



**5<sup>th</sup> Circuit Narrows Turnover Duty Owed by Vessel Owners in *Kirksey v. Tonghai Maritime*, 2008 WL 2735870 (5<sup>TH</sup> Cir. July 15, 2008)**

A vessel owner generally owes three duties to a longshoreman: (1) warning the stevedore of any hidden dangers that are not open and obvious (the turnover duty); (2) protecting against hazards from areas or equipment under the vessel's control (active control duty); and (3) intervening when the vessel's crew knows of a serious hazard and knows the stevedore decides to ignore the risk (duty to intervene). *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 165-67 (1981).

The turnover duty is two-fold: a duty to provide a reasonably safe ship in the first instance, and a duty to warn of dangerous conditions. While the open and obvious defense applied to the turnover duty to warn, often plaintiffs would argue the open and obvious condition still constituted a breach of the shipowner's turnover duty to provide a reasonably safe vessel, regardless of any duty to warn.

***Kirksey v. Tonghai Maritime***

*Kirksey v. Tonghai Maritime*, 2008 WL 2735870 (5<sup>th</sup> Cir. July 15, 2008), involved a longshoreman injured by shifting cargo while discharging a vessel in Houston, Texas. The lower court found that the steel coils and pipe were poorly stowed which made it difficult to discharge the cargo. It found that the longshoreman had done the best they could and that their only real choice was to unload the cargo or leave the job. Based upon these findings, the district court held the vessel owner responsible for failing to exercise reasonable care to have the vessel in such a condition that an expert and experienced stevedore could safely unload the vessel. The district judge also found the owner had failed to warn the stevedore to the danger of possibly shifting cargo. *Kirksey v. Tonghai Maritime*, 2008 WL 2735870 p.2. Citing the Supreme Court's *Howlett* decision, the Fifth Circuit described the narrow turnover duty owed by a vessel owner as follows:

In sum, the vessel's turnover duty to warn of latent defects in the cargo stow and cargo area is a narrow one. The duty attaches only to latent hazards, defined as hazards that are not known to the stevedore, and that would be neither obvious nor anticipated by a skilled stevedore in the competent performance of his work.



*Id.* (citing *Howlett v. Burkdale Shipping Co.*, 512 U.S. 92, 98 (1994)). The Fifth Circuit noted that *Howlett* had confirmed the viability of the open and obvious defense in cases involving the turnover duty to warn. The *Howlett* court, however, did not decide whether this defense was applicable to the turnover duty to provide a reasonably safe vessel, as opposed to the turnover duty to warn. In *Kirksey*, the Fifth Circuit nevertheless found that the *Howlett* decision was helpful in resolving this question as *Howlett* had (1) emphasized that the turnover must be defined in relation to the role of the stevedore and the ship owner, (2) held the ship owner has a right to expect that the stevedore would perform with reasonable competence and see to the safety of the cargo operations, and (3) held the imposition of a duty upon the vessel owner to inspect and supervise cargo operations would undermine Congress' intent in terminating the vessel's automatic faultless responsibility for conditions caused by the negligence or other defaults of the stevedore. *Id. at p.4*. Considering situations where a longshoreman claims to be injured by cargo that was improperly stowed at a prior port the *Howlett* court noted:

As we held in *Scindia Steam*, [as] a vessel need not supervise or inspect ongoing cargo operations for the benefit of longshoremen then on board, it would make little sense to impose the same obligation for the benefit of longshoremen at subsequent ports.

*Howlett*, at p.102-103. The *Howlett* court further considered the plaintiff's argument that a vessel must inspect the cargo after stevedoring loading operations are complete to discover hazards in the stow. The *Howlett* court rejected this argument noting:

Any hazard uncovered by a ship owner who inspects a completed stow would, as a matter of course, be discovered in a subsequent port by a stevedore 'reasonably competent in the performance of his work.' . . . Once loading operations are complete, it follows that any dangers arising from an improper stow would be at least as apparent to the [stevedore] as to the [ship owner].

*Howlett at p.104.*



In its recent *Kirksey* decision, the Fifth Circuit agreed with this analysis and noted that *Howlett* strictly limited the vessel's turnover duty to warn of latent defects and dangers. The Court found "it makes no sense to say that the vessel is nevertheless liable to the longshoreman for breach of the duty to turnover a safe ship based upon an *obvious* defect against which it had no duty to warn." *Kirksey v. Tanghai*, at p.6 (*emphasis in original*).

The 5<sup>th</sup> Circuit rejected three of its pre-*Howlett* decisions that held the open and obvious defense inapplicable to the duty to provide a reasonably safe vessel. These cases were *Lemon v. Bank Lines Limited*; *Harris v. Flota Mercante*, and *Woods v. Sammissa Co., Ltd.* The *Kirksey* court found in each of these cases that the Supreme Court's *Howlett* decision undermined their prior reasoning that a ship owner may have a duty to disclose an open and obvious defect during the turnover. *Kirksey at p.7.* The *Kirksey* court concluded: "we are satisfied that our pre-*Howlett* decisions discussed above are undermined by the Supreme Court's 1994 decision in *Howlett* and they do not control this case." *Kirksey at p.7.*

The *Kirksey* court also rejected the district court's imposition of liability on the basis of, in part, its finding that the longshoremen's only real choice was to unload the cargo or leave the job. The *Kirksey* court found that this argument only applies to situations "where the dangerous condition existed in the ship's equipment or was otherwise created by the ship owner through its negligence." *Kirksey at p.7.* It noted that the only case in which it had applied the "no alternative" exception to an unsafe stow was where "the shipowner controlled the manner and method of the stow and created the dangerous condition. However there is no evidence that the shipowner negligently created the dangerous conditions in the stow, and the exception, therefore, is inapplicable." *Id.* The *Kirksey* court summed up its interpretation of *Howlett* as follows:

Thus, most of the same considerations *Howlett* gives for permitting the ship owner to assert an open and obvious defense to a failure to warn claim strongly support making the same defense available to the ship owner defending against a claim based upon the general failure to provide a safe ship based upon defects in the stow.

*Kirksey at p.5.*



ADMIRALTY AND  
MARITIME MATTERS

AUGUST 2008

The Court then commented that its conclusion was confirmed by a closely analogous case from the Ninth Circuit, *Riggs v. Scindia Steam Navigation Co.* In *Riggs*, the loading stevedore had improperly stowed a cargo of pipe which was strewn about the hold in an obviously hazardous manner. The district court granted summary judgment holding that the vessel owner had no legal duty to prevent or alleviate the unsafe condition because the dangers were open and obvious to the longshoreman. The Ninth Circuit reversed, holding that “the open and obvious defense did not absolve the vessel owner from the turnover duty to provide a reasonably safe vessel.” *Kirksey at p.5*. The Supreme Court vacated the 9<sup>th</sup> Circuit’s judgment and remanded further consideration in light of *Howlett*. On remand, the Ninth Circuit affirmed the district court’s summary judgment. *Id.* (citing *Riggs v. Scindia Steam Nav. Co.*, 35 F.3d 1466 (9<sup>th</sup> Cir. 1994)).

The 5<sup>th</sup> Circuit concluded:

A fair reading of these opinions [*Howlett and Riggs*] compels the conclusion that the open and obvious defense is applicable to the turnover duty to provide a safe vessel and that the vessel owner has no legal duty to prevent or alleviate an unsafe condition in the cargo hold resulting from an improper stow when the condition is open and obvious to the longshore workers.

*Kirksey v. Tanghai at p.6 (quoting Clavy Daichai at p.671)*. As a result, if a defect in the stow is open and obvious, the vessel has no turnover duty to warn, and no liability for breach of the turnover duty to provide a reasonably safe ship. *Kirksey at p.6*.



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