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**Supreme Court of the United States**

October Term, 1968

Office-Supreme Court, U.S.  
**FILED**

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JOHN F. DAVIS, CLERK

**In the Matter of:**-----X  
FERERAL MARINE TERMINALS, INC.,

Petitioner

VS

BURNSIDE SHIPPING COMPANY, LIMITED

Respondent  
-----X**Docket No.** 291

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**Place** Washington, D. C.**Date** January 15, 1969**ALDERSON REPORTING COMPANY, INC.**

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Washington, D. C.

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C O N T E N T S

ORAL ARGUMENT OF:

P A G E

John W. Hough, Esq. on behalf of the Petitioner

3

Paul Mc Cambridge, Esq. on behalf of the  
Respondent

15

REBUTTAL ARGUMENT OF:

John W. Hough, Esq. on behalf of the Petitioner

41

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 -----X  
4 FEDERAL MARINE TERMINALS, INC., :

5 Petitioner, :

6 vs. :

No. 291

7 BURNSIDE SHIPPING COMPANY, LIMITED, :

8 Respondent :

9 -----X  
10 Washington, D. C.

11 January 15, 1969

12 The above-entitled matter came on for argument at

13 1:35 p.m.

14 BEFORE:

15 EARL WARREN, Chief Justice  
16 HUGO L. BLACK, Associate Justice  
17 WILLIAM O. DOUGLAS, Associate Justice  
18 JOHN M. HARLAN, Associate Justice  
19 WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
ABE FORTAS, Associate Justice  
THURGOOD MARSHALL, Associate Justice

20 APPEARANCES:

21 JOHN W. HOUGH, ESQ.  
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24 Chicago, Illinois 60603  
25 Counsel for Petitioner

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5 Counsel for Respondent  
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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 291, Federal Marine Terminals, Inc., Petitioner, versus Burnside Shipping Company, Limited.

Mr. Hough?

ARGUMENT OF JOHN W. HOUGH, ESQ.

ON BEHALF OF THE PETITIONER

MR. HOUGH: Mr. Chief Justice, may it please the Court:

One Gordon McNeill, a stevedore-employee of the Petitioner, Federal Marine Terminals, Inc., fell into the No. 3 deep tank of the vessel OTTERBURN, owned by the Respondent, on June 2, 1965, and was killed. Thereafter, his widow filed a wrongful death action against the vessel owners.

In a separate action the vessel owners, Burnside Shipping Company, the Respondent, filed an action under the Ryan Stevedoring Doctrine, seeking indemnification of any amounts which they had to pay to the widow.

In a counterclaim of this petitioner, petitioner sought to bring a direct action against the vessel, the petitioner being a stevedoring contractor, and sought to recover all the damages that it was exposed to under the Longshoremen's and Harbor Workers' Compensation Act, which had a potential total liability of \$70,000.

That counterclaim was dismissed upon the motion of

1 the Respondent in the District Court. The dismissal was  
2 affirmed in the Seventh Circuit.

3 We are here on the limited question, and we submit  
4 to this court that the question is, is there a stevedoring  
5 contract implied in fact running directly between the vessel  
6 owner and the stevedoring contractor?

7 We submit that the corollary question fairly  
8 encompassed within that issue is, does the Longshoremen's  
9 and Harbor Workers' Compensation Act act as a shield to the  
10 vessel owner to isolate the vessel owner from any liability  
11 directly against the stevedoring contractor?

12 Q Was the stevedoring contract made with the  
13 owner, the vessel owner or the charterer of the vessel?

14 A It is outside the record, Your Honor.

15 Q The reason I ask the question is I notice  
16 something in the briefs about it.

17 A There is an allegation in the brief of the  
18 Respondent that the stevedoring contract was made between  
19 the time charterer and the stevedoring contractor.

20 Q But that is a fact that destroys any basis for  
21 the implied contract, isn't it, with the vessel owner?

22 A We submit not, Your Honor. The time charterer  
23 is not in control of the vessel. It is only in control --  
24 insofar as before this court, it was an unwritten contract,  
25 and the time charterer only controls where the vessel is

1 going, not the crew or the or the operation of the vessel by  
2 its crew, the crew being under the control of the vessel  
3 owner, the time charterer controlling if the vessel is going  
4 from one city or one port to another.

5 We submit that it is not dispositive at all of this  
6 issue and that it does not bar this question.

7 Q Your claim, then, is entirely contractual in  
8 nature and doesn't rest in tort at all?

9 A Not at all, sir. It is based on the contract.

10 Q Is there any tort theory that would be of any  
11 aid to you? I suppose whoever is responsible for the  
12 condition of the vessel would have some obligations to the  
13 people who are on it just in ordinary tort.

14 A Yes, Your Honor, but we submit that this is  
15 based purely on the contract. We abandoned any resort to a  
16 tort theory.

17 Q Should I ask why, or is that forbidden?

18 A I would state bluntly under a tort theory, if  
19 we sued, we would sue as subrogee.

20 Q Why, because you think the Harbor Workers Act  
21 would catch you there?

22 A Yes, Your Honor. We would sue as subrogee, and  
23 then under the Ryan Doctrine the shipowner would turn around  
24 and sue the stevedoring contractor, and---

25 Q Is it because of some negligence of the one in

1 control of the ship certain equipment of the stevedore which  
2 is brought on the ship is damaged, along with an employee of the  
3 stevedore? Certainly the stevedore might in tort be able to  
4 recover for damages to the equipment, wouldn't he?

5 A Yes, Your Honor, but that is not the instant  
6 case before this court.

7 We suggest and urge to this court that the Ryan  
8 Stevedoring Company case in 1956 established that there was a  
9 stevedoring contract, even though unwritten, which was implied  
10 in fact. Under this stevedoring contract certain duties were  
11 owed by the stevedoring contractor directly to the vessel  
12 owner. If a violation of those duties by the stevedoring  
13 contractor, the very essence of that duty having been defined  
14 in that case as being the proper performance of the stevedoring  
15 contract, either offloading or onloading the cargo -- if there  
16 be a violation of those duties, the vessel owner could recover  
17 complete indemnification from the stevedoring contractor for  
18 any amounts that the vessel owner became obligated to pay to an  
19 employee of the stevedoring contractor who was injured aboard  
20 the vessel.

21 That case focused on side of that relationship, the  
22 duties owed by the stevedoring contractor to the vessel owner.  
23 It also stated that the Longshoremen's and Harbor Workers'  
24 Compensation Act did not preclude the vessel owner from being  
25 sued by the employee of the stevedoring contractor under a



1 tort theory and the vessel turning around, if there was a  
2 judgment against him by the stevedore, and recovering the  
3 full amount of that judgment directly from the stevedoring  
4 contractor, based on a breach-of-contract theory.

5 This court announced in that decision that the tort  
6 theory was not to be confused with the contract theory, that  
7 the action by the vessel owner against the stevedoring  
8 contractor was directly based on contract and not any tort  
9 theory.

10 We read in the Weyerhaeuser Steamship Company case  
11 in 1958 the warning announced by this court that the vessel  
12 owner can be precluded from recovering directly from the  
13 stevedoring contractor if there might be conduct on his part  
14 to preclude such recovery. This court did not go further to  
15 define what that might be.

16 In 1959, in Hugen versus Dampskisaktieselskabet  
17 International, the District Court, which was affirmed by the  
18 Ninth Circuit -- and certiorari was denied by this court --  
19 the District Court announced what the duties of the vessel  
20 owner were under the stevedoring contract, even though it be  
21 unwritten, stating that these were implied in fact. In essence  
22 these duties were to provide a reasonably safe place to work  
23 and to give warning of any latent danger. These duties we have  
24 quoted in length in our brief, and I briefly summarize them.  
25 But, in essence, those are the duties.

1 In the Hugen case, because the stevedoring contractor  
2 knew of a violation of these duties by the vessel owner and  
3 thereafter assumed the risk, recovery was denied. But these  
4 duties were thoroughly announced in that case.

5 In the Hugen case there was the statement that the  
6 stevedoring contractor did not board the vessel at its own  
7 peril. The owner does not turn over to the stevedoring  
8 contractor a vessel in any condition.

9 We submit to this court that there must be a reason-  
10 able time for the stevedoring contractor to inspect that  
11 vessel and to discover and correct any faults in that vessel  
12 that might exist.

13 If the shipowner can turn over to the stevedoring  
14 contractor a vessel in any condition, be there hatchboards or  
15 otherwise which are misplaced or weak, then we suggest this  
16 would encourage willful and wanton misconduct, because under the  
17 Ryan Doctrine the stevedoring contractor has almost an  
18 absolute liability for indemnification to the vessel owner.

19 Q But the shipowner is always going to be liable  
20 to the injured workmen, isn't he?

21 A Yes, Your Honor, usually.

22 Q Something very close to absolute liability  
23 under the Unseaworthiness Doctrine---

24 A Yes, Your Honor.

25 Q ---plus liability for negligence, I suppose.

1 A Yes.

2 Q And this, I should think, would operate as  
3 something of a sanction against the shipowner to keep a  
4 seaworthy and shipshape ship, wouldn't it?

5 A But it doesn't in all cases.

6 Q This theory of yours, has any court accept it  
7 ever?

8 A In the Hugen case it was announced.

9 There is a contract---

10 Q I mean this theory of yours of recovery.

11 A Of a contract?

12 Q By the employer who has to pay under the  
13 Longshoremen's and Harbor Workers' Compensation Act---

14 A No, that hasn't---

15 Q Recovering over against the shipowner---

16 A That theory has never been tested.

17 Q Your theory has never been advanced before,  
18 much less prevailed. Is that right?

19 A It has never been tested in any court other  
20 than this case.

21 Q You do have, of course, under the statute  
22 certain rights of subrogation, don't you?

23 A We have rights of subrogation, yes, sir.

24 Q And it is only because of the statute that you  
25 are liable at all, isn't it?

1 A No, Your Honor. Before that statute there was  
2 liability.

3 Q You were liable with fault---

4 A No---

5 Q It is only because of the statute that you are  
6 liable without fault. Isn't that true?

7 A It was extended to without fault, the Long-  
8 shoremen's and Harbor Workers' Compensation Act.

9 Q Yes.

10 A The Ryan case announced that there was an  
11 implied, in fact, contract. This court has announced only what  
12 duties flow from the vessel owner from the stevedoring  
13 contractor to the vessel owner under that contract.

14 This court has never announced what duties flow from  
15 the vessel owner to the stevedoring contractor under that  
16 contract. We suggest it is not a unilateral contract and that  
17 duties must flow from each side to the other.

18 Q Are you claiming on an implied kind?

19 A Yes, Your Honor. Even though Your Honor  
20 disagrees with the majority opinion in the Ryan case, we rely  
21 on the majority opinion on that. And since there is a contract  
22 announcement implied in fact, we say it has to flow both ways,  
23 the duties thereunder.

24 Q What would be the implied duties?

25 A The implied duties are announced in the Hugen



1 case and are essentially summarized as "a duty by the vessel  
2 owner to provide a reasonably safe place to work." We don't  
3 say "a safe place." We don't say to hand over an seaworthy  
4 vessel. We say only "a reasonably safe place to work."

5 Q So you would define by "contract" what essen-  
6 tially might be in terms of tort law owed to visitors or  
7 invitees.

8 A Essentially -- not invitees, no, just a  
9 reasonably safe place to work.

10 Q For whom?

11 A For the employees of the stevedoring contractor  
12 and for the stevedoring contractor, when he puts his employees  
13 aboard.

14 Q Which is about the same duty you would owe them  
15 in tort law?

16 A The employees or the stevedoring contractor?

17 Q The stevedore and his employees.

18 A No, Your Honor, because under the admiralty  
19 law to the employees of the stevedore under the Sieracki  
20 Doctrine, the vessel owner is to supply those employees with a  
21 seaworthy vessel.

22 Q That is right.

23 A That is a liability without fault.

24 Q Yes, but a violation thereof.

25 A We don't claim---

1 Q Yes, but can a stevedore sue the shipowner also  
2 in tort? He can sue him both for unseaworthiness and for  
3 tort on the negligence theory, can't he?

4 A Yes, both.

5 Q So you are really implying that the negligence  
6 standards that the shipowner would owe to the stevedore and his  
7 employees---

8 A I differentiate -- I must, because of the  
9 announcements of this court -- between the stevedoring  
10 contractor and his employees.

11 Q Right.

12 A I repeat, under the Sieracki Doctrine the duty  
13 of the vessel owner to supply to the stevedoring employees---

14 Q How did the Hugev case arise?

15 A The Hugev case arose in a very similar manner  
16 as the instant case, and an employee sued the vessel for  
17 unseaworthy condition.

18 Q Here that is not this case.

19 A I am sorry, Your Honor. I relate the previous  
20 case -- these are two different cases. These are two cases  
21 below.

22 The employee filed an action against the vessel.  
23 Thereafter, in this instant action, in a separate action, the  
24 vessel sought complete indemnification from the stevedoring  
25 contractor under the theory of the Ryan case, the implied, in

1 fact, contract, as announced.

2 Q Are you talking about this case or the Hugev  
3 case in that description?

4 A In this case -- that is the way this latter  
5 case grew up, too.

6 Q Yes. Now, how did the Hugev case arise?

7 A The same situation. A stevedoring employee  
8 sued the vessel owner, and thereafter the vessel owner sought  
9 indemnification from the stevedoring contractor.

10 Q And what happened?

11 A The stevedoring employee recovered---

12 Q Against the shipowner?

13 A ---against the shipowner. And the stevedoring  
14 contractor had sought indemnification, and was prohibited from  
15 it due to the fact that they had assumed the risk.

16 But in Hugev case, which we have set forth in our  
17 opening brief, the duties that the vessel owner owes directly  
18 to the stevedoring contractor. In the Hugev case the Court  
19 decided there was the contractual relationship directly  
20 between the vessel owner and the stevedoring contractor, even  
21 though unwritten.

22 This court has said that in Ryan case, too, but this  
23 court has never passed upon the question of the duties flowing  
24 from the vessel owner to the stevedoring contractor. It has  
25 never announced those. That has only been announced below,

1 and certiorari had been denied here in that case.

2 It was held by the Seventh Circuit that the  
3 Longshoremen's and Harbor Workers' Compensation Act isolated  
4 the vessel owner from all liability to the stevedoring  
5 contractor. That case in the decision rendered by the  
6 Seventh Circuit went further to state that the Longshoremen's  
7 and Harbor Workers' Compensation Act is the source of all  
8 remedies existent to the stevedoring contractor against the  
9 vessel owner.

10 We submit to this court that that is far beyond the  
11 intendments of the act. Section 904(a) imposes on the  
12 stevedoring contractor a liability without fault. Taking away  
13 from the employee is common-law liability and giving him a  
14 quid pro quo.

15 Section 904(b) provides that the liability of the  
16 stevedoring employer is the exclusive liability to a certain  
17 class, namely, the stevedore and all other persons claiming  
18 under and through him.

19 However, Section 933(i) of the act warns us that  
20 the Longshoremen's and Harbor Workers' Compensation Act only  
21 applies to this class of people. It does not go further.

22 The basic provision and reason for the Longshoremen's  
23 and Harbor Workers' Compensation Act was to replace the common-  
24 law liability, which was only possible, with an absolute  
25 liability, which was completely without fault but a liability



1 and a lesser liability by the stevedoring contractor to his  
2 employees and a resultant lesser liability.

3 The act, we submit, had no bearing whatsoever on the  
4 relationship between the stevedoring contractor and the vessel  
5 owner. True, there is a right to subrogation by the  
6 stevedoring contractor to the claims of his employees against  
7 third-party tort-feasors under Section 933(b).

8 Prior to the Ryan case it was mandatory. Perhaps  
9 the dissenting opinion in the Ryan case caused Congress to  
10 change its mind and amend it, so that now only if the person  
11 who is entitled to compensation under the act commences an  
12 action against a third party within that six months after an  
13 award and compensation is the action assigned, is the cause of  
14 action assigned to the employer.

15 MR. CHIEF JUSTICE WARREN: Mr. McCambridge.

16 ARGUMENT OF PAUL MC CAMBRIDGE, ESQ.

17 ON BEHALF OF THE RESPONDENT

18 MR. MC CAMBRIDGE: Thank you, Mr. Chief Justice.

19 May it please the Court:

20 I would first direct my answer to Mr. Justice Harlan's  
21 inquiry about whether the vessel was on time charter or whether  
22 the owner had entered into some contractual relationship with  
23 the stevedore.

24 The answer is in the record. There was an allegation  
25 in the libel that -- it is on page 5 of the Appendix. It is

1 paragraph 7 of the libel, in which we allege that the work of  
2 the Respondent was being performed pursuant to an agreement  
3 between the Respondent and the time charterer of the vessel,  
4 Federal Commerce and Navigation Company, Limited, a corporation  
5 affiliated with the Respondent. Then on page 9 of the  
6 Appendix that allegation in the libel is admitted. So I don't  
7 think there is too much question that the vessel was under time  
8 charter, and certainly that leads us right into immediately  
9 one of the principal contentions that we make to this court.  
10 That is that there is no privity of contract between the  
11 stevedore and the Petitioner -- I am sorry, the stevedore and  
12 the shipowner.

13 Therefore, absent a contractual relationship,  
14 certainly there cannot be any implied duties running from the  
15 shipowner to the stevedore.

16 Q Would the stevedore owe the shipowner any duties  
17 under Ryan?

18 A Yes, sir.

19 Q In spite of lack of privity?

20 A Yes, sir. I think that has been---

21 Q Contractual duties?

22 A Yes, sir. That was decided by this court that  
23 the shipowner was a beneficiary of the contract between the  
24 stevedore and time charterer. I think it was Reed versus  
25 Yaka Steamship Company.

1 Q A beneficiary, which would be different than  
2 making him liable on the contract.

3 A I think this is one of my opponent's principal --  
4 it seems to really trouble him that he feels he doesn't have  
5 an equal shot at the shipowner, that he is under some more  
6 stringent obligation to the shipowner than the shipowner is  
7 to the stevedore.

8 The Petitioner's counterclaim upon which it bases  
9 its claim to indemnity is based upon allegations that the  
10 shipowner was negligent and that the shipowner breached a duty  
11 owed to the stevedore that it would furnish its longshoremen  
12 employees a safe place to work on board the vessel.

13 Q All we have before us in this case -- and tell  
14 me if I am mistaken, because maybe I am -- but I understood  
15 all we had before us in this case was the grant of a summary  
16 judgment to your client on the Petitioner's counterclaim.  
17 Is that right?

18 A That is correct, Mr. Justice. The Court agreed  
19 with us that the counterclaim was defective as a matter of  
20 law, because---

21 Q As a matter of law.

22 A ---because essentially it stated a tortious  
23 claim of action rather than one under contract.

24 Q The Court denied a counterclaim on the other  
25 branch of the case. It denied a summary judgment on the case.

1 A Yes, sir.

2 Q It denied a summary judgment on the claim but  
3 granted a summary judgment on the counterclaim as a matter of  
4 law, holding, among other things, that the Federal statute  
5 was controlling in this situation and granted subrogation.  
6 Do I misunderstand what that is---

7 A That is correct, Mr. Justice.

8 Q I gather you argue, then, that whether there is  
9 an implied provision in the contract between the time charterer  
10 and the stevedore or not, that does not make the shipowner  
11 liable.

12 A This is a question that is not really before  
13 this court. This could arise, and it will arise, I think,  
14 with the efforts being made by shipowners to contractually --  
15 I am sorry -- not shipowners -- by stevedores to contractually  
16 work their way out of the predicament they are in, where they  
17 find themselves many times responding to what they consider is  
18 the ship's liability in this area of the law, where the  
19 shipowner has his right to indemnity against the stevedore  
20 for breach of its warranty of safe performance in the service  
21 of the vessel.

22 Q You don't urge here that the shipowner should  
23 be shielded simply because there is a lack of privity?

24 A No, sir. This is ancillary---

25 Q You are saying that he isn't liable here because



1 there is no provision in the contract to this effect?

2 A That is correct. That is---

3 Q You don't want the judgment affirmed on the  
4 other basis?

5 A No, sir. It doesn't matter to me how the  
6 judgment is affirmed.

7 We maintain that in this field of indemnity in  
8 longshoremen personal injury cases, indemnity as between a  
9 shipowner and a stevedore can be predicated only upon a  
10 contract theory of warranty.

11 Now, the stevedore's counterclaim for indemnity is  
12 premised entirely upon what we consider to be tortious  
13 conduct of the shipowner, which we say is not -- they are not  
14 duties that arise by virtue of any contractual relationship.  
15 These are duties which exist irrespective of any contractual  
16 relationship between the shipowner and a stevedore.

17 The Petitioner's counterclaim essentially has been  
18 changed. Mr. Hough has mentioned to the Court now that he is  
19 looking only for a reasonably safe place for his stevedore  
20 employees to work. However, the counterclaim itself  
21 specifically says it is based upon a purported duty owed by  
22 the shipowner to the stevedore to furnish a safe place to  
23 work.

24 Now, this duty to furnish a safe place to work is  
25 clearly a duty owed to the individual longshoremen working

1 on board the ship. It is the species of liability that was  
2 enunciated by this court in Sieracki.

3 Q But what if because of an unsafe place to work  
4 not only the stevedore's employees were injured but some  
5 equipment was destroyed belonging to the stevedore? Would you  
6 say there is no duty owed at all of the kind owed to the  
7 employees?

8 A This would depend upon the contract, I think,  
9 between the shipowner and the stevedore.

10 Q There isn't any contract between the shipowner  
11 and the stevedore.

12 A I don't think in this particular case -- I  
13 thought the Court was referring to a general obligation.

14 Q I was really referring to whether in tort the  
15 shipowner owes anything at all to the stevedore.

16 A I don't think there is any question but that---

17 Q But what he does?

18 A This is a duty generally owed to everyone.  
19 This duty to exercise ordinary care, which is spoken of by the  
20 Petitioner, the duty to warn of a hidden defect -- these are  
21 tort obligations. This court in Ryan admonished that in  
22 ascertaining a shipowner's liabilities and responsibilities  
23 that resort may not be had to principles of quasi contracts or  
24 to principles of tort liability.

25 Mr. Justice, you addressed yourself to the question

1 of what duties are owed to anyone who comes aboard a ship. I  
2 think it is clear that that question was put to rest in  
3 Kemerick, that the shipowner owes the duties to use ordinary  
4 care and to warn of hidden defects. He owes these to all  
5 persons who are lawfully aboard his vessel.

6 Therefore, it is clear, I believe, and obvious that  
7 these are not duties arising by virtue of contract but that  
8 they are independently owed duties and they are tort duties.

9 Now, the stevedore has brought his counterclaim,  
10 alleging that he has an independent cause of action against  
11 the shipowner under contract and separate from the action which  
12 is given under the Longshoremen's and Harbor Workers'  
13 Compensation Act. He says that Section 33 of that act  
14 provides a statutory method by which an employer may be  
15 reimbursed for the compensation expenditures that it must pay  
16 to its injured employees. But he says that because the act  
17 does not specifically bar an independent cause of action,  
18 therefore it should not preclude this action.

19 We feel that that argument is false, or at least  
20 the fallacy can be demonstrated by the fact that prior to the  
21 enactment of compensation statutes generally and this statute  
22 in particular, an employer had no non-negligent liability  
23 for injuries to its employees. Therefore, we feel that a  
24 proper construction of the statute says that if the liability  
25 stems from the statute, certainly then the corresponding right

1 to be reimbursed must also be predicated upon that statute.

2 I feel the Petitioner's principal complaint here is  
3 that he doesn't have a complete remedy under the Longshoremen's  
4 Act, by reason of the fact that if he takes under that act, as  
5 the assignee or the subrogee of the employee's claim, then he  
6 will be limited to the \$30,000 maximum recovery, which was  
7 permitted under Illinois law in effect at the time of this  
8 action.

9 However, it is maintained that the employer or his  
10 insurance carrier's potential liability is \$70,000. Therefore,  
11 he is going to be at least \$40,000 out-of-pocket right away  
12 if he cannot find a way to get around the Longshoremen's and  
13 Harbor Workers' Compensation Act.

14 I believe that this question of the possibility or  
15 likelihood that there would be cases in which the injured  
16 employee in bringing his cause of action against a negligent  
17 third party -- there were cases in which he would recover  
18 less from the negligent third party than he might against as  
19 a result of his entitlement to compensation benefits.

20 The Congress covered this in subsection (f) of  
21 Section 33. It isn't in the Appendix, but it is in the  
22 Petitioner's brief, on page 3 of Petitioner's brief.

23 In contemplating what would occur when there was a  
24 deficiency in the employee's recovery the Congress did not say  
25 or did not enact that the employer or his compensation carrier

1 might have a separate cause or additional cause of action  
2 against a negligent third party to recover the deficit that it  
3 might have from its right to be reimbursed or to recover from  
4 the employee's recovery. But instead, in protecting the  
5 employee, it said that the employer shall pay to the employee  
6 any deficiency between what it recovers from the negligent  
7 third party and what it was entitled to under the Compensation  
8 Act.

9         The act, I think, is designed to protect employees  
10 rather than employers, to some extent, anyway.

11         We feel that the Congress in enacting this statute  
12 specified and set forth a particular manner in which reimburse-  
13 ment could be achieved by the employer. And we feel that the  
14 mode of reimbursement under the statute is very plain. The  
15 compensation statutes have been consistently interpreted to  
16 cover the entire area of industrial injuries. And, basically,  
17 where Congress has provided a means of recovery, I don't  
18 think it is necessary to go outside the act. I think the  
19 recovery must be found within the four corners of the act.

20         We certainly feel that Congress did not intend that  
21 there should be two recoveries for a single tort.

22         The second aspect of this question that is before the  
23 Court is, how can the -- what rules do govern this area of  
24 indemnity? I think it is clear from the decisions of this  
25 court, beginning with Ryan, going under Weyerhaeuser, that



1 indemnity in these cases must be predicated entirely upon  
2 contractual warranty.

3 Q Do you mean by implied contract?

4 A It could be implied or expressed. We wouldn't  
5 have a problem if it were express.

6 Q That was the Ryan case?

7 A Yes, sir, implied warranty.

8 Q Why would not that carry over to the stevedore  
9 if he was made liable by reason of the neglect of the ship?

10 A Because it is not a contractual duty owed to  
11 the---

12 Q But the Court held it was implied contract.

13 A I am sorry. Maybe I misunderstood.

14 Q In the Ryan case.

15 A Yes, sir.

16 Q As I understand it here, an employee of the  
17 stevedoring company was killed by an alleged neglect of the  
18 ship.

19 A Yes, sir.

20 Q He had gone in there as a stevedore's employee.  
21 Now, under the Ryan case what would happen if he should sue  
22 and get a judgment against the ship?

23 A The shipowner would pay the judgment, and under  
24 Ryan he would bring his indemnity action against the stevedore  
25 employer alleging, anyway, a breach of the stevedore's

1 warranty of safe performance.

2 Q Suppose in reality it was neglect of the ship  
3 and not the neglect of the stevedore.

4 A The courts, in following this court's several  
5 decisions in this area of the law, have examined the  
6 shipowner's conduct in the context of whether this conduct  
7 has actively hindered or whether it has prevented the stevedore  
8 from safely performing its services to the vessel.

9 If the shipowner's conduct has been of that nature,  
10 then the courts merely say, "You have no right to indemnity  
11 for the amounts that you have paid to the injured employee."  
12 He cannot recover these from his employer.

13 But the courts have not gone further. They have not  
14 created the, you might say, the reverse warranty or the reverse  
15 obligation that there might be an affirmative recovery by the  
16 stevedore against the shipowner in that case.

17 Q Is this really the controversy? I am trying to  
18 get just what it is.

19 A man was killed. His wife sued. Did she get  
20 something from the stevedore?

21 A She is being paid compensation benefits, yes,  
22 sir.

23 Q By the stevedore?

24 A Yes, sir.

25 Q Now, the stevedore sets up a claim against the  
ship?

1 A Yes, sir.

2 Q He says, "I have had to pay under the law because  
3 of your neglect, and I want you to indemnify me." Is that  
4 what the case is about?

5 A That is what the case is about, yes, sir.

6 Q That is the whole thing?

7 What law was it that was passed by Congress after the  
8 Ryan case?

9 A They amended the provision in Section 33, which  
10 required an automatic assignment of the employee's cause of  
11 action against the third party to the employer. There is an  
12 automatic assignment under the old act---

13 Q Automatic assignement on the injured man?

14 A To his employer.

15 Q To his employer. Assignment of what?

16 A His cause of action against a negligent third  
17 party.

18 Q Against the ship?

19 A Yes, sir.

20 Q Why can't they recover on that assignment?

21 A They can recover on that assignment as a matter  
22 of subrogation, Mr. Justice. However, they take it as an  
23 assigned cause of action. They therefore stand in the  
24 employee's stead in bringing that suit. The employee is  
25 limited to the maximum recovery of \$30,000, which was in effect

1 under the old Illinois Wrongful Death Act at that time.

2 Q You therefore say that the stevedoring company  
3 would be limited to just what the employee could get?

4 A Yes, sir.

5 Q From his employer, the stevedore?

6 A Yes, sir.

7 Q And that is your issue?

8 A Yes, sir.

9 Q Why had the stevedore been paying out under the  
10 Longshoremen's and Harbor Workers' Act \$70,000? What amount  
11 is that?

12 A This is a potential liability which they allege.

13 Q Now, can the employee stevedore sue the  
14 shipowner on a negligence theory or an unseaworthiness theory?

15 A Yes, sir.

16 Q And either way was there a wrongful death action  
17 for unseaworthiness?

18 A Not as such. Following these courts' decisions  
19 from the late 1950s---

20 Q You could reach out if there was a state wrong-  
21 ful death statute? You could borrow it?

22 A You could borrow the concept of unseaworthiness.

23 Q Whatever cause of action he brings here is  
24 limited to \$30,000?

25 A Yes, sir.

1 Q Do they admit that, the other side?

2 A Oh, yes, sir.

3 Q Is that all they claim?

4 A I cannot speak for Mr. Hough, but what he wants  
5 to do is avoid the impact of the Compensation Act. He wants  
6 to say, "Regardless of whether there is a Compensation Act, I  
7 have a separate cause of action against this shipowner because  
8 this shipowner has been negligent."

9 Q "In addition to the subrogation right given by  
10 the Act, I have my own cause of action against the shipowner."

11 A Yes, Mr. Justice.

12 Q Not for the death of the men, though, that he  
13 has had to pay, does he?

14 A No, not for the death of the men.

15 Q What is it he claims?

16 A He claims that he has been damaged in the amount  
17 of a potential liability of \$70,000, which represents the  
18 total amount of compensation benefits that may have to be paid  
19 to the decedent's widow and to his dependent children.

20 Q Why would he have to pay that if the man if  
21 limited to \$30,000?

22 A The man is limited to \$30,000 in his recovery  
23 against me, the negligent shipowner.

24 However, under the Act there is no maximum  
25 limitation---



1 Q Amount of compensation under the Longshoremen's  
2 Act?

3 A That is correct, sir.

4 Q As against his own employer there is no limit?

5 A That is correct.

6 Q Am I correct in understanding that the question  
7 is whether the liability imposed by the Longshoremen's Act  
8 must be borne by the stevedore employer and it stops there or  
9 whether he can consider that as an element of damages and  
10 recover, therefore, against the shipowner?

11 A I think that is an aspect of the case,  
12 Mr. Justice.

13 Q The difference here is there is no doubt that  
14 the stevedore could recover up to \$30,000 from the shipowner.  
15 The question is, can he recover up to \$70,000, which is the  
16 estimated amount that he would have to pay out as in substance  
17 and insurance under the Act?

18 A Yes, sir.

19 We say that the Petitioner stevedore has not stated  
20 a cause of action under which he can recover. He has not  
21 spoken once in the area of whether there has been a breach of  
22 any implied warranty by the shipowner. We claim he is  
23 alleging merely tortious conduct.

24 Q May I interrupt there just a moment?

25 I understood you a moment ago to say to

1 Mr. Justice Fortas that the Petitioner is entitled to subroga-  
2 tion of the \$30,000.

3 A Yes, sir.

4 Q Now you say that he is entitled to no relief.

5 A He is entitled to subrogation to his employee  
6 in his employee's cause of action against us. But I say that  
7 my position is, sir, that he does not have an independent  
8 cause of action other than that given by the Compensation Act.  
9 Under the Act he is subrogated to his employee's recovery.

10 Q I see.

11 Are you just claiming that he is proceeding the  
12 wrong way? Is that what the fight is about?

13 You admit liability, \$30,000 of it.

14 A We admit that we may be liable for as much as  
15 \$30,000, yes, sir.

16 Q But you are claiming that he is not bringing  
17 suit in the right manner?

18 A I say he has no cause of action against us.

19 Q If it is subrogated to him, why hasn't he?

20 A His employee has already brought a cause of  
21 action. There is a parallel case -- two cases will be tried  
22 by the District Court. One is the widow's action against us  
23 under the wrongful death action for \$30,000.

24 Now, the stevedoring company or its insurance  
25 company will be entitled to be reimbursed from whatever the

1 widow's recovery is against us up to the amount of the compen-  
2 sation payments they have made.

3 Q On the subrogation idea?

4 A Yes, sir.

5 This, of course, is a puzzling thing, to me, anyway.  
6 If the stevedore felt that it had an independent cause of  
7 action not under the Compensation Act, why didn't it bring it  
8 directly against us rather than after the widow's action had  
9 been brought and we had to go back and bring our action for  
10 indemnity?

11 Q Has the stevedoring company been paid what  
12 it is entitled to as a subrogee?

13 A It has not as yet been paid, Your Honor?

14 Q You say they could sue you directly?

15 A They say they can sue us directly. We say,  
16 "No, you cannot."

17 Q How can they get it?

18 A They can get it through their employee's  
19 recovery against us. The only way that they can get it is by  
20 virtue of their employee's recovery against the---

21 Q How can they get it from him?

22 A Because this is the manner in which the Act says  
23 it will be recovered.

24 Q Do you mean that you pay the employee for  
25 damages---

1 A Yes, sir.

2 Q ---and they have to sue him for damages?

3 A As a matter of law they have lien against his  
4 recovery. As representing a shipowner, I cannot effectively  
5 enter into a settlement compromise without the approval of the  
6 compensation carrier, because if I do---

7 Q If you do, you may owe him too?

8 A I may owe him also, but it may cut off the  
9 employee's right to any deficiency if we settle the claim with  
10 the compensation carrier without their written approval of the  
11 settlement.

12 Q It looks to me like under your plan the  
13 stevedoring company is going to lose its right to recover,  
14 which you say it has, as a subrogee.

15 A No, sir, because there is a separate action in  
16 which the widow has brought her cause.

17 Q Why hasn't it been tried yet?

18 A No, sir.

19 Q If she gets judgment in that action, the check  
20 you make out in payment of that judgment will not be to the  
21 widow, or at least you won't pay the widow off?

22 A No, we will pay the widow off.

23 Q At that point, though, doesn't the employer  
24 receive the money?

25 A I don't know what the employer will be entitled

1 to receive from the check that we pay her, whatever it has  
2 already paid.

3 Q Let us assume that it has paid up to that date  
4 more than \$30,000.

5 A Then they will get the whole \$30,000.

6 Q How do they get it? Do they enter the lawsuit  
7 between you and the widow and say, "Please pay us rather than  
8 the widow"?

9 A They are in the lawsuit right now. They are the  
10 employer.

11 Q If they have paid out more than \$30,000 and the  
12 judgment is for \$30,000, you are going to be making out the  
13 check to the employer, to the stevedore.

14 A I think the effect of that is that it would  
15 be, yes, sir.

16 Q Maybe because I just can't understand it -- I  
17 must confess I don't quite understand it---

18 A That is my fault, sir. It is not yours. My  
19 job is to make it understandable.

20 Q No, it is mine, but I just can't quite under-  
21 stand the defense.

22 The facts are this woman is getting so much a week  
23 now, isn't she?

24 A Yes, sir.

25 Q Under the Longshoremen's Act?



1 A Yes, sir.

2 Q And whatever is paid, I understand, the amend-  
3 ment to the law gives the stevedoring company the right to be  
4 treated as subrogated to the employee's claim. Therefore, the  
5 employer, the stevedore, would be entitled to recover from  
6 somebody.

7 A That is correct, sir.

8 Now, if you want to look behind the scenes in this  
9 case -- and I don't think it effects really what has been  
10 done -- the insurance company actually has brought the suit  
11 in the widow's name. The insurance company is suing as  
12 Mrs. McNeill has sued the shipowner.

13 Q I am sure that this is just a suit between  
14 the insurance company---

15 A It is.

16 Q The practical difference is the difference  
17 between \$30,000 and \$70,000, because of the impact of the  
18 Illinois wrongful death statute?

19 A Yes, sir.

20 Q That is all the stevedoring company could be  
21 held liable for, then, \$30,000?

22 A No, sir. The stevedoring company can have a  
23 potential liability of \$70,000 if the widow does not marry  
24 until the children reach the age of 18.

25 Q And the subrogation you are talking about, is

1 that subrogation under the Longshoremen's Act, which does not  
2 give \$30,000?

3 A The Illinois wrongful death action would limit  
4 the subrogated right to \$30,000, yes, sir.

5 Q Although it has not been definitely decided  
6 that that is applicable in this claim. I notice that the Court  
7 of Appeals for the Seventh Circuit put it as quite a tentative  
8 conclusion.

9 A I don't think there is too much question about  
10 it.

11 Q But it hasn't been decided, has it?

12 A In this area of the law?

13 Q In this case.

14 A This was not a question before the Court of  
15 Appeals.

16 Q Exactly.

17 A The question merely went to whether the  
18 counterclaim for indemnity for all the costs that the stevedore  
19 might have to pay in compensations, recover its attorney's  
20 fees for suing us -- the only thing that was before the Court  
21 of Appeals was whether it stated a cause of action.

22 Q And whether or not the statutory right of  
23 subrogation was an exclusive right?

24 A Yes, sir.

25 Q That was what was decided.

1           A     Absent an express agreement between the parties.

2     I would have to make that very clear, that, of course, the  
3     parties are free to contract. But the Court of Appeals for  
4     the Seventh Circuit held that by virtue of the relationship  
5     between the parties, there was not necessarily implied any  
6     warranty running from the shipowner to the stevedore.

7           The Court of Appeals correctly reasoned that absent  
8     such an express agreement that the stevedore's exclusive means  
9     of recovering its compensation payments was by the vehicle of  
10    the action under the Longshoremen's and Harbor Workers'  
11    Compensation Act.

12          Q     Are they claiming an implied agreement to  
13    compensate them, to give them a complete recoupment for  
14    anything they had to pay out on account of that injury to the  
15    man?

16          A     Whether they stated it in so many words, I  
17    think----

18          Q     That is their claim, isn't it?

19          A     That is the claim, yes, sir.

20          Q     And we have held there is an implied contract  
21    on the part of the stevedoring company to compensate the ship  
22    for any injuries brought by its negligence.

23          A     An implied warranty.

24          Q     Why should not that implied warranty exist on  
25    both sides?

1           A     Because this court held in Ryan that the  
2 stevedore's obligation to safely perform was truly of the  
3 essence of the stevedoring contract. It was performing  
4 services to the vessel, and the essence of the contract was:  
5 "We will safely perform these." And the Court---

6           Q     I was wondering why the Court could find an  
7 implied contract in favor of the ship against the stevedoring  
8 company, for it is not doing any negligently that caused its  
9 damage. Why can't the Court find the same implied contract  
10 on the other side?

11          A     I read your dissent in the Ryan case, sir, and  
12 I can understand that this would be a reasonable approach to  
13 the question.

14          Q     One of your answers, I suppose, is that the  
15 Longshoremen's and Harbor Workers' Act prevents the  
16 implication, because it does give the stevedore a remedy but  
17 defines it.

18          A     That is one answer, Mr. Justice. I don't think  
19 it would necessarily prevent it if it were expressly agreed  
20 upon.

21          Q     I understand that.

22          A     But the duties which the stevedore urges we owed  
23 to them as a matter of contract are tort duties, the duty to  
24 use ordinary care, the duty to warn of hidden defects. These  
25 are tort duties.

1 Q Wouldn't you?

2 A I would acknowledge these are duties we owe to  
3 everyone aboard the ship, but they do not arise necessarily  
4 by virtue of the stevedoring contract, whereas this court  
5 has---

6 Q That is only a matter of semantics.

7 A Two District Court decisions in California  
8 interpreted the Hugen case, which is relied upon by my  
9 opponent -- said it isn't just a matter of semantics, but  
10 really true perspective of the reasoning is that these duties  
11 existed independent of contract and that they do not arise by  
12 virtue of the contract.

13 Q But if they do, you would admit liability,  
14 wouldn't you? If the law does give liability against the  
15 ship on that basis, would you deny liability?

16 A No, sir. But I think this really goes to the  
17 real crux of why this case possibly could be important.

18 Q I agree with that.

19 A If I may just a moment -- I don't want to---

20 MR. CHIEF JUSTICE WARREN: You may answer the  
21 question.

22 MR. MC CAMBRIDGE: If the shipowner does, in fact,  
23 impliedly warrant that it will observe a tort obligation to  
24 use ordinary care or to warn of hidden defects, or if it owes  
25 the duty to furnish a safe place to work, not only to the



1 individual longshoremen, which Sieracki says it owes, but it  
2 also owes that same duty to the stevedore employer to furnish  
3 its employees a safe place to work.

4 The whole balance in this area of indemnification  
5 between shipowners and stevedores will be thrown out of balance  
6 because in every case the fact that a shipowner has failed to  
7 furnish a safe place to work -- and that is this liability  
8 without fault. It is the absolute non-delegable duty that it  
9 has. In every case that would prevent its recovery of indemnity  
10 against a stevedore, because it would be a breach of contract.  
11 It would be a breach of warranty, that it would furnish a safe  
12 place to work.

13 Now, the cases have never held -- in fact, the cases  
14 are in accord that the shipowner does not warrant to a  
15 stevedore that it will furnish this seaworthy vessel. The duty  
16 to furnish a seaworthy vessel and the duty to provide a safe  
17 place for longshoremen to work is identical -- it is the  
18 identical obligation, really. And the injured longshoremen  
19 recover in these cases because the shipowner has breached this  
20 duty to furnish a safe place to work.

21 Q May I ask you just this one question?

22 Suppose they admit a contract with the stevedoring  
23 company to bring your men over this gangway, this walking place  
24 right here. He brings them over. It is discovered that with  
25 the knowledge of the owner of the ship that thing has been so

1 defective, it is absolutely bound to break and let him go into  
2 the sea. It broke, and he went into the sea and was drowned.  
3 What about that?

4 A In that case I would say that the injured or  
5 deceased could recover from the shipowner, and the shipowner  
6 would be prevented from recovery of indemnity from the  
7 stevedore because, obviously, the ship's gangway is something  
8 that is furnished by the shipowner. Therefore, in the first  
9 instance, the longshoremen recover.

10 The second aspect of that question would be that in  
11 the first time up a gangway the stevedore does not necessarily  
12 have a duty to inspect. This is something that is within the  
13 realm of the shipowner's responsibility. Therefore, in this  
14 case the furnishing of the defective gangway would prevent the  
15 stevedore---

16 Q Now, suppose there stood in the way of the  
17 stevedore any protection because of a decision by this court  
18 that had held that he must indemnify the shipowner even though  
19 it is the shipowner's negligence.

20 A These are not the decisions of this court.

21 Q I rather thought it was in the Ryan case. I  
22 still think so. I think there is your trouble.

23 MR. CHIEF JUSTICE WARREN: You may answer very  
24 briefly, if you wish. But we are running considerably  
25 overtime.

1 MR. MC CAMBRIDGE: I am satisfied that the Court has  
2 heard me completely.

3 MR. CHIEF JUSTICE WARREN: Very well.

4 Mr. Hough, you have a few moments if you wish to  
5 use them.

6 REBUTTAL ARGUMENT OF JOHN W. HOUGH, ESQ.

7 ON BEHALF OF THE PETITIONER

8 MR. HOUGH: I would like to point out to the Court  
9 that the Respondent recognized that changing law here would  
10 perhaps have a decided impact on the industry, in that Ryan  
11 changed the law existent up to that time and as had been  
12 enacted under the Longshoremen's and Harbor Workers'  
13 Compensation Act, long before the advent of Ryan.

14 I would like to point out to the Court that the  
15 position of the law now is, affirmed by the Ninth Circuit, the  
16 Hugen case makes the very definite statement that the law, not  
17 the holding that absent-an-express provision to the contrary,  
18 the shipowner owes to the stevedoring contractor under the  
19 stevedoring contract the implied, in fact, obligations.

20 The Ninth Circuit holds there is an implied, in fact,  
21 contract. The Seventh Circuit holds there is none.

22 We ask this court to clarify the law. And we urge  
23 that there is this implied, in fact, contract, under which  
24 duties flow both ways, and, secondly, that the Longshoremen's  
25 and Harbor Workers' Compensation Act was not designed to and

1 does not isolate the shipowner from liability to the stevedoring  
2 contract for a breach of that contract. That act has no bearing  
3 on that relationship, we suggest to this court.

4 Thank you.

5 (Whereupon, at 2:45 p.m., the hearing in the above-  
6 entitled matter was concluded.)

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