekly wage loss of $1,471.00 from 4 August 2006 plus superannuation contributions at a rate of 9% per annum.

The pleadings

8 The respondent as plaintiff pleaded that the injury he suffered was occasioned by the negligence of the appellants as defendants, their servants or agents. As against CSL the particulars alleged failing to provide a safe place of work, failing to ensure the walkways were safe and free from hazard, failing to provide a safe system of work, failing to warn of the dangers of walking on a ship that was not free from dust and slurry and failing to provide a document identifying a safe working practice. As against Inco, the respondent repeated these particulars and further alleged that Inco failed to have proper concern for his safety.

9 In their defence, the appellants denied they were negligent and submitted that they did not owe the respondent a duty of care, that the iron ore residue and slurry on the deck of the ship was an "obvious risk" of which the respondent was presumed to have been aware and that they had no duty to warn him of the iron ore residue on the deck: the *Civil Liability Act 2002* (NSW), ss 5F, 5G and 5H; and that the iron ore residue and slurry was an inherent risk: the *Civil Liability Act*, s 5I. The appellants also pleaded that the respondent caused or contributed to his injury by failing to keep a proper lookout, failing to take sufficient care for his own safety, failing to walk along the starboard side of the vessel and by failing to have regard to the obvious risk. The appellants also pleaded that the respondent suffered the injuries in the course of his employment as a result of the negligence of his employer and that damages ought to be reduced in accordance with *Workers Compensation Act 1987* (NSW), s 151Z(2). The appellants also pleaded that the respondent was the person in charge of the ship, appointed under Part 32 of the Maritime Orders promulgated under the *Navigation Act 1912* (Cth) by virtue of which the respondent had responsibility for the loading of the ship and for ensuring that

loading was carried out in an orderly manner. According to this argument the respondent's injuries were caused by his failure to properly discharge his legal role and obligations.

10 The allegation that the respondent should have used the starboard side of the deck arose because of how the iron ore fines were habitually unloaded from the ship. She was self-unloading, with gear to unload on the port side. Thus, she always berthed port side to and unloaded the fines to port. This meant that, with the use of the water suppression system to dampen the inevitable iron ore dust on unloading, the port side of the deck generally had slippery iron ore slurry to a significantly greater extent than the starboard side of the deck.

11 By his reply the respondent relied on the *Civil Liability Act,* ss 3B(1)(f) and (g) in the event that the *Workers Compensation Act,* s *151Z* applied to the assessment of damages, and that the respondent's claim should be assessed at common law.

Judgment below

12 The primary judge found in favour of the respondent. The primary judge held that CSL (implicitly CSL and Inco) as the owner and occupier of the ship owed the respondent a duty to take reasonable care to avoid foreseeable risk of injury under the *Civil Liability Act* ss 5B to 5D: [4].

13 The primary judge considered the evidence of Captain Pyett, the expert marine engineer called by the respondent, and a Mr Jaksic, an engineer called by the appellants. The primary judge concluded that the appellants were not required to install walkways along the deck of the ship: [8]. Nevertheless, the judge concluded that the risk was not obvious and a warning should have been given by the appellants that the filings could be wet underneath and could create a slip hazard: [16]. The judge found that the appellants breached their duty to the respondent. Whilst it was not reasonable to require the ship to go out to sea to have its decks washed after unloading the iron ore fines and before loading coal, the appellants could have had the area where the respondent was required to walk swept and could have instructed the plaintiff not to walk where the filings were likely to have been made wet: [17].

14 As to contributory negligence, the primary judge found that the respondent knew of the risk of the slippery wet iron ore filings and did not take sufficient care for his own safety. The respondent should have anticipated slipping on the iron ore dust because of his knowledge of the loading system and likely use of the water to suppress the dust: [18]. The judge also concluded that the respondent's employer "would have known about the presence of iron filings and the manner in which the water suppression system worked": [18]. That is the employer knew of the slippery deck.

15 The primary judge concluded that damages should be reduced by 15 per cent for contributory negligence: [19]- [20].

16 The primary judge then dealt with the *Workers Compensation Act*, s 151Z. He stated that the respondent's employer had an obligation to the respondent to provide a safe system of work and a safe place of work: [21]; that the respondent was in charge of the operation of the ship and the obligations of the employer were delegated to him, including the obligation to provide a safe system of work: [21]; that the employer's obligation to provide a safe system of work was non-delegable and its failure to properly inspect the ship to determine whether there was a safe way for the respondent to work was a breach of duty of care owed to him: [21]; and that the contribution of the employer was 40 per cent: [21].

17 The primary judge assessed the total damages as being $231,918.03 and ordered the appellants to pay the respondent $118,278.00.

Issues on appeal

18 The appellants appeal to this Court complaining about the primary judge's conclusion that they were in breach of a duty of care by failing to sweep the deck and to instruct the respondent not to walk in the area were the filings were likely to be wet, in particular, in circumstances where the primary judge concluded that the respondent was in charge of the system for loading, and further, in circumstances where in so finding the respondent was working as an employee of a stevedoring company and the injury was caused by circumstances intrinsic to the activity of loading and unloading the vessel of which the employer was aware or ought to have been aware.

19 The respondent cross-appealed as to contributory negligence and the apportionment of liability to his employer.

20 The respondent also relied on a notice of contention specifying two alternative grounds upon which the primary judge's judgment could be upheld:

(a) the evidence of a safer alternative system of accessing the deck area by the starboard deck of which the respondent was not advised; and

(b) the failure to advise the respondent or his employer of the ship's system of using the starboard deck for access to the hatches.

21 There was no issue of quantum on appeal.

Submissions

The failure of the submissions to attend to the character of the jurisdiction – federal jurisdiction

22 The written submissions of the parties filed before the hearing of the appeal, like the arguments at the trial and the primary judge's reasons paid no attention to a fundamental question necessary to be considered in every case: the identification of the character of the jurisdiction being exercised by the court - whether State or federal. The importance of this early enquiry, **in every case**, is that the answer to it may affect the law applicable to the controversy.

23 Where the Court's authority to adjudicate upon a matter derives from the judicial power of the Commonwealth, the Court will be exercising "federal jurisdiction": see *Anderson v Eric Anderson Radio & TV Pty Ltd* [1965] HCA 61; 114 CLR 20 at 30 (Kitto J). The authority of this Court to exercise federal jurisdiction will depend upon there being a law of the Commonwealth Parliament investing the Court with such jurisdiction pursuant to s 77(iii) of the Constitution. Such a law may be made in relation to the contents of ss 75 and 76 of the Constitution, here, in relation to "any matter … arising under any laws made by the Parliament", those being matters falling within the original jurisdiction of the High Court: Constitution, s 76(ii) and in any matter of Admiralty or maritime jurisdiction under s 76(iii) of the Constitution. To the extent that this Court might otherwise have had power to deal with a matter arising in federal jurisdiction, that power was removed, and then invested, subject to conditions, by s 39(2) of the *Judiciary Act 1903* (Cth). At least to the extent that there is a single "matter" which is the subject of federal jurisdiction, this Court will, pursuant to s 39(2), only be exercising federal, and not State, jurisdiction: see, eg, *Felton v Mulligan* [1971] HCA 39; 124 CLR 367 at 410-413 (Walsh J, Barwick CJ agreeing at 373). See generally L Zines *Cowen and Zines's Federal Jurisdiction in Australia* (3rd Ed Federation Press) at 65-77 and 194-196.

24 The law to be applied in the operation of federal jurisdiction may not be a law passed by the Commonwealth Parliament, but it will be a law (whether Commonwealth, State or general law) which operates in federal jurisdiction by virtue of a law of the Commonwealth Parliament. The relevant provisions are to be found in ss 79(1) and 80 of the *Judiciary Act*, which provide:

> **"s 79 State or Territory laws to govern where applicable**
>
> (1) The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, **except as otherwise provided by the Constitution or the laws of the Commonwealth**, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.
>
> …
>
> **s 80 Common law to govern**
>
> So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters."

25 In the present case, there was only one "matter" which was the subject of the proceedings, namely the claim by the respondent for damages arising out of an accident which occurred on *Iron Chieftain*. Such a matter will arise in federal jurisdiction if "a party on either side of the record relies upon a right, immunity or a defence derived from a federal law": *Agtrack (NT) Pty Ltd v Hatfield* [2005] HCA 38; 223 CLR 251 at [32] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

26 This dispute was in federal jurisdiction for at least two reasons. First, the facts as pleaded made the claim a general maritime claim under the *Admiralty Act 1988* (Cth), s 4(3)(c) or (d). Under s 4(3)(c) a claim for personal injury sustained in consequence of a defect in a ship or in the apparel or equipment of a ship is a general maritime claim. It is not necessary to discuss at length the drafting of this provision, based as it was on the *Supreme Court Act 1981* (UK), s 20(2)(f) (and its predecessors) and its relationship to the *International Convention Relating to the Arrest of Sea-Going Ships 1952*, Art 1(1)(b). Giving such a jurisdictional provision in the *Admiralty Act* an ample rather than restricted interpretation (as to which approach see *Tisand Pty Ltd v The Owners of the Ship MV Cape Moreton* [2005] FCAFC 68; 143 FCR 43 at 59-61 [59]-[65]), there is no good reason to restrict such defects in the ship to inherent defects in the design or structure of the ship and not to cover a ship made temporarily defective for safe use by a layer of slippery slurry on the deck. If this be wrong, under the *Admiralty Act, s* 4(3)(d) the claim here arose out of what was said to be an omission of those in possession or control of the ship in the management of the ship including an omission in connection with the loading of goods on to or the unloading of goods from the ship: see generally, D J Cremean *Admiralty Jurisdiction* (Federation Press 2008) at 64-73; S Hetherington *Annotated Admiralty Legislation* (Law Book Co 1989) at 39-40; and the Australian Law Reform Commission Report *Civil Admiralty Jurisdiction* (1986) ALRC 33 at 123-124 [166]. The matter (being the controversy) was therefore a matter of Admiralty and maritime jurisdiction (the *Australian Constitution*, s 76 (iii)) and a matter arising under a law made by the Parliament (the *Australian Constitution*, s76(ii)).

27 Secondly, relevant to the ascertainment of the rights and responsibilities of the parties to the controversy was the meaning and effect of section 9 of Part 32 of Marine Orders dealing with Cargo Handling Equipment promulgated by the Commonwealth under the *Navigation Act 1912* (Cth), s 425. The Marine Orders do not form the foundation of a cause of action. However, their existence and content were said by the appellants to negate the conclusion of the existence of a duty of care on their part. As such, the Marine Orders were asserted to be relevant to the controversy as part of the vindication of the appellants' position. In this respect, the Marine Orders take a position of greater significance in the controversy than merely by reference to their interpretation. The matter was therefore one arising under (as opposed merely to the interpretation of) a law made by the Parliament: see generally L Zines *Cowen and Zines's Federal Jurisdiction in Australia* at 66-71 and *Felton v Mulligan.*

28 For reasons which will be explained, although reference was made in the course of the proceedings to the *Occupational Health and Safety (Maritime Industry) Act 1993* (Cth) ("the *Maritime OH&S Act*")

that legislation gave rise to no statutory civil cause of action for breach of statutory duty. Whilst the obligations it created may have informed the scope and content of a duty arising under the general law, and its contravention may be relevant to the consideration of whether there was a breach of any common law duty of care, it may be arguable whether that would be insufficient to give rise to an exercise of federal jurisdiction. However, that is not a matter which needs to be determined in the present case. Federal jurisdiction was undoubtedly engaged as a result of the pleadings for the reasons noted above.

29 The pleadings also sought to rely upon provisions of State legislation and, in particular, the *Civil Liability Act* and the *Workers Compensation Act*, s 151Z: see [9] above. Whether those statutory provisions operated in the present case depended upon ss 79 and 80 of the *Judiciary Act*. They did not operate of their own force as State law, they were relevant only if picked up on surrogate federal law by ss 79 and 80. No party submitted that this legislation was not picked up. Unfortunately, this legal structure was not addressed before the primary judge and therefore not considered by his Honour. Nor was it addressed in written submissions filed by the parties before the hearing of the appeal. It gave rise to a fundamental question, capable of affecting the outcome of the proceedings. In the present case, it required an adjournment of the proceedings to allow the parties to consider their positions and file further written submissions. It is important that attention be addressed to such matters at an early stage, and not in the final stages, of litigation.

Appellants' initial submissions

30 The appellants submitted that the primary judge erred in holding the appellants were in breach of their duty to the respondent. The respondent, it was submitted, was an independent contractor to whom the appellants as occupiers had no duty to give a warning of defects to: *Papatonakis v Australian Telecommunications Commission* [1985] HCA 3; 156 CLR 7 at 30 (Brennan and Dawson JJ) and 38 (Deane J). The respondent had worked on the vessel for 10 years and the loading and unloading procedure had remained the same during that time. The respondent gave evidence that he knew that there was always a film of iron ore on the deck, that he would have to walk on the particles and that there as a risk of slipping, that he looked for dry spots and that thinking he was stepping on a dry spot he slipped on the wet slurry underneath. The appellants submitted that they were entitled to rely on the respondent and his employer to devise an appropriate method of dealing with the hazard. The appellants submitted that the control of the operation was in the hands of the respondent and his employer. They also relied upon the Marine Orders.

31 The respondent acknowledged that he was the person in charge for the purposes of the Marine Orders and was responsible for the loading. The authority of the respondent as the person in charge was recognised by the master. The appellants submitted that the respondent was required to take steps to ensure the areas over which he and other persons working on the ship would be required to pass would be safe, being the very failure which the primary judge attributed to the appellants; and that the

appellants were not required to take further action to sweep or barricade the area absent a direction or request from the respondent.

32 The appellants submitted that the primary judge erred in placing the obligation to sweep the area on the appellants rather than the respondent's employer, and according to the criteria laid down by Basten JA in *Sydney Water Corporation v Abramovic* [2007] NSWCA 248; 5 DDCR 570 the circumstances did not give rise to a duty upon the appellants. (See now, *Caltex Refineries (Qld) Pty Ltd v Stavar* [2009] NSWCA 258 at [73]-[75] and [230]-[237].) The appellants submitted that they were not required to provide a safe system of work, rather the respondent's employer was liable as the respondent's principal.

33 On the cross-appeal the appellants submitted that the primary judge did not err in his Honour's decision as to contributory negligence, applied the correct principles and the decision of the primary judge was correct on the evidence. It was submitted that the principles articulated by the Court in *Tarabay v Leite* [2008] NSWCA 259 should be applied to the appellate review of findings as to contributory negligence.

The respondent's initial submissions

34 The respondent submitted that the appellants' appeal should be dismissed and the cross-appeal upheld, and that the respondent be awarded the damages assessed below without reduction.

35 The respondent submitted that the principle in *Papatonakis* had no application because the risk occurred before the respondent had anything to do with the ship, the risk was not an obvious risk and that warning should have been given by the first appellant, as the shipowner, that the iron ore dust could be wet underneath and could present a slip hazard. The respondent further submitted that, in any event, *Papatonakis* supported the primary judge's finding. It was not incumbent on the respondent to require the ship's captain or anyone else to sweep the desk to make the deck safe. The risk was not obvious and the respondent did not perceive any risk in advance. There was no system in place, as there should have been, for using the starboard side for forward deck access. The appellants were aware that the dust could become slippery on the port side. Consequently, it was submitted, the primary judge did not err in finding that the appellants breached their duty to the respondent.

36 On the cross-appeal the respondent submitted that he was not guilty of contributory negligence. The primary judge did not find that the risk was obvious and general awareness of the risk would not suffice. It was therefore submitted that the finding that the respondent did not check the stability of the area in which he walked was not supported on the evidence. It could not be inferred that the respondent had knowledge that there as a greater risk of walking on the port side of the deck as he was not aware of the appellant's system to use the starboard side of the deck to access the forward deck and the respondent did not show a lack of care for his own safety.

The Court's invitation for further submissions

37 During the hearing the Court invited further submissions on the Maritime OH & S Act and inferentially any attendant question of federal jurisdiction and upon the law of torts in maritime law and upon certain cases identified by the members of the Court.

The appellants' further submissions

38 In their supplementary submissions the appellants submitted that the duty in the terms stated in *Grant v Sun Shipping Company Limited* [1948] AC 549 and the decision of Devlin J in *Richards v W F White & Co* [1957] 1 Lloyd's Rep 367, did not address the issue in the present matter – that the presence of the slurry was not hidden or unknown to the respondent, and further, the respondent was the person in charge of the vessel. The appellants submitted that *Kermarec v Campagnie Generale Transatlantique* 358 US 625 (1959) did not represent the law in Australia, that the existence of a duty of care in Australia is governed by settled principles and does not turn on predetermined categories and therefore the fact that harm occurred on a ship in navigable waters is not determinative.

39 In relation to the operation of the Maritime O H & S Act, the appellants submitted that the respondent was not an employee of the operator and was a person in charge under the Marine Orders. The appellants submitted that the *Navigation Act* applied to the extent of any inconsistency with the Maritime O H & S Act and that the Maritime O H & S Act did not affect the operation of the *Navigation Act*. The Marine Orders, delegated legislation under the *Navigation Act*, made the respondent the person in charge and with effective control of the loading operation. On the authority of *Crimmins v Stevedoring Committee* [1999] HCA 59; 200 CLR 1 and *Grant v Sun Shipping* the appellants accepted that a ship operator would, in the ordinary course, owe a duty of care. The appellant submitted, however, that the Marine Orders affected the position by carving out an area of statutory responsibility imposed on the respondents. The obligation to secure the safety of persons on the deck was that of the respondent.

40 The appellants submitted that the appeal should be allowed, the decision below set aside and judgment be entered in favour of the appellants and the cross-appeal be dismissed.

The respondent's further submissions

41 In his supplementary submissions, the respondent submitted that *Kermarec* and *Grant* support the proposition that a shipowner owes a duty of care to those working lawfully on the ship. The respondent submitted that the owner has an obligation to make the premises reasonably safe for a person working on the ship regardless of their employment and that therefore the duty of the owner cannot be negated

by the imposition of requirements to ensure safety on the respondent himself. In relation to the operation of the Maritime O H & S Act, the respondent submitted that the ship was a prescribed ship (under s 4) and that the shipowner owed the respondent, as a contractor (under s 4), the duties under s 13 which were identical to the duties owed to a direct employee under s 11 of the Act. In relation to the operation of the *Civil Liability Act* and whether the presence of the dust and slurry on the deck was an obvious risk under s 5F which required no warning, the respondent submits that s 5H(2) operated to negate the operation of the section as the appellant was required under s 11(6) of the Maritime O H & S Act to give the respondent a written warning – by way of information, instruction, training and supervision so that they could go about their work in a way that was safe and without risk to their health. Accordingly, it was submitted there was no conflict between the federal and state legislation. The respondent submitted that the master was the person in charge under the Marine Orders since the vessel was self-unloading. The master therefore was under an obligation to make the workplace safe once it had become unsafe. The respondent submitted that the obligations on the master under the Marine Orders are additional to the operator's duty of care and obligations under the Maritime O H & S Act and duties at common law.

42 The respondent submitted that given the failure of the appellants to comply with the Maritime OH & S Act, the employer of the respondent should not be held culpable beyond a general failure to ensure as far as practical safe premises for its employees and a reduction of 15 per cent, not 40 per cent was more appropriate.

The appellants' further submissions in reply

43 The appellants submitted that the respondent's reliance on s 11(6) of the Maritime OH & S Act overlooked the need for the operator to have control of the ship, the fact that the owner did not know what the respondent was doing or where he was or how he was doing it and that the respondent did not need any information, instruction or training because he knew the dust or slurry would be present, was slippery and that there were two sides to the vessel. Accordingly, it was submitted that s 5H(2) of the *Civil Liability Act* did not apply. Further, it was submitted that the contention regarding s 151Z of the *Workers Compensation Act* failed to take into account the non-delegable duty owed by the employer.

44 The appellants submitted that the apportionment was not erroneous and was not outside the discretion of the primary judge.

The relevant legal environment

45 The disposition of the controversy requires an appreciation of the content and operation, first, of relevant Commonwealth legislation, secondly, if relevantly applicable, of State statutes picked up as surrogate federal law and thirdly, the Australian common law to the extent that it is not modified by relevant legislation.

46 The Maritime OH & S Act applied to *Iron Chieftain*, as a "prescribed ship" engaged in the coasting trade and thus a ship to which Part II of the *Navigation Act* applied: s 4, as engaged in interstate trade or commerce: s 6(1).

47 By the Maritime OH & S Act, s 7 the operation of the *Navigation Act* was not affected.

48 The Maritime OH & S Act, s 11 deals with duties of operators of ships in relation to their employees. The respondent, of course, was not the employee of either appellant; but s 13 makes s 11 relevant. (There was no debate about Inco being the "operator" of *Iron Chieftain* as the word is defined in the Maritime OH & S Act, s 4 – "the person who has the management or control of the ship". As to the meaning of "operator", see *ASP Ship Management Pty Limited v Administrative Appeals Tribunal* [2006] FCAFC 23; 149 FCR 261.)

49 The Maritime OH & S Act, s 11 is relevantly in the following terms:

> "**11 Duties of operators in relation to their employees**
>
> (1) An operator of a prescribed ship or prescribed unit must take all reasonable steps to protect the health and safety at work of employees.
> Penalty: 1,000 penalty units.
>
> (2) In particular but without limiting subsection (1), an operator must take all reasonable steps to comply with the rest of this section. An operator who fails to take those steps contravenes subsection (1).
>
> (3) An operator must provide and maintain a working environment (including plant and systems of work) that:
>
> (a) is safe for employees and without risk to their health; and
>
> (b) provides adequate facilities for their welfare at work.
>
> (4) An operator must, in relation to any workplace under the operator's control:
>
> (a) ensure the workplace is safe for employees and without risk to their health; and
>
> (b) provide and maintain a means of access to and from the workplace that is safe for employees and without risk to their health.
>
> (5) An operator must ensure the safety at work of employees (including the absence of risks at work to the health of employees), in connection with the use, handling, storage or transport of plant or substances.
>
> (6) An operator must give employees the information, instruction, training and supervision necessary to enable them to perform their work in a way that is safe and without risk to their health. An operator may provide information, instruction and training on a prescribed ship or prescribed unit."

50 The Maritime OH & S Act, ss s 13 and 14 are in the following terms:

"**13 Duties of operators in relation to contractors**

(1) The obligations of an operator of a prescribed ship or prescribed unit in respect of employees employed on the ship or unit that are set out in subsections 11(1) to (6) also apply in respect of persons who are contractors on that ship or unit to the extent set out in this section, and not otherwise.

(2) The obligations apply in relation to matters over which the operator has control.

(3) The obligations apply in relation to matters:

(a) over which the operator would, in the circumstances, usually be expected to have had control; and

(b) over which the operator would have had control apart from an express provision to the contrary in an agreement made by the operator with such a contractor.

Penalty: 1,000 penalty units.

(4) For the purposes of an offence against this section, strict liability applies to the physical element, that the obligations set out in subsections 11(1) to (6) apply as set out in subsection (1) of this section.

14 Duties of operators in relation to third parties

An operator of a prescribed ship or prescribed unit must take all reasonable steps to ensure that persons, other than employees or contractors, at or near a workplace under the operator's control are not exposed to risk to their health or safety arising from the conduct of the operator's undertaking.

Penalty: 1,000 penalty units."

51 Under the Maritime OH & S Act, s 4 the word "contractor" is defined as meaning:

"… an individual who does work on a prescribed ship or a prescribed unit under a contract between an operator and that individual or any other person (whether an individual or not)."

52 Sections 11 and 13 create offences. It will be necessary, however, to examine their operation and effect on the law of torts. Before doing so, it is necessary to ascertain the extent of operation of s 13, in particular as to the facts here.

53 The appellants submitted that s 13 does not operate to have s 11 read as if the word "employee" was replaced by, and taken to be a reference to, subcontractor or an employee of a subcontractor. Thus, it was submitted, since the respondent was not an employee of either appellant s 11 as invoked by s 13 did not apply.

54 We reject this submission. Plainly s 13 is intended to place upon the operator of the ship the obligations in s 11 but in relation to contractors. This is the clear purport of the words. Further, the section heading (though not part of the Act: the *Acts Interpretation Act 1901* (Cth), s 13(3)) also makes it plain. Given the clarity of the words, this extrinsic aid is unnecessary: *The Ombudsman v Moroney* [1983] 1 NSWLR 317 and D Pearce and R Geddes *Statutory Interpretation in Australia* (6th Ed

LexisNexis 2006) at 161-163 and in particular the cases referred to at 163 discussing the operation of the *Acts Interpretation Act*, s 15AB in this context.

55 Not only the plain words of s 13 lead to this conclusion. The objects of the Maritime OH & S Act set out in s 3 support the construction. Those objects are as follows:

> "(a) to secure the health, safety and welfare at work of maritime industry employees; and
>
> (b) to protect persons at or near workplaces from risks to health and safety arising out of the activities of maritime industry employees at work; and
>
> (c) to ensure that expert advice is available on occupational health and safety matters affecting maritime industry operators, maritime industry employees and maritime industry contractors; and
>
> (d) to promote an occupational environment for maritime industry employees that is adapted to their health and safety needs; and
>
> (e) to foster a cooperative consultative relationship between maritime industry operators and maritime industry employees on the health, safety and welfare of maritime industry employees at work."

56 There was no suggestion in the argument that s 13 did not apply because there was no contract between either appellant (as "operator") and PKCTL for the purpose of the definition of "contractor". There was evidence of this contract. There was no suggestion that the loading was pursuant to a contract between shipper and stevedore, as opposed to ship or operator and stevedore. In any event, the words "under a contract" in the definition appear to be sufficiently wide to include an individual who does work under a contract between stevedore and someone other than the shipowner or the operator of the ship.

57 It will be necessary to consider s 13 in the light of the relevant Marine Orders and the *Navigation Act*. Subject to that influence, s 13 can be seen to impose obligations on Inco as the operator of *Iron Chieftain* in relation to matters over which it has control, or would be expected to have control, or would have had control, but for an agreement with the contractor, relevantly as follows:

> (a) to take all reasonable steps to protect the health and safety at work of an individual (such as the respondent) who does work on a prescribed ship (s 11(1));
>
> (b) to take all reasonable steps:
>
> > (i) to provide and maintain a working environment (including systems of work) that is safe (s 11(2) and (3)(a));
> >
> > (ii) to ensure a safe workplace and to provide and maintain a means of access to and from the workplace that is safe (s 11(2) and (4)(a) and (b));

(iii) to give such an individual the information, instruction, training and supervision necessary to enable him or her to perform his or her work in a safe way (s 11(2) and (6));

(c) to provide and maintain a working environment (including systems of work) that is safe; (s 11(3)(a));

(d) to ensure a safe workplace and to provide and maintain a means of access to and from the workplace that is safe (s 11(4)(a) and (b)); and

(e) to give such an individual the information, instruction, training and supervision necessary to enable him or her to perform his or her work in safe way (s 11(6)).

58 The obligations in (a) and (b) above are enforceable under the criminal law: see ss 11(1) and (2) and 13. However, the obligations under ss 11(3)-(6) and 13 operate independently of the criminal law, though they provide content for the offence under s 11(2) as picked up by ss 13(1) and (4).

59 Subject to the operation of the Marine Orders and the *Navigation Act*, what is the effect of these obligations?

60 The Maritime OH & S Act, s 118 provides that the Act does not confer a right of action in any civil proceeding in respect of a contravention of a provision of the Act or confer a defence to an action in any civil proceeding or otherwise affect a right of action in any civil proceeding. Thus, the statutory intention is not to create a statutory cause of action: cf *O'Connor v S P Bray Limited* [1937] HCA 18; 56 CLR 464.

61 Any duty of care owed by the appellants arises from their respective positions as owner and operator of the ship and being in possession or having the management and control of the ship. The obligations under ss 11(1)-(6) and 13, in particular those expressed by reference to taking all reasonable steps, whilst not founding a separate statutory cause of action (see s 118) may nevertheless be relevant to assessing the breach of any relevant common law duty of care: *Henwood v Municipal Tramways Trust (South Australia)* [1938] HCA 35; 60 CLR 438 at 449, 453 and 461, *Sibley v Kais* [1967] HCA 43; 118 CLR 424 at 427; and *Tucker v McCann* [1948] VLR 222 at 225-226 and 237. Further, as will be seen the place of these statutory obligations in a law of the Parliament is not irrelevant to the consideration of the imposition of and the determination of the content of a duty of care at common law.

62 Here, the obligations are both general and specific. The general obligations require at least reasonable steps to provide for a safe working environment and safe workplace. The specific obligations require the provision and maintenance of, and reasonable steps for the provision and maintenance of, a means

of access to and from the workplace that is safe for persons working on the ship and the provision to such persons of information, instruction, training and supervision necessary to enable them to perform their work in a safe way.

63 What then is the duty, if any, of the appellants at general law to exercise care in respect of the safety of stevedores coming on board ship in order to undertake their tasks in respect of loading? We will answer this, before turning to the effect, if any, of the Marine Orders under the *Navigation Act*.

64 In recognising the nature and content (including the scope) of the duty of care of the owner and operator of a working commercial ship one needs to recognise that maritime law has its own marine (as opposed to terrene) roots. This is not to view maritime law as a wholly self-contained and isolated strand of law from the common law, but rather to recognise the realities of maritime activities and commerce as influencing the content of the law as it applies to maritime subjects and the distinctive character of maritime law: *Moragne v States Marine Lines Inc* 398 US 375 at 386-388 (1970) cited by Gleeson CJ, Gummow J, Hayne J and Heydon J in *Blunden v The Commonwealth* [2003] HCA 73; 218 CLR 330 at 337-338 [13]; and see in a variety of contexts, *Tisand Pty Ltd v The Cape Moreton* at 76-80 [129]-[148]; *The 'Lottawanna'* 88 US 558 at 573 (1875); *The 'Gaetano and Maria'* (1882) 7 PD 137 at 143; *The 'Tolten'* [1946] P 135 at 142; *Schiffahartsgesellschaft Leonhardt & Co v A Botacchi SA De Navigacion* 773 F 2d 1528 at 1531-1533 (1985 Eleventh Circuit Court of Appeals); and see generally the Hon John R Brown "Admiralty Judges: Flotsam on the Sea of Maritime Law" (1993) 24 *Journal of Maritime Law and Commerce* 249. An example of this can be seen in *Kermarec v Compagnie General Transantlantique* at 628-632 where the United States Supreme Court rejected the terrene based legal categories for occupier's liability in favour of a duty upon the shipowner, based on maritime traditions of simplicity and clarity without feudal-based land law categories, expressed as one to exercise reasonable care for the safety of those coming on board the vessel for purposes not inimical to the owner's legitimate interests.

65 Here, what is to be recognised is that a working commercial ship such as *Iron Chieftain* is not merely an inanimate structure. As Black CJ, Emmett J and Allsop J said in *ASP Ship Management* at 285-286 [98] in the context of a discussion of the notion of operation of a ship, a ship is a chattel, but is not any ordinary chattel. It is a working technical and commercial enterprise which is engaged in activity that has inherent danger to those on board, to the environment and her surroundings. It is comprised of various interconnected bodies of machinery, operated by different people, some crew and some from on-shore when berthed. Safety, both for those working on board and others (along with the welfare of the environment) is a constant and underlying maritime theme and consideration epitomised by modern standards such as the *International Safety Management (ISM) Code* (Annex to the International Maritime Organisation Assembly Resolution A.741 (18) 4 November 1993).

66 The liability of shipowners to stevedores has been considered in a number of English cases. In *Grant v Sun Shipping Ltd* the responsibility of the shipowner to dock labourers working on board ship while in

berth was discussed by the House of Lords. Lord du Parcq (with whom Lord Porter and Lord Uthwatt agreed) expressed the view at 562 that the shipowners knowing that the pursuer would be returning to the ship to work after dinner was under a duty (we interpolate, to exercise reasonable care) to see that the place where he was to work was reasonably safe; and that the shipowner was not absolved from this duty to the pursuer by the regulatory requirements that placed the same duty on the ship repairers who had been working nearby.

67 Lord Porter and Lord du Parcq also discussed (at 555 and 566, respectively) the question of the asserted contributory negligence of the pursuer in terms of relevance to the present case. They discussed the decisional process of the human mind in everyday action and the bringing to bear of past experience, acquired knowledge and intuition in decision making processes over seconds or fractions of seconds by an experienced stevedore. Decisions made by such workmen, in part intuitive and in part based on experience from years of work, should not necessarily be criticised after the event because of a failure to take a precaution apparently available, in particular with the benefit of hindsight.

68 In *Cremin v Thomson* (1941) 71 Ll L Rep 1, the House of Lords discussed the responsibility of the shipowner to the stevedore in terms of a duty to exercise reasonable care to make the hold reasonably safe to work in: at 6-7 (Lord Simon), 9-11 (Lord Wright) and 14 (Lord Porter). It is unnecessary to deal with the issue of non-delegability there dealt with. See also *Hillen and Pettigrew v ICI (Alkali) Limited* [1936] AC 65 at 69-70 (Lord Atkin) and *Compania Mexicana de Petroleo El Aguila SA v Essex Transport & Trading Company Ltd* (1929) 33 Ll L Rep 202 at 207-208 (Scrutton LJ), 211-213 (Sankey LJ) and 214 (Russell LJ).

69 The abolition in the Australian common law of the categories of duty by reference to types of entrant in *Australian Safeway Stores Pty Ltd v Zaluzna* [1987] HCA 7; 162 CLR 479 makes the precise terms of these decisions less than critical. What they do reveal, however, is a recognition of the requirement of a shipowner to exercise reasonable care to avoid exposing a stevedore coming on to his ship to risk of injury which reasonable care would see eliminated or ameliorated, whether by attending to it physically or by warning or otherwise. This is especially so if the danger or risk on board is created by a particular operation of the ship. The duty is to exercise reasonable care for the safety of those coming on board to work the ship, here by loading her. The scope and content of that duty included a duty to exercise reasonable care to see that the workplaces of such stevedores on board were reasonably safe.

70 The appellants emphasised what was said in *Papatonakis* at 30 by Brennan J and Dawson J and at 38 by Deane J as to what an invitor need not guard against in relation to invitees who are tradesmen or experts. At 30, Brennan J and Dawson J said after referring to *Christmas v General Cleaning Contractors Ltd* [1952] 1 KB 141, *Bates v Parker* [1953] 2 QB 231, *Archer v Hall* [1967] 1 NSWR 107; *Wright (WH) Pty Ltd v Commonwealth* [1958] VR 318 and *Pinborough v Minister for Agriculture* (1974) 7 SASR 493:

> "The principle which these cases illustrate is this: where an independent contractor carrying on a particular trade is engaged by an occupier to work on his premises, the occupier is not under a duty to give warning of a defect in the premises if tradesmen of that class are accustomed to meeting and safeguarding themselves against defects of that kind."

At 37-38 Deane J discussed the same cases and said:

> "Those cases did not however involve circumstances in which the occupier had, by interfering with technical equipment, created a risk of injury to one who might fail to appreciate the existence or extent of the non-expert meddling that had occurred. In my view, they should be seen as involving no more than instances of the application of the ordinary principles of the law of negligence to the particular circumstances there involved. … To the extent that they support the proposition that, in the ordinary case where there has been no undisclosed non-expert meddling with a technical installation, an occupier is entitled to rely upon an expert to work out the appropriate method of dealing with a technical matter calling for expert skill, they represent no more than commonsense. …"

71 The above duty and its discharge must of course reflect the reality of the functions being undertaken on board ship during loading and unloading. Stevedores bring a degree of expertise, experience and skill to their work on board. They do this, however, in the environment of, and with the equipment and machinery provided by, the ship. The master and officers maintain a responsibility for the ship, her safety and stability and for the care of the cargo. They retain a right to direct and control the stevedores. The stevedores are, however, not the employees of the ship or its owners: *Cameron v Nystrom* [1893] AC 308 at 312 (Lord Herschell) and *Karuppan Bhoomidas v Port of Singapore Authority* [1978] 1 WLR 189 at 193.

72 The recognition of these respective functions and roles can be seen in the discussion of the shipowner's duty of care to the stevedore in *Federal Marine Terminals Inc v Burnside Shiping Co Ltd* 394 US 404 (1969) and *Scindia Steam Navigation Co Ltd v De Los Santos* 451 US 156 (1981). Under these cases the duty extends at least to the exercise of ordinary (viz reasonable) 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 ship or ought reasonably to be known to the ship and that are not known or would not be obvious to or anticipated by him or her if he or she were reasonably competent in his or her work: *Federal Marine Terminals* at 416 and *Scindia* at 166-167.

73 In *Scindia* the Court rejected the notion that the ship must inspect or supervise the stevedores in their work. The case involved the operation and application of the *Longshoremen's and Harbour Workers' Compensation Act* (33 USCA §905(b)) but the duty of care was one at general law.

74 One of the leading United States scholars in the field, Professor Robert Force, put the position as follows in *Admiralty and Maritime Law* (Federal Judicial Centre 2004) at 108-109:

"In *Scindia Steam Navigation Co., Ltd. v. De Los Santos* the Supreme Court articulated guidelines setting forth the duties that a vessel owes to maritime workers. In general, a vessel owner who turns part of a ship over to a stevedore may rely on the expertise of the stevedore in loading or discharging cargo from the vessel. Negligence that occurs during these operations usually is the fault of the stevedore or its employees and is not attributable to the vessel owner. Nevertheless, a vessel owner must exercise "reasonable care under the circumstances."

Scindia described the following three duties that the vessel owner owes to a maritime worker: (1) A "vessel owes to the stevedore and his longshoremen employees the duty of exercising due care 'under the circumstances.' This 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." (2)"It is also accepted that the vessel may be liable if it actively involves itself in the cargo operations and negligently injures a longshoreman or if it fails to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas, or from equipment, under the active control of the vessel during the stevedoring operation." And (3) "We are of the view that absent 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."

The necessary consequence is that the shipowner is not liable to the longshoremen for injuries caused by dangers unknown to the owner and about which he had no duty to inform himself."

75 We turn to the Marine Orders.

76 The purposes of Part 32 of the Marine Orders were set out in section 2. These purposes insofar as relevant to the loading and unloading of cargo were in part directed to the matters in s 425(1) (a), (b) and (c) of the *Navigation Act* which were as follows:

> "(a) the inspection and testing of machinery and appliances for the loading and unloading of ships;
>
> (b) the prevention of the use of defective machinery or appliances for the loading or unloading of ships;
>
> (c) the protection of the health and the security from injury of persons engaged in the loading or unloading of ships."

77 The purposes described in section 2 were also to give effect to certain instruments of the International Labour Organisation ("ILO"), being Convention No 152, Occupational Safety and Health (Dock Work), 1979, Recommendation No 160, Occupational Safety and Health (Dock Work), 1979, ILO Code of Practice: Safety and Health in Dock Work, 1977.

78 Section 9 of Part 32 deals with the "Person in Charge" and is in the following terms:

"**9 Person In Charge**

9.1 Identifying the person in charge

9.1.1 A person, other than the master, undertaking to load or unload a ship at a port in Australia must, before commencement of that undertaking, appoint a person or persons in charge of the undertaking.

9.1.2 A person making an appointment under 9.1.1 must provide to the master of the ship written notification of the appointment or appointments.

9.1.3 A person in charge must enter in a logbook:

(a) the time at which he or she commences each period of duty as person in charge; and

(b) the time of termination of each such period of duty.

9.1.4 Notwithstanding 9.1.1 and 9.1.3 but subject to 9.1.7, a person who has commenced a period of duty in charge of loading or unloading of a ship is deemed to remain person in charge for the purposes of this Part:

(a) until that person has directed loading or unloading of the ship to cease and has made an entry to that effect in the logbook; or

(b) until another person appointed in accordance with 9.1.1 has commenced a period of duty as person in charge and has made an entry to that effect in the logbook.

9.1.5 Not more than one person at a time is to be person in charge.

9.1.6 A person must not be appointed as the person in charge unless that person is:

(a) well experienced in all aspects of the type of loading or unloading to be undertaken; and

(b) capable of directing all tasks relevant to the loading or unloading.

9.1.7 A person appointed in accordance with 9.1.1, being unable to direct the loading or unloading of a ship at any time during his or her period of duty, may appoint a person qualified in accordance with 9.1.6 to direct the loading or unloading during the period of that inability, and such qualified person is deemed to be the person in charge for that period for the purposes of this Part.

9.1.8 Where cargo is being loaded or unloaded by crew of the ship, the master will for the purposes of this Part be deemed to be the appointed person in charge.

9.2 Functions and duties of person in charge

9.2.1 It is the function of the person in charge to direct the tasks relevant to the loading or unloading of the ship and to ensure that they are carried out in a safe and orderly manner.

9.2.2 It is the duty of the person in charge to take all reasonable steps necessary to discharge his or her function, and in particular to ensure as far as practicable that:

(a) all operations are performed in compliance with this Part;

(b) the materials handling equipment of the ship has been tested, thoroughly examined and inspected as required by this Part;

(c) persons are not engaged in loading or unloading unless they have been given adequate instruction and training concerning the risks involved and precautions to be taken;

(d) all persons are reasonably protected against accidental injury arising from the loading or unloading of the ship, and from movement of unsecured cargo or other objects on the ship;

(e) persons not engaged in the loading or unloading of the ship or having any other proper function in connection with the loading or unloading, do not remain:

(i) in the vicinity of cargo-handling operations; or
(ii) on any deck where roll-on/roll-off loading or unloading is taking place,

unless such person has the permission of the master or a person authorised by the master to give such permission; and

(f) if a workplace becomes unsafe or there is a risk of injury to health, effective measures are taken to protect the workers until the place has been made safe again.

9.2.3 If, in connection with the loading or unloading of a ship:

(a) a person receives an injury requiring referral to a hospital; or

(b) a component of materials handling equipment fails in operation, whether or not any person is thereby injured,

the master, on advice from the person in charge, must submit to the Manager, Marine Operations and Personnel, in AMSA through AusSAR:

(a) within four hours of the incident—an initial report in accordance with Form MO-32/5 in Appendix 23; and

(b) within 72 hours of the incident—a full report in accordance with Form MO-32/6 in Appendix 23."

79 Section 10 deals with loading and unloading and is in the following terms:

"**10 Loading and unloading**

10.1 Person in charge to direct loading and unloading

A person must not, to any extent, load or unload a ship unless that person does so under the direction of the person in charge.

10.2 Loading and unloading to comply with this Part

A person must not:

(a) to any extent, load or unload a ship;

(b) use or operate any materials handling equipment in connection with the loading or unloading of a ship;

(c) direct or purport to authorise any other person to load or unload a ship to any extent, or operate materials handling equipment in connection with the loading or unloading of a ship; or

(d) use or direct or purport to authorise any other person to use in connection with the loading or unloading of a ship, except in the event of an emergency, any means of passage or access,

otherwise than in compliance with or as provided by this Part.

10.3 Use of equipment

10.3.1 Subject to 10.3.2, a person who:

(a) is under 18 years of age; or

(b) does not possess the necessary aptitudes and experience,

must not:

(c) operate any mechanical stowing appliance, crane or winch; or

(d) give directional signals to a driver of a crane, winch or other mechanical stowing appliance; or

(e) have responsibility for attending to cargo falls on winch ends or winch drums; or

(f) perform tasks involving hoisting, lowering or otherwise adjusting derrick gear or other materials handling equipment.

10.3.2 Provision 10.3.1 does not apply to:

(a) a member of the crew of the ship being loaded or unloaded; or

(b) a person under training while properly supervised.

10.3.3 A person must not operate power operated hatch covers unless that person is:

(a) a member of the crew of the ship being loaded or unloaded; or

(b) a person authorised to do so by the officer in charge of the loading or unloading operation.

10.3.4 A person, other than a member of the crew of the ship, must not operate ship's side, bow or stern doors, 'tween deck bulkhead doors, ramps, retractable car decks or similar ship equipment unless that person has been specifically authorised by the Master of the ship to do so.

10.4 Protective clothing

A person must not load or unload a ship unless that person wears protective clothing and other protective equipment appropriate for the loading or unloading operation, for the duration of the operation.

10.5 Operations to or from a barge or lighter

Cargo must not be loaded into a ship from a manned barge or lighter, or unloaded from a ship into a manned barge or lighter, unless there is provided on the barge or lighter, at least one lifebuoy with at least 30 metres of buoyant line attached.

10.6 Removal of equipment

10.6.1 A person must not, during the loading or unloading of a ship, remove or otherwise interfere with any fencing, safety device, gangway, means of access, ladder, lighting, hatchway cover, materials handling equipment, stage, mark, life-saving appliance or other article or fitting provided in connection with loading or unloading for the purpose of compliance with this Part, except:

(a) in the event of an emergency; or

(b) as directed by the master or an officer of the ship, or by the person in charge.

10.6.2 Any item referred to in 10.6.1 removed as permitted by that provision, must be replaced as soon as there is no longer any reason for its removal, by the person effecting or directing the removal, as appropriate.

10.7 Reporting of risks

If persons engaged in the loading or unloading of a ship have reason to believe that a risk exists and those persons are unable reasonably to remove the risk themselves, the situation must be reported to the person in charge as soon as practicable."

80 Section 8 provides that paras 9.1.2, 9.1.3, 9.1.6, 9.2.3, 10.1, 10.2, 10.3.1, 10.3.3, 10.3.4, 10.6.1 and 10.6.2 are penal.

81 The whole of the Marine Orders provides for a comprehensive structure of requirements attending to safety in cargo operations.

82 The respondent was the person in charge for the loading of the coal. The identification of one person in charge of the loading can be understood as a safety requirement to ensure there is no divided responsibility leading to confusion in operation. The responsibility for the safe and orderly carrying out of the function extends to some degree to testing and being satisfied with the ship's equipment: paras 9.2.1 and 9.2.2 (b) and to supervision of the workplace: paras 9.2.2 (d) and (f).

83 The appellants submitted that since the Maritime OH & S Act, s 7 provides that that Act does not affect the operation of the *Navigation Act* the Marine Orders deprive the Maritime OH & S Act of relevance and terminate the existence of any common law duty of care that might otherwise have been owed by the appellants to the stevedores. We do not agree.

84 It can be accepted that to the extent that there is any inconsistency the Marine Orders will prevail. But the Marine Orders can be seen to operate within a factual and operational context of the shipowner and operator providing to the stevedores the ship and its equipment in order that cargo handling operations can be conducted in accordance with Part 32 of the Marine Orders. There is nothing in the Marine Orders that can be seen as intended to terminate any obligation otherwise imposed by law upon a shipowner or operator to exercise reasonable care for the safety of stevedores. If the general law,

informed to any relevant extent by the Maritime OH & S Act, imposes on the shipowner and operator a duty to exercise reasonable care to provide stevedores a safe workplace upon which to conduct their work on board for the benefit of the shipowner or operator, we do not see how delegated legislation imposing comformable and not inconsistent obligations on another person (here one of the stevedores) dissolves or makes otiose that duty of the shipowner and operator. It does not lead to incoherence or disconformity that a shipowner or operator who has failed to exercise reasonable care in relation to the safety of those who come on board to work should be liable to such person, even if there is another person (even, as here, the injured person) who has by delegated legislation been given responsibilities for safety in the relevant operation and who should have recognised the lack of safety involved in the operation.

85 The lack of any such incoherence or disconformity is reinforced when one examines the ILO instruments that the Marine Orders were implementing. They make clear that the safety and well-being of those who work on the ship is the responsibility of **everyone** connected with the operation of the ship. It would not fulfil the purposes of the ILO instruments to conclude that the placing of legal responsibility on the respondent under the Marine Orders absolved the appellants from their responsibilities under the Maritime OH & S Act or under their general law duty to exercise reasonable care to provide a reasonably safe workplace for stevedores such as the respondent coming on board.

86 It can be accepted that the discharge of any duty upon the shipowner would take into account the operation of Part 32. That, however, does not remove the duty of the shipowner or operator to exercise reasonable care in all the circumstances for the safety of stevedores who come on board to work the ship for the provision of a reasonably safe working environment.

87 The above expression of the duty recognises the shipowner's and operator's responsibilities, along with others who share with them the tasks of working the ship while she is in port, in the provision of a safe maritime working environment for those on board and who come on board. The duty thus expressed conforms with precedent in other common law countries. It conforms with sensible maritime practice. It conforms with international ILO standards for the provision of a safe maritime environment. It conforms with the Maritime OH & S Act.

88 In discharge of the duty, due recognition will be given to the reality of the independent skill of people such as stevedores and the expectation that such persons will conduct themselves appropriately. In this respect, the considerations referred by the United States Supreme Court in *Marine Terminals* and *Scindia* and the matters to which Brennan J, Dawson J and Deane J referred in *Papatonakis* will be reflected in a consideration of the discharge of the duty.

89 Another way of recognising the matters of expert skill of the stevedores as discussed in *Federal Marine Terminals* and *Scindia* and the matters referred to in *Papatonakis* might be to confine the expression of the content or scope of the duty to exercise reasonable care in all the circumstances to have the ship and

her equipment in such condition to allow an experienced stevedore to carry out cargo operations in reasonable safety and to warn of non-obvious dangers or hazards of which the owner or operator was aware or ought reasonably to have been aware. Whilst these can be seen to be aspects of the duty, we do not think that they state its limits exhaustively. A shipowner or operator who provides or makes available a dangerously slippery deck which has been made so by its own working of the ship and which, to the knowledge of the owner or operator, could be rendered safer by readily available and known precautions cannot be heard to say that it owes no duty to take reasonable steps to eliminate the danger because the stevedore exercising reasonable care for himself could demand that the owner or operator remedy the dangerous state of affairs before he undertakes or completes his work. There may be contributory negligence, but the duty is not so confined.

90 In our view, expression of the duty in terms in conformance with what was said in *Grant v Sun Shipping* better reflects the informing considerations as to the need for safety in conducting cargo operations on board a working commercial ship and the recognition of the role played by all concerned for safety in such operations. The considerations of skill, experience and interrelated functions of parties will be relevant to discharge or breach of the duty.

The facts here and the disposition of the appeal

91 The essential facts relevant to the working out of the inter-related responsibilities to which we have referred are not complex. They emerge from the evidence of the respondent, Capt Briggs the master of *Iron Chieftain*, Capt Pyett, the marine consultant and contemporaneous records.

92 The working of this ship by the self-unloading to port and the water suppression system inevitably caused slippery slurry on the port side. The starboard side was safer to use (Briggs: Black T130 (35)). Inco's records revealed a preferred procedure of using the starboard side for forward deck access (incident report Blue 6 S-U). Since (and because of) the accident the port side is barricaded off (Briggs: Black T130 (24-30) Formosa: Black T42 (7-20)). The appellants used the one ship for the run between Whyalla and Port Kembla. The previous operator used two ships, allowing *Iron Chieftain* to be loaded less full, in which circumstances the loading could be, and was, supervised from the bridge and access along the deck was prohibited because of its slippery nature (Formosa: Black T60 (48) - T61 (40)). Thus, the occasion to use the slippery port deck was brought about partly by the commercial choice of the appellants in using one ship on the run.

93 No instructions or advice were or was given to the respondent not to use the port deck, or to use the starboard deck (Formosa: Black T41 (47) - T42 (5)). There was some suggestion in Capt Pyett's report and the respondent's evidence that inspection for trimming the load required the person in the respondent's position to view the hold from both the port and starboard side of the hatch. That is not consistent, however, with the respondent saying that he always used the port side (Formosa: Black T22 (46) - T23 (15)) or with the new post accident practice of barricading off the port side. The risk of

slipping was known to the appellants, as was the fact that the safer side of the deck was the starboard side.

94 The respondent was familiar with the ship (Formosa: Black T59 (26-37)). The respondent knew that the deck could be slippery. He recognised on the day that the deck was slippery. He thought he had chosen dry iron ore dust to place his feet on; in fact it was wet and slippery underneath (Formosa: Black T23 (17) – T24 (13); T63 (33) – T64 (12)). The respondent recognised that walking on the iron ore dust exposed him to the risk of slipping (Formosa: Black T64 (10-12)); but he felt he "had no choice" because his employer had not made other arrangements (Formosa: Black T64 (14-19)).

95 The respondent recognised that he was the "person in charge" and could have stopped loading until the iron or had been swept up (Formosa: Black T64 (20-49)). The respondent had complained to his employer, PKCTL, in the past about the iron ore and the danger it posed (Formosa: Black T67 (20) - T68 (14)).

96 The danger could have been dealt with by sweeping up the slurry if a path were needed or by advising or requiring the stevedores to inspect the holds from the starboard side (Briggs: Black T130 (3-35)).

97 The thrust of the appellants' case was that because the respondent was the person in charge, it was his and his employer's responsibility to the exclusion of the shipowner and operator to call for the remedying of any unsafe aspect of the working environment for the stevedores caused by the operation of the ship by the owner or operator in unloading the iron ore fines. We have already rejected that in the formulation of the duty of care.

98 Here, whatever might be the position in other circumstances in relation to an obviously defective piece of equipment that the owner or operator could reasonably expect would not be used, the owner or operator knew that through their own working of the ship the port deck was made dangerous for the stevedores, that the danger could be avoided by readily available means including sweeping the deck, roping off the port deck or encouraging use of the starboard deck, that the stevedores were working using the port deck in the dangerous state without any of these steps being taken and that there was a real risk of personal injury to the stevedores in working in this way arising from the dangerous state of the ship. That reasonable care by the stevedores might be seen to require them to complain to the appellants about the dangerous state of their ship produced by how they worked it did not negate the appellants' duty to take reasonable care to take reasonable steps to provide a safe workplace for stevedores on their ship.

99 The primary judge found the appellants to have breached their duty of care in failing to have the port deck swept. There was ample material to support that conclusion. The danger was real and known. The appellants were aware of a safer way of traversing the deck – the starboard side, but did not tell or advise the respondent to use it. The appellants took no step, after unloading, to render the port deck

safe by sweeping it, which Capt Briggs said would take an hour or so, or by closing it off. Instead, they left the deck in a slippery state thereby providing an unsafe working environment for the stevedores, leaving them to deal with it as best they could. This conduct was a failure to comply with the Maritime OH & S Act, ss 11(1), (2), (3)(a), (4)(a) and (6) and 13. As such they were failures relevant to assessing breach of the general law duty of care. There was, in my view, a clear breach of the common law duty of care, whether one has regard to these provisions or not.

100 The appellants called in aid the *Civil Liability Act*, s 5H which is in the following terms:

> "5H No proactive duty to warn of obvious risk
>
> (1) A person (*the defendant*) does not owe a duty of care to another person (*the plaintiff*) to warn of an obvious risk to the plaintiff.
>
> (2) This section does not apply if:
>
> (a) the plaintiff has requested advice or information about the risk from the defendant, or
>
> (b) the defendant is required by a written law to warn the plaintiff of the risk, or
>
> (c) the defendant is a professional and the risk is a risk of the death of or personal injury to the plaintiff from the provision of a professional service by the defendant.
>
> (3) Subsection (2) does not give rise to a presumption of a duty to warn of a risk in the circumstances referred to in that subsection."

101 Despite the lack of submissions on the topic from the parties, there is a real issue as to whether *Civil Liability Act*, s 5H is picked up by the *Judiciary Act*, s 79 in the light of the Maritime OH & S Act. The doubt would be significantly greater if the Maritime OH & S Act provided for a statutory cause of action; but it does not. (See s 118 and the discussion above.) Nevertheless, the Maritime OH & S Act, ss 11(6) and 13 can be seen to require the appellants to give the respondent information about the use of the starboard deck, and thus these provisions may be seen as a written law provided for by the *Civil Liability Act*, s 5B (2)(b). Furthermore, it was not the risk of slipping on the slurry that the respondent needed warning against. Rather, the breach of duty was the failure to take reasonable steps to remove the danger and provide a reasonably safe access to the holds or to advise of a safer way of getting to the forward holds that was known to the appellants. Whilst the respondent was familiar with *Iron Chieftain*, it was only one ship of many he no doubt worked on. The restriction of access to the starboard deck was a precaution known to the appellants, and not, it would seem, appreciated by the respondent.

102 The conclusion by the primary judge of breach of duty by the appellants was correct.

103 The primary judge concluded that the respondent's employer, PKCTL, was also negligent. On the evidence given by the respondent that he had complained to his employer about the very danger which caused his injury and nothing had been done this conclusion was clearly correct. The primary judge attributed responsibility to PKTCL of 40 per cent. We will discuss this assessment shortly.

104 The primary judge also concluded that the respondent was contributorily negligent in his own injury to a degree of 15 per cent. In all the circumstances the conclusion that the respondent was contributorily negligent might be seen as somewhat harsh. He had complained to his employer about the danger posed by the wet iron ore. He viewed the matter as one sufficiently serious to complain to his employer. His employer did not take the matter up with the appellants. In these circumstances the criticism made of the respondent at the trial by the appellants that he should have called for a cessation of loading in order to remedy the problem might seem somewhat harsh, a little unrealistic and not without a tinge of hypocrisy given that the appellants' working of the ship caused the danger in the first place. It can be said that the respondent should have recognised his authority as the person in charge to do that which the appellants say he should have done – that is to confront the appellants about the dangerous state of the deck that they had provided for him and his colleagues to work on. This criticism might particularly be made if because of his failure to take these steps one of his colleagues was injured: cf the *Civil Liability Act*, s 5R. As it happened, he was injured. Recognising that the dangerous state of the deck was caused by the appellants in their operation of the ship, was known to the appellants and could have been remedied by the appellants and that the appellants could have given the respondent further information about a safer way of doing his job and recognising that he had complained to his employer to no avail it might be thought inappropriate to conclude that he was contributorily negligent. It was open to conclude that he was doing his best on the day to pick his way through what appeared to be wet slurry by finding dry patches to stand on and that he should not have been put in this position either by the appellants or by his employer. Nevertheless, the position he held under the Marine Orders was a responsible one, and one that did call for him to act. The primary judge took this into account and attributed 15 per cent contributory negligence. We are not prepared to conclude that that assessment should be interfered with.

105 As to the respective proportions of responsibility between his employer (40 per cent) and the appellants (60 per cent), we are not prepared to interfere with that assessment. The evaluative task of reaching that conclusion as to respective fault was open to the primary judge and we see no error in the respective division. Given the complaint that the respondent had made to his employer, if we were making the assessment rather than reviewing the primary judge's assessment, we might give a greater proportion to the employer. However, we see no error in the formulation by the primary judge of that division. Though the employer should have taken up the matter with the appellants, equally, indeed primarily, the appellants should not have provided an unsafe working environment for the stevedores when it was a matter which could have been dealt with by them in the manner that was identified in the evidence. Shipowners and operators should not provide a dangerous working environment for stevedores to work in, and merely expect them (the stevedores) to exercise such power that they may have to require reasonable precautions to be taken for their own safety. That is not how the interrelated responsibilities for maritime safety in cargo operations should work. The law does not provide for it.

106 For the above reasons we would dismiss the appeal and the cross-appeal. As to costs, to avoid unnecessary expenditure on assessment, we would order the appellants to pay 75 per cent of the costs

of the respondent of the appeal and the cross-appeal. If any party considers this costs order unjust or inappropriate, he or it may move the Court for its variation in accordance with the Rules.

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