

# Supreme Court of the United States

OCTOBER TERM, 1970

In the Matter of:

Docket No. 47

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Joseph Charles Usner,

Petitioner,

vs.

Luckenbach Overseas Corporation,  
Et Al.

Respondent.  
----- X

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Place Washington, D. C.

Date November 18, 1970

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C O N T E N T S

ARGUMENT OF

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on behalf of Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

JOSEPH CHARLES USNER,

Petitioner,

vs.

No. 47

LUCKENBACH OVERSEAS CORPORATION,  
ET AL.,

Respondent.

Washington, D. C.,

Wednesday, November 18, 1970.

The above-entitled matter came on for argument at

11:46 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice  
HUGO L. BLACK, Associate Justice  
WILLIAM O. DOUGLAS, Associate Justice  
JOHN M. HARLAN, Associate Justice  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HENRY BLACKMUN, Associate Justice

APPEARANCES:

H. ALVA BRUMFIELD, ESQ.,  
Baton Rouge, Louisiana  
Counsel for Petitioner

CHARLES KOHLMAYER, JR., ESQ.,  
New Orleans, Louisiana  
Counsel for Respondent.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Usner vs. Luckenbach Overseas Corporation, No. 47.

Mr. Brunfield, you may proceed whenever you're ready.

ARGUMENT OF H. ALVA BRUNFIELD, ESQ.,

ON BEHALF OF PETITIONER

MR. BRUMFIELD: Mr. Chief Justice, and may it please the Court. The sole question presented in this case is whether operational negligence occurring at the time of the injury renders a vessel instantaneously unseaworthy. It is devoid of any problems of defective equipment, unseaworthiness of any other part of the vessel whatsoever.

A motion for a summary judgment filed by the shipowner was denied by the trial court on the basis of Mascuilli. The Fifth Circuit Court of Appeals reversed, holding that the operational negligence, as presented in the case, did not instantaneously make the ship unseaworthy and in effect refused to follow the court's decision in Mascuilli.

Now, Mascuilli, the facts there are on all fours with the facts here. The facts in Usner was that the ship was seaworthy, the equipment was, it was the operational negligence of an operator, a longshoreman, of a winch that caused the sling to come down too fast into the barge and striking the petitioner and injuring him.



1           The equipment was used before and after this occur-  
2       rence without any trouble whatsoever, and the same thing is  
3       true with the facts as established from the record in Mascuilli,  
4       because the trial court in that case found in the Findings of  
5       Fact No. 35 that the operational negligence of the winch  
6       operators in operating the -- guide the winches that had to  
7       attach the guide lines in such a manner that they became  
8       taught and causing a breakage of the equipment, striking  
9       Mascuilli and killing him. And it was done so instantaneously  
10      that the officer had no opportunity to give a warning.

11           So the cases are on all fours and we submit that  
12      Mascuilli is the posture of the issue here and answers the  
13      question very clearly to us that operational negligence occur-  
14      ring at the time of the injury makes the ship instantaneously  
15      unseaworthy.

16           Q     Even if it is not on-board the ship or having  
17      anything directly to do with the ship?

18           A     Even if it has nothing to do with the ship,  
19      the ship owner has no knowledge of it, didn't own it, had no  
20      control of it, as was held in Patterson, may it please Your  
21      Honor, a landmark case. The Court held that that was no de-  
22      fense and that it made the ship unseaworthy.

23           Now, the Fifth Circuit has -- and the Ninth, I be-  
24      lieve -- have been straining at gnats and hair-splitting and  
25      attempting to apply a time element to make the negligent act

1 exist to such an extent that it would ripen into an unseaworthy  
2 condition. And the decisions are just not reconcilable at  
3 all and we submit that the reason that they have got them-  
4 selves on these horns of dilemma is because they fail to  
5 follow fundamental principles and guidelines that this Court  
6 has enunciated over the years. Unseaworthiness can be caused  
7 by no negligence at all, structural defects. Unseaworthiness  
8 can be caused by a non-negligent act, as Mr. Justice Black,  
9 in Waldron, where the jury found that the order given by the  
10 mate to move the rope by two instead of three or four seamen  
11 was not negligent and yet this case held that the question of  
12 unseaworthiness should be submitted to the jury even though  
13 the jury had found that that act itself was not negligent.

14 Unseaworthiness can be caused by negligent acts,  
15 and unseaworthiness can be caused by negligent acts which  
16 occur at the same time and make the ship instantaneously un-  
17 seaworthy.

18 Now, this Court has never, never required that  
19 there be a showing that a time must elapse from the negligent  
20 act until the occurrence of the unseaworthiness. This Court  
21 has never done that. In Mahnich, this Court held that the  
22 act of the seamen in choosing the rotten rope instead of the  
23 good rope created unseaworthiness.

24 In Crumady, Mr. Justice Douglas held that the act  
25 of setting the electrical cutoff device incorrectly created

1 unseaworthiness.

2 Q Were those cases on ship-board or on the docks  
3 or the piers?

4 A Mahnich was the seaman, Crumady was a long-  
5 shoreman, both on ship. But in Gutierrez, Mr. Justice White,  
6 it occurred on the dock where the beams spilled out of the  
7 defective containers, holding that that caused unseaworthiness  
8 to the ship.

9 So this Court has never, never required this so-  
10 called lapse of time to ripen an act of negligence into un-  
11 seaworthiness. Somewhere down the line usually you are going  
12 to find some act of negligence that started the motion to  
13 make the ship unseaworthy, and this Court has held that there  
14 is no distinction between the acts of the equipment of itself  
15 being defective, for example, and the acts of personnel, of  
16 the seamen, the longshoremen or the workers aboard. That was  
17 clearly pointed out in Boudoin and in Waldron itself, and at  
18 the moment that a piece of equipment or pertinence of the ship  
19 itself became defective, it was at that very moment that the  
20 ship became unseaworthy. And the same is true by the act of  
21 a defective seaman or a defective worker, by performing a  
22 negligent act. The minute he does that, that makes the --  
23 and he causes injury -- that makes the ship unseaworthy.

24 And we submit, may it please Your Honor, that in  
25 Mascuilli, when the question was posed as to whether or not,

1 because in Mahnich, in Crumady, in Gutierrez, the question as  
2 to the time lapse wasn't even considered. But in Mascuilli  
3 you had it before you, exactly that question, as to whether or  
4 not the operation by the winch making the guy lines come  
5 taught and breaking causing the injury instantaneously with-  
6 out affording the officer or anyone giving -- having an op-  
7 portunity to give any warning, you held in no uncertain terms  
8 that that was unseaworthiness and that liability to the ship-  
9 owner was established.

10 Q As you put your thesis together with Ryan, do  
11 you think you run into any problems or incongruities in rela-  
12 tion to the provisions of the Longshoremen and Harbor Workers  
13 Act? These were stevedores, weren't they, who were hurt?

14 A True.

15 Q Now, do you think that gives rise to any  
16 problem?

17 A No, I don't believe it does, may it please  
18 Your Honor, because this Court has outlined various guidelines  
19 to make those determinations, because --

20 Q Well, we have certainly gone right down the  
21 line up to date on what you're arguing, there is no question  
22 about that. But I am just suggesting, I suppose there comes a  
23 time in every course of legal development where one might take  
24 a new look.

25 A Well, may it please Your Honor, insofar as



1 the stevedores are longshoremen, it is known and can be taken  
2 as a fact that the seamen or the people, the workers in that  
3 class are doing now work that was traditionally done before  
4 by the seamen, and that work has become more dangerous, using  
5 more dangerous and hazardous equipment, and so it gives rise  
6 to this Court extending the maritime law to these types of  
7 workers. And insofar as the triad of going back in indemnity  
8 against the stevedore, you lay down various lines there that  
9 where the unsafe place to work, where this duty was violated  
10 in that respect, then of course there would be indemnity over  
11 from the stevedore to the shipowner. And so that in itself  
12 is not a -- should not be a determinate -- has not been, be-  
13 cause the principles that have been enunciated by this Court  
14 that this duty of warranty of furnishing a ship reasonably  
15 safe for the intended purpose, and furnishing the place safe  
16 to work has been founded in the law enunciated by this Court  
17 down through the years, and we can see nothing insofar as  
18 that problem goes that would cause a tearing up of not only  
19 pages of jurisprudence of this Court but, sir, I would say  
20 volumes, and this condition of unseaworthiness can be transi-  
21 tory. This is a temporary condition, like in this case --  
22 well, the Mitchell case, Mr. Justice Stewart, here you had  
23 instead of that, you had a longshoreman creating this transi-  
24 tory or temporary condition by his negligent act. And I  
25 know that we speak of unseaworthiness, it connotes a condition,

1 and we speak of negligence, it connotes causation. But just  
2 because the claim is met, and just because you have causation  
3 and negligence occurring at the same time, nonetheless you  
4 have unseaworthiness, and that is exactly what this Court has  
5 adhered to all the way, and it is not so much as the manner in  
6 which the condition of unseaworthiness took place but the fact  
7 that it did. It is a species of liability without fault, is  
8 really what it amounts to.

9 Q What is the reason, Mr. Brumfield, I don't see  
10 why the act has to be a negligent act under your submission,  
11 in your theory?

12 A It doesn't, but I say --

13 Q Any act, any very careful act on the part of  
14 seamen on a well equipped and very seaworthy ship, any very,  
15 very careful act, it just happens to injure somebody and it  
16 would under your theory create an unseaworthy ship and create  
17 liability on the part of the shipowners on unseaworthiness.  
18 Wouldn't that be correct?

19 A That is exactly right, may it please Your  
20 Honor, and you so held in Waldron because the jury in that  
21 case held that the very act of the mate giving the order was  
22 not negligent, and yet the Court reversed it and sent it  
23 back to submit the unseaworthiness principally to the jury on  
24 the basis that it didn't take any negligence at all to make an  
25 unseaworthiness condition. But just because you have got

1 operational negligence occurring at the time of the injury,  
2 that still doesn't make it not seaworthy. That is how simple  
3 it is to me, that for the life of me I cannot understand why  
4 the courts -- and I know that some of the courts, the Fifth  
5 particularly, have criticized Mascuilli by saying it is not  
6 illuminating and it is cryptic and by saying that you did it  
7 for cure and you used -- I believe you used exactly 14 words  
8 in that decision. And you said that petition for writ of  
9 certiorari is granted and the judgment is reversed, but it  
10 couldn't be made any clearer than that to me because what was  
11 presented to you as a matter of law was whether instantaneous  
12 negligence made the ship instantaneously unseaworthy.

13 Q Maybe this represents a little rebellion of  
14 the lower court judges.

15 A Maybe it does, Your Honor.

16 MR. CHIEF JUSTICE BURGER: We will recess for lunch  
17 now.

18 (Whereupon, at 12:00 o'clock, meridian, the court  
19 was in recess, to reconvene at 1:00 o'clock p.m., the same  
20 day.)  
21  
22  
23  
24  
25

1 AFTERNOON SESSION

2 1:00 p.m.

3 MR. CHIEF JUSTICE BURGER: Mr. Brumfield, you may  
4 continue.

5 ARGUMENT OF H. ALVA BRUMFIELD, ESQ.,

6 ON BEHALF OF PETITIONER -- RESUMED

7 MR. BRUMFIELD: Mr. Chief Justice, and may it  
8 please the Court. As we were stating prior to lunch, this  
9 Court has rendered many landmark decisions in so-called  
10 cryptic times of just a few words, and one case that comes  
11 to mind is the Peterson case, where Your Honors held that a  
12 snatch block was brought ashore by stevedoring company, not  
13 owned by the shipowner, the shipowner had no knowledge of it,  
14 it was defective, and held that in itself caused the ship to  
15 be unseaworthy, and you did that in exactly four words. You  
16 said the judgment is affirmed.

17 Another landmark case, especially down in our sec-  
18 tion of the country, the Gianfalo case, where you had under  
19 consideration the review of a Fifth Circuit Court of Appeals  
20 decision involving whether or not a workman on board a  
21 submergible drilling barge in drilling operations offshore --  
22 first of all was the seaman, and second of all was the sub-  
23 mersible drilling barge a vessel, and you did that, I think,  
24 in twenty-five words, by saying that the judgment of the  
25 court of appeals was reversed and the case is remanded to the



1 district court with the direction to reinstate the judgment.

2 And so it may be, as Mr. Justice Harlan says, a re-  
3 bellion, but nonetheless the pronouncements of this Court in  
4 many of the landmark decisions, Mahnich, Crumady, Waldron,  
5 Mitchell, Gutierrez -- all of them, it adhered to this same  
6 principle of the humanitarian doctrine of species of liability  
7 without fault.

8 Q How long has it been since the first case which  
9 you have cited?

10 A Crumady was in 1944.

11 Q How about Mahnich?

12 A I mean Mahnich was in 1944; and never in all of  
13 the occasions that you had to review this question did you re-  
14 quire any time lapsing or that this condition had to develop  
15 over a period of time from the act of negligence to the injury.

16 Q Has Congress taken any action since those  
17 cases were decided?

18 A No, Your Honor, they haven't passed any legis-  
19 lation concerning this problem since then, no, sir. And so we  
20 say that in answer to Chief Judge Brown, of the Fifth Circuit,  
21 when he said, in talking about Mascuilli, of course nothing we  
22 say about what the Supreme Court said or thought it said can  
23 add much to what was said or what it will say it said.

24 Q Was he on the panel that decided this case?

25 A He was on the panel to decide the Grigsby case

1 in the Fifth Circuit, in which they held that operational  
2 negligence was -- brought about unseaworthy conditions, but it  
3 wasn't instantaneous. It was over a lapse of time and, I be-  
4 lieve Mr. Chief Justice Burger was on the panel of that --

5 Q Factually, that was a very different case.

6 A Yes, altogether, but he --

7 Q All of the conduct there was on the vessel.

8 A True.

9 Q There was no question about relating it to some  
10 fictional aspect of its being a hundred yards away from the  
11 vessel?

12 A Right, may it please Your Honor, but Chief  
13 Judge Brown, in writing the opinion, made the statement about  
14 Mascuilli and did make the same statement other than holding  
15 that a different panel in Usner held that reverse the district  
16 court, holding that operational negligence didn't make the  
17 ship unseaworthy instantaneously. And the only reason that  
18 I make that statement is that we feel that this Court in  
19 Mascuilli has answered the very issue that is being presented  
20 here and in no uncertain terms, because you reversed a finding  
21 -- a district court and a circuit court of appeals decision,  
22 based upon facts which were finding of facts, and it is a  
23 question of law that was presented that an instantaneous  
24 negligence occurring at the time of the injury made the ship  
25 unseaworthy.

1           Or, in other words, there is -- just because you  
2 have an operational negligence occurring at the time of the in-  
3 jury, that in itself doesn't take away the fact that you have  
4 unseaworthiness, because, as was pointed out, many times in  
5 the Waldron case and others you don't need any negligence at  
6 all to find that there was an unseaworthy condition in the  
7 vessel.

8           Q     As I recall, the reversal in Mascuilli cited  
9 two cases.

10          A     Yes, sir, Crumady and Mahnich.

11          Q     Do you feel that either of those cases stands  
12 for the reversing proposition?

13          A     Yes, I do, may it please Your Honor, because in  
14 both of those cases, Mahnich and in Crumady, it was based upon  
15 the fact that operational negligence created the unseaworthy  
16 condition. In Mahnich, getting, choosing the rope which was  
17 rotten was the negligent act that created the unseaworthiness.

18          Q     At least there, though, you do not have an  
19 effective piece of equipment.

20          A     Yes, you did.

21          Q     But here, I take it, we have no defective piece  
22 of equipment?

23          A     Right, may it please Your Honor, but we don't  
24 need a defective piece of equipment to make a ship unseaworthy.  
25 This Court has held, Mr. Justice Black, in Waldron, and in

1 many other decisions, in Boudoin, where irascible seaman, men  
2 can make a ship unseaworthy just the same as a defective  
3 piece of equipment. And just because you have the operation  
4 of the human element, the personnel, as were pointed out in  
5 Waldron, there is no distinction between the ship's equipment  
6 and the personnel aboard. Both can bring about an unseaworthy  
7 condition.

8 Q Well, I think this is true, but I had assumed  
9 that your primary argument here was one of instantaneous  
10 negligence, and hence my question about the two supporting  
11 cases cited.

12 A What I say, in those cases, Crumady and in  
13 Mahnich, this Court didn't concern itself with going into the  
14 facts or determining what lapse of time is necessary for the  
15 choosing of the rotten rope or for the mis-setting of the  
16 electrical cutoff device to make it unseaworthy. You never  
17 have done that.

18 And so here you have the situation of where the  
19 operational negligence occurred at the same time of the injury,  
20 nonetheless you have unseaworthy conditions. There is no need  
21 for the lapse of time to make this act of negligence jell into  
22 or ripen into an unseaworthy condition. And so we say that  
23 Crumady and Mahnich do support Mascuilli, and Mascuilli had  
24 before it the very question of instantaneous negligence that  
25 we have here, as to whether or not the act of negligence



1 occurring at the time of the injury made the ship instantane-  
2 ously unseaworthy. Or to say it another way, just because you  
3 had an operational negligence that brought about this condi-  
4 tion, that in itself doesn't take away from the fact that the  
5 ship was unseaworthy.

6 And so we say, may it please Your Honor, that this  
7 Court could be cryptic, if it wishes, and decide this case in  
8 four words, and those four words, the judgement is reversed.

9 Thank you very much.

10 MR. CHIEF JUSTICE BURGER: Mr. Kohlmeier?

11 ARGUMENT OF CHARLES KOHLMAYER, JR., ESQ.,

12 ON BEHALF OF RESPONDENT

13 MR. KOHLMAYER: Mr. Chief Justice, and may it please  
14 the Court. Addressing ourselves first to the question just  
15 asked by Mr. Justice Blackmun, it is our submission that the  
16 Court could not in Mascuilli have meant the reversal to be on  
17 operational negligence basis. The concept was new to the  
18 Court, the concept was a very large one, affecting an entire  
19 industry, and it is generally thought by the bench and bar,  
20 we believe, that the Court would not have summarily treated  
21 such an important subject.

22 On the other hand, Mascuilli did in fact have as its  
23 basis the tight line situation that did come up in Crumady.  
24 It did have as a potential the same type of thing, accident,  
25 that happened in Crumady. There were no electrical cutout

1 switches in Mascuilli, and it would have been very easy for the  
2 Court in Mascuilli to have pitched -- I am talking about the  
3 district court now -- to have pitched its decision in favor of  
4 the plaintiff on an unseaworthiness basis, not an operational  
5 negligence basis, but on the basis that the ship was improperly  
6 rigged, and the condition that we say must be incident of any  
7 case where liability is imposed on the ship, that condition did  
8 then exist at that time.

9 Certainly the citation of Mahnich and Crumady does  
10 not give rise to any thought that this Court is reversing on  
11 a theory of instantaneous unseaworthiness or operational  
12 negligence.

13 This is a case, if the Court please, and all unsea-  
14 worthiness cases are cases of liability without fault, that is  
15 of course true. This man who was injured was standing on a  
16 barge nextdoor to the ship which was being loaded. Cargo was  
17 being handled from the barge to the ship, the swing was brought  
18 down too quickly, struck him, knocked him off the barge and  
19 caused his injuries. He was immediately adjacent to the ship.  
20 There was no unseaworthiness present that we can discern or  
21 that anyone has suggested in the record.

22 The fact is that this was operational negligence.  
23 The winchman let the swing down too fast. Since it is liabil-  
24 ity without fault, is it a matter of having an insurer's  
25 liability for anyone who goes on-board a ship who has a

1 business on-board the ship, who is a passenger, who is a work-  
2 man? If so, then we submit it is up to Congress to make that  
3 decision, or certainly it is up to this Court to do it, and  
4 this Court has not yet done it. There is no such thing as an  
5 insurer's liability yet.

6 If Your Honors choose to make such a decision, it  
7 will be a future decision, but none exists on the books as of  
8 today. If, however, it is any act which causes an injury to  
9 another party on-board ship, regardless of whether the act is  
10 negligent and regardless of whether the ship becomes unsea-  
11 worthy, then, if the Court please, it is exactly that act that  
12 is in fact imposing the shipowner's -- the insurer's liability  
13 on the shipowner, and this is what we submit cannot be done.

14 I think that Mr. Justice Stewart suggested that in  
15 the course of Mr. Brumfield's argument, and I think that is  
16 the answer to the suggestion. It cannot be that you can  
17 pitch liability on an act unless it is negligence or on a con-  
18 dition unless it is unseaworthy -- unseaworthiness.

19 Now, if we want to change terminology --

20 Q But the condition need not have been caused by  
21 any negligence or by any fault at all, that is correct, isn't  
22 it?

23 A This is, of course, correct.

24 Q I mean, for example, the Mitchell case, there  
25 was gurry on the ship's railing and nobody knew whether

1 anybody was negligent in causing that condition. That wasn't  
2 an element in the case. Is that correct?

3 A I think Your Honor is correct in your state-  
4 ment of the end result. It was not an element in the case. I  
5 rather doubt that no one knew that it was there. I think it  
6 was there --

7 Q No one knew how it came to be there, whether  
8 it was through the fault of anybody, that was --

9 A That is correct, and I would think that it is  
10 proper to state that under the existing law knowledge of the  
11 condition need not be brought home to the shipowner in order  
12 to enforce liability on him, because it is a liability without  
13 fault. It is not the situation of the corner grocery, where  
14 the Coca-Cola bottle is knocked off and he leaves it there too  
15 long and somebody steps on it and is cut. If it is there for  
16 a moment, it is a condition, whether the owner knows it or not,  
17 it still is a condition, and when a party is injured by virtue  
18 of that condition, then there is liability, but it is a con-  
19 dition and it is a condition which preceeds the accident,  
20 preceeds the injury, and the doctrine presupposes condition  
21 rather than causation, and in fact is -- this is a definition,  
22 I should think, of unseaworthiness, a condition rather than  
23 causation; the fact that you know about it or don't know about  
24 it is of no moment because, as you point out, it is a liability  
25 without fault.



1           In the case of Mascuilli, to revert to it one more  
2 time, if I may, and then to set it at rest, certainly it is  
3 not an easy case, easy decision to understand, and certainly  
4 the Second Circuit takes one view of the interpretation and  
5 the Fifth Circuit and the Ninth Circuit take a completely and  
6 irreconcilably opposite view of the same decision. So that we  
7 do have a direct conflict in the three circuits, the two on  
8 the one side and the one on the other, with possibly the third  
9 and the fourth mixing in, some may say, in favor of the Second,  
10 and some may say in favor of the Fifth, but certainly there  
11 are two circuits at least one the one side and one at least  
12 on the other side, and the views are diametrically opposed to  
13 each other.

14           Q       When was case acted on?

15           A       1920, I believe.

16           Q       And that is even the right to recover for  
17 negligence?

18           A       I'm sorry, sir?

19           Q       That gave an action for negligence to seamen?

20           A       Yes, sir.

21           Q       That was against a background of court developed  
22 remedies for seaworthiness, dating back to the late 19th  
23 Century?

24           A       I think dating back even further than that, but  
25 say to the Ociola, yes, you had your remedy for unseaworthi-

1       ness at the Ociola.

2               Q       There must have -- have you looked at the  
3       legislative history of the Jones Act in terms of what Congress  
4       might have said about existing remedies of seamen?

5               A       I think that -- frankly, I have not, no, Your  
6       Honor. But the Jones Act is presently interpreted as being  
7       an exclusive remedy.

8               Q       What?

9               A       It is presently interpreted as giving an ex-  
10      clusive remedy to a seaman.

11              Q       Well, a seaman usually will sue for both  
12      negligence and unseaworthiness, though -- sue for both negli-  
13      gence and unseaworthiness.

14              A       Correct.

15              Q       So in that sense it is not exclusive.

16              A       Correct. And graphs his unseaworthiness action  
17      onto his negligence action and brings it both in negligence  
18      and unseaworthiness.

19              Q       But did Congress express any dissatisfaction  
20      at all on the seaworthiness concept developed in the courts  
21      when it passed the Jones Act?

22              A       Not to my knowledge, but I am not familiar  
23      with that, if the Court please, and I couldn't answer the  
24      question.

25              Q       Thank you.

1           A     I don't think, however, that the Sieracki  
2 type of seaman such as we are dealing with here would be  
3 covered by the same type of hearing that Your Honor is refer-  
4 ring to, because I think the hearings insofar as the Jones Act  
5 are concerned would be limited to seamen as such, to the men  
6 who work on-board ships and not to the harbor workers who  
7 have been given seamen rights and the so-called Sieracki  
8 seamen who got their rights following the Sieracki case, rather  
9 than from the legislation and the Jones Act.

10           I believe that these cases that we're getting now  
11 are going much further than the Court ever dreamt that they  
12 could go. In the Fifth Circuit, at least, we're getting  
13 further and further away from the ship as the unseaworthiness  
14 doctrine grows and as this instantaneous negligence doctrine  
15 could grow.

16           If this case were to be decided adversely to the  
17 position we take, under the case law that is now coming up, it  
18 would be possible for a truckdriver to negligently operate a  
19 truck on his way to a wharf or pier and for the ship to be-  
20 come responsible for his injuries by reason of his having been  
21 -- the ship having become unseaworthy.

22           Q     Say that again.

23           A     In the Fifth Circuit right now there is case  
24 law -- and I should imagine that Your Honors will get these  
25 cases on writ -- there are two cases decided in September, the

1 Law case and the Chagois case, where, one, a man is discharging  
2 a rail car --

3 Q Let's talk about that truckdriver.

4 A The other one is a lift truckdriver who was on  
5 the wharf hooking up to -- this lift truckdriver in the Fifth  
6 Circuit case was moving some cargo on the wharf to get it near  
7 to the ship, and the -- what they call "headache rack" on top  
8 of the protection on top of the lift truck on the wharf falls  
9 on his head, held that he could recover against the ship on  
10 the grounds of unseaworthiness.

11 Now, this --

12 Q I heard you to say that these cases led to the  
13 theory that a man who had not been on the ship and wasn't  
14 going to the ship, driving out in town --

15 A This is a simple extension of that, if the  
16 Court please. If when you are discharging a car 500 feet away  
17 from the ship and working with the tool to discharge rice from  
18 the car and you get hurt discharging the car, and the court  
19 holds that the ship is responsible for your injury and the  
20 ship didn't furnish that tool and you're not employed by the  
21 ship.

22 Q Which case was it that held that?

23 A That was the Chagois case, if the Court please,  
24 C-h-a-g-o-i-s -- vs. Lykes Brothers.

25 Q Have they officially reported yet?

1           A     I do not think it is officially reported. It  
2 is in slim opinion, of course. I think September 30, either  
3 September 15 or September 30, one is the Chagois vs. Lykes  
4 Brothers, and the other one is Law vs. The Saginaw Hill, which  
5 was decided on September 16. That was the one where the  
6 lift truck had the headache rack fall on the man. The other  
7 one was the rice auger case hurting the man.

8           But these are the extensions that you get to --

9           Q     But these are not here?

10          A     No, sir.

11          Q     Not in this case?

12          A     Not in this case. This case is a sling  
13 attached to the ship itself with the man standing directly  
14 adjacent to the ship but not on-board the ship, which I don't  
15 think could make any difference, although it might. But he is  
16 not on-board the ship. He is engaged in loading.

17          Q     Suppose this equipment you are talking about,  
18 that was attached to the ship, was actually defective and had  
19 been defective for six months, no good. Would you say that  
20 was something that affected the boat?

21          A     Clearly a case of unseaworthiness which would  
22 be actionable.

23          Q     Would be actionable?

24          A     Certainly. We don't --

25          Q     That would make the ship unseaworthy?



1           A     Oh, yes. Oh, yes. I would think also that  
2 there would be very few people who would object to the concept  
3 of a man recovering for what we would call true unseaworthi-  
4 ness. It is the idea of bringing the unseaworthiness into  
5 play where the ship itself is perfectly sound and someone makes  
6 it --

7           Q     This is equipment and that other was the equip-  
8 ment. You mean the ship itself as a whole has to be unsound?

9           A     No, the ship and its equipment be perfectly  
10 sound. But the state of the law, as I understand it today, if  
11 the ship itself and all of its equipment is completely sound  
12 and a longshoreman goes on-board the ship and drops some  
13 grease on the deck and the man following him slips on that  
14 grease, that ship is unseaworthy and that man can sue the ship  
15 for his injuries.

16          Q     But you don't need to indulge in much of a  
17 fiction to relate that to the ship, do you?

18          A     No, sir, because that, of course, happened on  
19 the ship and that, of course --

20          Q     Why do you need to indulge in fiction to re-  
21 late this to the ship?

22          A     This accident?

23          Q     Yes.

24          A     You don't. You don't. What I am saying,  
25 though, if the Court please, is that if you permit the

1 operational negligence to substitute for unseaworthiness, if  
2 you require that simple -- if you permit simple negligence to  
3 be a substitute for unseaworthiness, then where are you going  
4 to get -- you are going to get these cases stretching further  
5 and further away from the ship and you are going to be --

6 Q We can take up those cases when we get them.

7 A That, of course, is true, but I submit to the  
8 Court in all seriousness that there is no reason for this  
9 type of extension. This is a new departure from existing law  
10 and --

11 Q How far is it a new departure from Waldron?

12 A Well, I should think that Waldron is a case  
13 that could be very easily decided on the same basis as Boudoin  
14 vs. Lykes, that the ship can be unseaworthy in manpower as  
15 well as in equipment. We have always recognized that. If you  
16 put two men on a job that takes four men to do, certainly I  
17 should think --

18 Q Well, that is instantaneous, isn't it? The  
19 order is given and they put two men where they ought to have  
20 four, that is negligence?

21 A And then the two men --

22 Q And then it would be upheld because of the  
23 lack of seaworthiness in that case?

24 A I don't think that the Waldron case held that,  
25 no, if the Court please. I think you sent it back because the

1 lower court had taken the unseaworthiness issue away from the  
2 jury.

3 Q The unseaworthiness?

4 A Yes. But the negligence matter was held  
5 against the plaintiff in the Waldron case, which was the sub-  
6 ject of the dissent that was in that case, where it was held  
7 that since there was -- since the jury had found there was no  
8 negligence in assigning two men to do the job, then it couldn't  
9 very well be unseaworthy, the ship couldn't be unseaworthy  
10 because there was no lack of manpower. This is the way I read  
11 the case. Nevertheless it was sent back and it was --

12 Q Why was it sent back?

13 A I think it was sent back on the unseaworthi-  
14 ness issue. But still it was a condition, because there were  
15 two men carrying something that the Court said might be four  
16 men should carry.

17 Q At that moment. The next movement might have  
18 only required one man, or four men or five men.

19 A This is true. This is true, but --

20 Q I can understand your argument that those cases  
21 should be overruled, but I don't agree with it. But I don't  
22 understand your argument that we haven't decided against you  
23 in this case, previously.

24 A Oh, I don't think the Waldron case comes close  
25 to this case, if the Court please, and I don't think that --

1 I think you have to do more than come to that conclusion,  
2 come to the conclusion that operational negligence is involved  
3 to get to the result in the Waldron case. You don't need that  
4 theory spelled out that way to get to the answer in the Waldron  
5 case.

6 In Waldron, the condition was there, that was the  
7 fact, that two men were doing the work that three or four men  
8 should have been doing at that moment, to the same extent as  
9 if an improper tool had been given to them to use, and on that  
10 basis you had an incompetent crew or incompetent -- incomplete  
11 work force and that made the ship unseaworthy. But it was a  
12 condition that existed at the moment of injury, so I could  
13 justify the Waldron case without any difficulty.

14 Now, all of this stems, I think, from --

15 Q If I may just say that if somebody on-board  
16 ship negligently dropped grease and the next man comes by and  
17 slips, the ship is unseaworthy?

18 A I don't think there is much doubt about it on  
19 the status today at all, Mr. Justice Marshall.

20 Q Well, suppose this man who negligently for a  
21 moment let that sling down too fast had dropped the grease  
22 and the man had been injured. You wouldn't be here, would  
23 you?

24 A I don't guess I would be.

25 Q Frankly, I don't see the difference between

1 negligently dropping the grease and negligently slipping on the  
2 winch.

3 A Well, the concept of unseaworthiness is the  
4 keynote, I think, and the touchstone on which we have to view  
5 these cases. That concept, we submit, requires there to be a  
6 condition, and if you do not have a condition, you cannot have  
7 unseaworthiness, by definition.

8 Q The grease is a condition?

9 A Correct.

10 Q That separates the --

11 A Correct. Now, the fact --

12 Q On the unseaworthiness, would you agree or not,  
13 whether or not the man who dropped it was negligent in drop-  
14 ping it, he might have been very careful in dropping it. He  
15 might not have been negligent at all. Nonetheless if there is  
16 a greasy deck, it is an unseaworthy condition and the man  
17 following him can collect against the shipowner for an unsea-  
18 worthy ship, isn't that it?

19 A Correct.

20 Q So negligence has nothing to do with it?

21 A Nothing at all to do with it, and nor would  
22 the fact that the shipowner had knowledge or did not have  
23 knowledge of the existence have anything to do with it.

24 This doctrine, we submit, comes from Judge Hand's  
25 decision on the Second Circuit in *Grillea*, and in *Grillea* we



1 feel that Judge Hand indicated at that time that there had to  
2 be a time interval in order to apply the doctrine that he was  
3 speaking for then. As you recall, in Grillea, there was a  
4 hatchboard cocked over a hatcheye unequally, and the man fell  
5 on the hatchboard. But he indicated that a time interval  
6 had to elapse. And if you don't have your time interval  
7 elapsing, if you don't have your condition existing, you have  
8 got something that isn't unseaworthiness. Now, I don't know  
9 what it is. And, of course, the law can be changed, but at  
10 this moment it isn't unseaworthiness as we know it and as the  
11 word is defined to be, because it is not a condition and you  
12 must have a condition for anything to be unseaworthy.

13 Additionally, the question of what this does to  
14 the industry when you put it together with Ryan is startling  
15 in its results. The men who work on these ships, of course,  
16 are covered by the compensation act, are giving their compen-  
17 sation by their employers. They have their comp awarded to  
18 them as their sole and exclusive remedy. They have their  
19 right to a third-party action and the third party, of course,  
20 goes back against the employer so that in all of these cases  
21 that come to court, not in all but in 99 percent I should say,  
22 there is a liability over charged against the contract  
23 stevedore or the employer of the injured man.

24 We're getting the circuitry of action to come right  
25 around the corner back to where the Congress said it could not

1 rest. And philosophically it is our submission that it is un-  
2 fair to foist upon anyone a fixed liability without fault and  
3 yet put no limits on that liability, and that is what this  
4 type of result comes to.

5 Q What percentage of the ships do you suppose  
6 that operate have insurance policies?

7 A A hundred, I would say.

8 Q A hundred percent?

9 A Yes, sir.

10 Q It is a question of which insurance company  
11 in the end has to pay it?

12 A Well, it is a question, if you bring it down  
13 to that, Mr. Justice Black, of how much is the public going to  
14 pay for the service, because obviously the public is going to  
15 get the charge passed along to it in higher costs. So that  
16 doesn't matter whether it is insurance or not.

17 Q Anyhow, if there are injuries enough --

18 A Pardon?

19 Q If they have serious enough injuries, the  
20 public will have to bear it anyway, won't they?

21 A Well, there is a big difference, I should  
22 think, between a judgment for \$500,000 in cash damages and a  
23 judgment for \$102 a week or \$122 a week.

24 Q Was this judgment for a million dollars?

25 A In our case?

1 Q Yes.

2 A In our case, we got a summary judgment with  
3 the defense.

4 Q You got a summary judgment?

5 A Yes, sir.

6 Q I was going to ask you if you could state pre-  
7 cisely what the ruling is you are asking this court to make?

8 A In this particular case, if the Court please,  
9 the case comes to you on the Fifth Circuit's statement that  
10 there is no such thing as operational negligence constituting  
11 unseaworthiness which would be actionable by an injured man.  
12 We seek an affirmance of that ruling. Operational negligence  
13 as such, does not, on the part of the contract stevedore, does  
14 not give rise to an action against the ship for unseaworthi-  
15 ness.

16 Q Whether it is instantaneous or not?

17 A It is the same thing, if the Court please,  
18 instantaneous negligence and operational negligence, we would  
19 think, would be the same thing.

20 Q So what in effect you are doing is asking to  
21 get rid of this line of decision?

22 A No, I think not, because I don't think you  
23 have ever had that decision, unless you made that decision in  
24 Mascuilli or unless you made it as Mr. Justice Black says you  
25 made it in Waldron. I don't know that you have. There is no

1 clear-cut statement by this Court that instantaneous negligence  
2 constitutes unseaworthiness or that operational negligence  
3 constitutes unseaworthiness, not that I know of.

4 Q Mr. Kohlmeier, this action was, according to  
5 Judge Simpson in the Fifth Circuit, involved a claim based on  
6 negligence and unseaworthiness, and I notice that you directly  
7 said, in answer to my brother Black a moment ago, you got a  
8 summary judgment. What happened to the negligence claim? It  
9 is almost conceded, at least arguendo, that there was negli-  
10 gence in this case, wasn't there?

11 A The negligence charge was against the long-  
12 shoremen, apparently, if the Court please, and not against the  
13 ship. The operator of the winch, who was the negligent party,  
14 was an employee of the longshore -- of the stevedore, and a  
15 fellow employee of the injured plaintiff.

16 Q Well, then there wouldn't be --

17 A I should think that --

18 Q -- negligence. I would think this would be  
19 litigated by the Federal Harbor Workers and Longshoremens  
20 Act.

21 A I should think that you're right. He has no  
22 claim for negligence under this concept, under the facts of  
23 this case.

24 Q If indeed the man who was negligent was an  
25 employee of the same employer, who was the longshoremen.

1 A Correct.

2 Q And his recovery would be limited to the  
3 Federal Workmen's Compensation statute.

4 A That is correct, yes, sir.

5 Q Well, longshoremen can't maintain a negligence  
6 action against a ship anyway?

7 A Well, I think he could maintain a negligence  
8 action against a ship, yes, if the Court please.

9 Q Under the Jones Act?

10 A It is --

11 Q Because he is doing seaman's labor?

12 A He is given something that is pretty -- for all  
13 practical purposes, he can do the same thing that a seaman can  
14 do.

15 Q In these cases, Mr. Kohlmeyer, that you re-  
16 ferred to -- I think you said they are on the way here possibly  
17 -- they have been decided in the Fifth Circuit -- in terms of  
18 distance, if you know the facts, how far from the vessel was  
19 the farthest occurrence? You said 500 yards --

20 A I am not sure if the court mentions the exact  
21 -- exactly how far the occurrence -- the injury was from the  
22 ship itself, but in the Chagois case --

23 Q But it is substantial distance in any event  
24 that separates the --

25 A It is well away, yes, sir, and in the Law



1 vs. Saginaw Hill case, they made no bones about how close it  
2 was to the ship. The fact was that -- the concept of both  
3 cases was that he was preparing cargo for loading on-board  
4 the ship and therefore he was engaged in loading the ship and  
5 therefore the ship owed him a duty of -- owed him a seaworthy  
6 ship and not to have him injured, and therefore grant him a  
7 recovery. This was the concept and the approach that the  
8 court gave to both cases.

9 Q Well, distance or remoteness from the ship  
10 has never been thought to be controlling?

11 A No, I shouldn't think so.

12 Q Generally, there is that maintenance and cure  
13 case where they went off on liberty and fell out of the  
14 window of a bordello.

15 A Yes, but in this context, these people are  
16 loading ships, you see, and where they are loading ships you  
17 always think that they are right on the ship, but obviously  
18 this wouldn't apply if a man was going back and forth on and  
19 off the ship carrying cargo on his shoulder, when he was carry-  
20 ing it onto the ship or carrying it off of the ship. But that  
21 isn't the way stevedoring is done. They have a bunch of men  
22 that are in the hold and another bunch that are on the shore,  
23 and the theory now is that the men on shore have the same  
24 rights as the men on the ship. That in the event they are  
25 posted to shore today and not in the ship today doesn't change

1 their rights at all.

2 I see my time is up. Thank you.

3 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Kohlmeier.

4 Mr. Brumfield, you have about five or six minutes  
5 remaining.

6 ARGUMENT OF H. ALVA BRUMFIELD, ESQ.,

7 ON BEHALF OF PETITIONER -- REBUTTAL

8 MR. BRUMFIELD: Thank you. Mr. Chief Justice, and  
9 may it please Your Honors; with regard, Mr. Justice Marshall,  
10 to the dropping of the grease, if the grease is dropped with-  
11 out any negligence whatsoever and another seaman or a steve-  
12 dore steps on it, my good friend says that is an unseaworthy  
13 condition, which I agree. And by the same token if that  
14 grease was dropped on the seaman or worker himself and, say,  
15 hit him in the eye and put his eye out, nonetheless you would  
16 have the unseaworthy condition. And this theory that I think  
17 generated from the Firth Circuit to the effect that there must  
18 be some time element in order for this negligent act or non-  
19 negligent act to ripen into the unseaworthy condition, is  
20 just fiction and is no basis on any decision of this Court.

21 And just because you have the condition and the  
22 causation occurring at the same time or seconds apart, it is  
23 the condition itself that is important, the unsafe place to  
24 work that is violated, and if that is done by a matter of  
25 seconds or a matter of hours or a matter of days, it would

1 not make any difference, if this thing itself, as Your Honor  
2 dropped the grease, or if the seaman himself, when he was  
3 measuring it, dropped --

4 Q Operating a winch was not a condition --

5 A Your Honor?

6 Q The man operating a winch was not "a condi-  
7 tion," it was a man operating a winch.

8 A Right. But the man --

9 Q Mr. Kohlmeyer says there is a difference.

10 A I say that there is no difference, and this  
11 Court has said so in no uncertain terms in the Waldron case,  
12 it makes no difference between the equipment and the personnel,  
13 because this condition can be brought about by a defective  
14 piece of equipment or by negligent operation of the equipment  
15 or even by non-negligent operation of the equipment.

16 Q If it is temporary just for one second --

17 A It makes --

18 Q -- it makes no difference?

19 A It makes no difference, may it please Your  
20 Honor, because this --

21 Q The condition had been there a long time and --

22 A Sir?

23 Q The condition has been there quite a while in  
24 Mitchell.

25 A Your Honor, you didn't even make that deter-

1 mination. You said it was there, it was transitory, it was  
2 temporary, it was on the rail, he stepped on it. Now, if it  
3 had been there for hours or been there days, I say it would  
4 make absolutely no difference whatsoever, because the cond-  
5 tion -- it didn't have to be there a matter of hours before  
6 this sailor stepped on the rail and he was thrown overboard.  
7 It could have been there a second before he stepped on that  
8 rail, and this so-called condition -- of course, it is an  
9 unseaworthy condition, but it is preceded by some negligence,  
10 but that can occur just seconds before or at the same time,  
11 there has to be some negligent act to create the condition.  
12 Of course, we agree with that.

13 But just because you have an operational negligence,  
14 that does not take away from the fact that that operational  
15 negligence instantaneously creates an unseaworthy condition.

16 Q I believe you said that that originated, that  
17 idea or concept originated in the Fifth Circuit?

18 A In the Antoine, Robichaux, Dugas cases they --

19 Q What cases?

20 A They are cited in my brief -- Antoine --

21 Q They are in your brief?

22 A Yes -- Antoine, Robichaux, Dugas --

23 Q Who wrote the first one, do you remember?

24 A I sure don't, Mr. Justice Black, but they con-  
25 cern themselves with a lapse of time, whereas nowhere in this

1 Court, in its decisions in Crumady and Gutierrez, where it  
2 happened offshore with beanbags or the -- those cases, nowhere  
3 when this question of negligence or non-negligence, creating  
4 a condition of unseaworthiness, was the time element ever  
5 considered.

6 Now, you did squarely hold that an instantaneous  
7 operational negligence created unseaworthy conditions, and  
8 you held just as clearly as anything in any decision that you  
9 ever pronounced in this Court, because the lower court found  
10 a finding of fact, No. 35, that says that the operational  
11 negligence occurred, the equipment was seaworthy, and it oc-  
12 curred so instantaneously that the officer couldn't warn,  
13 give any warning whatsoever. It occurred then.

14 Now, the court denied that liability and Your  
15 Honors reversed it. Well, that is saying that instantaneous  
16 operational negligence makes the ship instantaneously unsea-  
17 worthy and that is how clear that decision is. And you don't  
18 have to have this lapse of time, when you say it must precede  
19 the grease dropping or someone stepping momentarily there-  
20 after on the grease spot. It makes no difference whether it  
21 was there in a matter of time.

22 The condition is the unsafe place to work, and if  
23 that is created by a negligent act, it is unseaworthy, and  
24 just because it occurred seconds before or just because mo-  
25 mentarily at the same time, you have the causation and



1 condition meeting at the same time, is unseaworthy, and thus  
2 what Your Honors have held, you held it in Mascuilli, you did  
3 hold this same question before and that is what you did hold  
4 in absolutely no uncertain terms. And we submit, may it please  
5 Your Honors, that that is the policy, that is the Mascuilli  
6 decision in line with the other decision of Crumady and  
7 Mahnich, are justification and authority if -- in the need in  
8 making pronouncements, which you certainly held that in  
9 Mascuilli, and there is absolutely no question about it.

10 And as I say, here where you have a defective equip-  
11 ment, may it please Your Honors, to say it one more time,  
12 momentarily can create the ship unseaworthy, or any kind of  
13 transitory condition can momentarily make that ship unsea-  
14 worthy. An act of man, there is no distinction between equip-  
15 ment and personnel --

16 Q I think we have your point.

17 A Yes, that in itself can make it unseaworthy.  
18 Thank you very much, Your Honor.

19 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Brumfield.  
20 Thank you, Mr. Kohlmeyer. The case is submitted.

21 (Whereupon, at 1:46 o'clock p.m., argument in the  
22 above-entitled matter was concluded.)

23 - - -  
24  
25