

Hines v. British Steel Corporation United States Court of Appeals, Seventh Circuit, 23 July 1990 907 F.2d 726

Katherine Vasilopolous '92

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against a stevedore whose breach of the warranty of workmanlike performance, implicit in the stevedoring contract, resulted in injuries for which the shipowner was held liable. Its purpose was to make the party responsible for the injuries pay for the result of its negligence. But while the court noted that the *Ryan* doctrine might no longer be valid, (in light of the adoption by a number of circuits of the policy of apportioning liability according to the comparative fault of each party as opposed to following indemnity principles espoused in *Ryan*), the court did point out that it was unnecessary to decide its validity because Selvick's claim fell outside the scope of *Ryan*. The warranty runs against the stevedore, not against the cargo owner who had merely hired the stevedore, and in this case Selvick was suing the cargo owner, Valders, and not the stevedore, Strauss.

The court also rejected Selvick's claim that it was an intended beneficiary of the stone supply contract between Valders and C-Way. Relying on the Restatement (Second) of Contracts, secs. 302, 304 (1981), the court held that Selvick was only an incidental beneficiary and, therefore, not entitled to damages from Valders. Finally, as Selvick was unable to produce any evidence to substantiate its claim as an intended beneficiary to the contract, the court held that Valders was accountable only to C-Way for any breach caused by the alleged negligence of Strauss.

Stephen W. Beyer '92

HINES V. BRITISH STEEL CORPORATION

United States Court of Appeals, Seventh Circuit, 23 July 1990
907 F.2d 726

Absent an express contractual provision to supervise stevedoring operations, a time charterer has no general duty to do so, and is not liable under the Longshore and Harbor Workers Compensation Act for the injuries or death of a longshoreman arising out of such operations.

FACTS: On October 3, 1987, Clark Hines (Hines), a longshoreman who was employed by Ceres Terminals, Inc. (Ceres), was killed while performing stevedoring duties aboard the M.S. Ravenna (the Ravenna). British Steel Corporation (BSC) had time chartered the Ravenna from its owner, Roscoe Shipping, S.A., and had docked the vessel in Chicago on October 1, 1987 to unload a cargo of steel. The master and the crew of the Ravenna were employees of Roscoe Shipping.

Just prior to the accident, the steel had been completely unloaded from the Ravenna. Hines and other Ceres employees were clearing dunnage (pieces of lumber used to protect cargo during transport) out of the ship's holds. Captain Tore Sorenson, a Ceres superintendent, was in charge of the stevedoring operations aboard the Ravenna. At the time of the accident, BSC's cargo representative, John Folan, was not on board the vessel.

An unused bundle of dunnage was secured with Ceres owned slings to one of the ship's cranes. The crane operator then improperly swung the loaded crane over the open hatch of the hold in which the men were working. Swinging a loaded crane over an open hatch while men are working below is a forbidden activity and Ceres crane operators are instructed not to do so. For no discernible reason, the bundle of dunnage fell from the crane and struck a dumpster in the hold. The bundle broke apart, and pieces of flying dunnage struck Hines, who later died.

Rachelle Hines, wife of the decedent, brought this action as special administrator of his estate under the Longshore and Harbor Workers (LHWCA), 33 U.S.C. §905 (b), against BSC to recover damages for her husband's death. She filed the suit in the Circuit Court of Cook County, Illinois, but BSC removed it to the United States District Court for the Northern District Of Illinois. BSC then moved for summary judgment on the grounds that it had no general duty to supervise stevedoring operations aboard the Ravenna. The plaintiff asserted that the various agreements BSC made with Ceres and Roscoe Shipping showed a clear intent by BSC to control Ceres unloading operations.

The district court granted summary judgment in favor of BSC, finding that BSC was amenable to suite under the LHWCA but concluding that the Supreme Court decision in *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156 (1981) precluded a finding that BSC had a general duty to oversee Ceres operations. The court found that the language of the charter party, together with Captain Sorenson's testimony that Folan took no part in the actual stevedoring operations, indicated that BSC had no special duty to ensure the safety of the longshoremen. Rachelle Hines appealed the decision.

ISSUE: Did BSC, a time charterer, owe a duty to Ceres, an independent stevedoring contractor, to supervise the stevedoring operations aboard the Ravenna?

ANALYSIS: In *Scindia*, the Supreme Court interpreted the vessel's duty to inspect or supervise the stevedore's cargo operations under the 1972 amendments to 33 U.S.C. 905(b) as nonexistent. The court held that a shipowner "is not liable to longshoremen for injuries caused by dangers unknown to him." Although *Scindia* involved a shipowner and not a time charterer, the principles discussed there apply with equal force to the present case.

In this case, the crane was in good working condition, the dangerous act of the crane operator was unforeseeable, and the BSC cargo representative was not on board the vessel at the time of the accident. Under these conditions, the court found, BSC is not liable pursuant to *Scindia*, absent an express contractual agreement. Appellant argued that BSC contractually undertook control of the stevedoring operations and therefore had a duty of care to the Ceres employees under Restatement of Torts (Second) 414. The court noted that the comments to Section 414 suggest that the right to make recommendations, to inspect, and to order work stopped or resumed is not enough to constitute retention of control, and that there must be a retention such that the stevedore cannot do the work in his own manner. The court also noted that few courts have applied Section 414 in the context of a lawsuit under Section 904(b) of the LHWCA, but the Supreme Court in *Scindia* recognized the Restatement as a useful analytical tool. However, the court also remarked that Section 414 does not address the contractual relationship between BSC and Roscoe Shipping. Accordingly, it is applicable only to the various agreements between BSC and Ceres. Since BSC did not retain the requisite degree of control of stevedoring operations outlined in Section 414, no duty is imposed on BSC by this section.

Appellant further argued that clause 8 of the charter agreement between BSC and Roscoe Shipping, together with paragraph "j" of BSC's instructions to the ship's Master, gave BSC control over the discharging of the cargo. Paragraph "j" gave BSC the right to appoint a stevedore, who was to remain under the direct control of the ship's Master. Clause 8 of the charter party provided in relevant part that the captain would be under the orders of BSC and that BSC was to "load, stow, trim and discharge the cargo at its own expense *but such stowage shall be conducted by and under the control of the Master and the Owners shall be responsible for the proper stowage and correct delivery of the cargo.*" The court observed that clause 8 is a stan-

ard provision in a charter party. *Spence v. Mariehamns RIS*, 766 F.2d 1504 (11th Cir. 1985). But, the court stated, the amended part of clause 8 included in the charter party between BSC and Roscoe Shipping did not place the responsibility of proper discharge of cargo on BSC. *Irby v. Tokai Lines*, 1990 WL 18880, 1990 U.S. Dist. Lexis 2116 (E.D.PA. Feb 23, 1990).

The court concluded that the plain language of clause 8 contained no suggestion that BSC had a duty to supervise, and that the appellant failed to present any extrinsic proof that BSC and Roscoe Shipping meant to impose such a duty. Therefore, the court rejected Mrs. Hines' contention that clause 8 was an agreement between the parties placing the responsibility for the safety of the longshoremen during cargo operations on BSC.

Appellant's final argument was that BSC had such control over the stevedoring operations as to raise a duty on BSC's behalf to ensure the safety of Ceres employees. She called attention to the right of BSC's cargo representative to be present during the discharging of cargo, his

right to make suggestions, and to the ten pages of instructions on proper handling of BSC cargo given to Ceres. The court concluded that Folan merely regulated the proper handling of BSC cargo so as to avoid any damage to it, and that the ten pages of instructions were simply a "laundry list" of suggestions on how to handle the various products BSC ships. BSC in fact retained no actual control over the stevedoring operations. Therefore, no duty could be imposed on BSC to ensure the safety of the longshoremen.

As the depositions of Sorenson and Folan support the finding that BSC was not in any way involved in the operative control of the stevedoring operations, and as Sorenson testified that the responsibility to ensure the safety of his workers was his own, the Court of Appeals found no general duty, under *Scindia*, for BSC to supervise stevedoring operations, and no contractual agreements imposing such a duty. Therefore, the court affirmed the judgment of the district court granting summary judgment in favor of BSC.

Katherine Vasilopoulos '92

AFRAM LINES INTERN., INC. V. M/V CAPETAN YIANNIS

United States Court of Appeals, Eleventh Circuit, 19 June 1990

905 F.2d 347

Absent extraordinary circumstances, plaintiff need not post countersecurity in amounts exceeding the security of the original claim when the plaintiff does not seek to release its property from the counterplaintiff's custody and when the counterplaintiff cannot proceed *in rem* or *quasi in rem*.

FACTS: In December, 1987 Brotherhood Shipping Company, Ltd. (Brotherhood), owner of the M/V Capetan Yiannis (the vessel) entered an agreement with a nonparty, Grant Shipping Company, and Afram Lines International, Inc. (Afram), a Florida corporation. Under the agreements the vessel was to be subchartered to Afram and was to carry cargo for Afram from Milwaukee, Wis., to West Africa. The vessel would be commanded by a Brotherhood employee.

On December 12, 1987 the parties took the vessel to the port of Milwaukee and began to load cargo. On December 14, the harbor master issued a notice to all affected vessels of an impending storm. After allegedly receiving ambiguous advice from Afram's Milwaukee representative, the vessel master decided to keep the vessel tied to the dock. During the storm the vessel's mooring lines split and the vessel was pushed repeatedly against the dock causing both vessel and dock substantial structural damage.

Afram promptly filed an action in the Eastern District of Wisconsin seeking recovery *in rem* against the vessel and *in personam* from Brotherhood for \$1.7 million in damages for Brotherhood's alleged negligence, conversion, and breach of the subcharter agreement. In response to Afram's demand of security Brotherhood agreed with Afram to post a \$440,000.00 bank guarantee, thereby avoiding arrest of the vessel.

Afram then instituted an action in the United States District Court for the Middle District of Florida. Brotherhood filed an answer and a counterclaim. The counterclaim alleged that Brotherhood had sustained damages in the amount of \$4,724,475.74 which was attributable to Afram's own conduct. After filing the answer and counterclaim Brotherhood filed a motion pursuant to Rule E(7) of the Supplemental Rules for Certain Admiralty and Maritime Claims (Rule E(7)), to compel Afram to post countersecurity. The district court granted the motion and ordered Afram to post security to the full stated amount of Brotherhood's claim. Afram filed a motion for reconsideration, which was denied. Afram appealed the decision to the United States Court of Appeals for the Eleventh Circuit.

ISSUE: Did the district court err in ordering the plaintiff to post countersecurity in amounts exceeding the security of the original claim when the plaintiff did not, by posting countersecurity, seek to release its property from the counterplaintiff's custody and when the counterplaintiff could not bring an action *in rem* or *quasi in rem*?

ANALYSIS: The Court of Appeals for the Eleventh Circuit vacated the order of the district court, finding that the district court had abused

its discretion in requiring Afram to post the sum.

In its decision the court looked first at Rule E(7). The court found that the rule stands for the proposition that in the event of a counterclaim, where the defendant had given security to respond in damages, the plaintiff shall give security in the usual amount and form to respond in damages to the claims found in the counterclaim, unless the court, for cause shown, otherwise directs. The purpose of the rule, the court noted, is to "place the parties on an equality as regards to security."

Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co., 263 U.S. 629, 638-39 (1924). The court further found that to effectuate Rule E(7) the district court has broad discretion to determine whether, and to what amounts, countersecurity shall be posted.

Despite this broad discretion, the court stated that the district court should consider several factors. For example, it should be reluctant to order countersecurity if the plaintiff does not, by the posting of countersecurity, seek to release its property from the counterplaintiff's custody. *Expert Diesel, Inc. v. The Yacht "Fishin' Fool"*, 627 F. Supp. 432 (S.D.Fla.1986). The court also held that it should be determined whether the counterplaintiff could have brought an action *in rem* or *quasi in rem* for in the event that the counterplaintiff could not have proceeded in this manner, there would be little reason to require a larger bond on the counterclaim than on the original claim. In addition, the court held that the district court should look at the plaintiff's financial ability to post the countersecurity. Finally, the court held, it should be considered to what extent the counterclaim may be frivolous.

Applying the facts, the court of appeals concluded that Afram did not seek to release any of its property from Brotherhood's custody by posting countersecurity. It also found that Brotherhood could not proceed *in rem* or *quasi in rem* and that Brotherhood sought its recovery from Afram *in personam*. With these two factors present, the court ruled that district courts should not, absent extraordinary circumstances, require claimants, like Afram, to post countersecurity in an amount which exceeds the security posted on the original claim. Thus the court held that the district court had abused its discretion when it ordered Afram to post full countersecurity.

John Froitzheim '92