ORIGINAL

In the

Supreme Court of the United States

VICTORY CARRIERS, INC., et al.,

Petitioners,

v.

BILL LAW,

Respondent.

Docket No. 70-54

Pages 1 thru 46

Washington D.C.
October 18, 1971
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v. No. 70-54

MILL LAW,

Respondent.

Washington, D. C.,

Monday, October 18, 1971.

The above-entitled matter came on for argument at 1:44 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice [presiding]
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

W. BOYD REEVES, ESQ., 1101 Merchants National Bank Building, Mobile, Alabama 36602, for the Petitioner Gulf Stevedore Corp.

ROSS DIAMOND, JR., ESQ., 610 Van Antwerp Building, Mobile, Alabama 36601, for the Respordent.

C O N T E N T S

P R O C E E D I N G S

MR. JUSTICE DOUGLAS: No. 70-54, Victory Carriers, Incorporated, vs. Law.

Mr. Reeves.

ORAL ARGUMENT OF W. BOYD REEVES, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. REEVES: Mr. Justice Douglas, may it please the Court:

The issue presented in this case is whether a vessel's warranty of seaworthiness extends to a fork lift machine which is operated exclusively upon the dock by an operator who does not go aboard the vessel and who is injured by reason of some defect or fault in the lift machine, as opposed to any part of the vessel, its gear or personnel causing the accident.

The facts of this case are not in serious dispute, and are relatively simple. The respondent, Bill Law, who is an employee of Petitioner Gulf Stevedore Corporation, was operating a fork lift machine on the dock, moving a cargo of airplane landing mats from their dockside storage point to a point approximately -- to a point alongside the vessel where he would put them down and they would subsequently be loaded on board the vessel.

When Mr. Law was approximately 50 feet away from the vessel, on the dock, the overhead protection rack or, as the longshoremen commonly refer to it as, the headache rack came

loose and struck him on the back of his head.

Now, there's no question, but none of the vessel's gear or its equipment or cargo caused the rack to come loose. I fell because of some defect within the rack. However, the district court did not consider whether it was defective or not to be determinative or material to the question presented, because after Mr. Law's deposition was taken all parties moved to summary judgment in their favor, the vessel and stevedore who was impleaded by the vessel, and also the plaintiff longshoreman himself.

The district court granted the summary judgment motion of the vessel and of the stevedore, and denied the motion of the plaintiff; and on appeal the Fifth Circuit Court of Appeals reversed and held that Mr. Law was in the service of the vessel, that the lift machine was in fact an appurtenance of the vessel, although it was not used on the vessel; and that Mr. Law was therefore entitled to the warranty of seaworthiness.

Now, the appellate court made no consideration of the Extension of Admiralty Jurisdiction Act, and, as the respondent has pointed out in its brief, this issue was not raised in the Court of Appeals until the time of oral argument and then again after the ruling in the petition for rehearing, which was denied by the lower court.

One of the reasons it was not raised was because of

some question as to exactly what the Extension of Admiralty Jurisdiction Act meant. After briefs were filed in this case in the Fifth Circuit, and before the court's opinion came out, this Court decided Nacirema Operating Company vs. Johnson, which admittedly was concerned with the question of whether the Longshoremen and Harbor Workers Act extended to an injury which occurred on the dock.

There the Court discussed the Extension Act, and said that: there's much to be said for the uniform treatment of longshoremen injured while loading or unloading a ship, but even construing the Extension Act to amend the longshoremen's Act would not affect this result, since the longshoreman injured on the pier, by pier-based equipment, would still remain outside the Act.

Now, in Gutierrez vs. Waterman, this Court also considered the Extension Act, and concluded there that there was maritime jurisdiction under the Act when the shipowner committed a tort while the ship was being unloaded; and the impact of that tort was felt ashore at a time and place not remote from the act.

If the Court will remember, Gutierrez involved defective containers, bean bags which permitted beans to be spilled out onto the dock as they were being discharged. The Court concluded that the act of the vessel was its defective cargo containers, and this was felt ashore and caused the

injury.

That case is understandable. But in our case the vessel played no part in plaintiff's injury, as he was injured solely on the dock by this shore-based equipment which never went aboard the vessel.

Now, there's one question, and I will get into this as part of the other argument as to: if, in fact, the lift machine became an appurtenance of the vessel, if, in fact, it was defective, then would it not come under the Extension Act?

I submit to the Court that this lift machine never became an appurtenance of this vessel, for several reasons. There is a -- well, let me back up just for a minute, because the Fifth Circuit said that the lift machine became an appurtenance of the vessel, relying on this Court's decision of Alaska Steamship Company vs. Petterson.

There is where this Court held that when the stevedore brings equipment aboard the vessel to be used in discharging the loading operation, it becomes an integral part of the ship's equipment, and if it's defective then the vessel is responsible for it.

Subsequent lower court decisions, the Deffes vs. Federal Barge Lines case, out of the Fifth Circuit, held that a marine leg that was shore-based and ran into a barge, if it was defective that made the barge defective.

The Ninth Circuit, in Huff vs. Matson, and the Third

Circuit, in Spann vs. Lauritzen, have held similarly.

But in all of those cases there was involved gantries or conveyors or hoppers or something that connected the vessel with the shore-based equipment. In our case there was nothing to connect the lift machine with the vessel.

Q Well, suppose the lift machine, the fork lift, went up a ramp onto the deck, would your argument be different?

MR. REEVES: Yes, sir; it would have to be, Mr. Justice Marshall. I believe that if the --

Q Even though the accident occurred on the pier?

MR. REEVES: No, sir. I believe that if the lift machine ran up onto the vessel --

Q Well, the lift machine has been going all morning, up the ramp onto the vessel, and at 2 o'clock in the afternoon it moved to the vessel and they had the accident.

MR. REEVES: On the shore?

Q Yes, sir -- on the wharf.

MR. REEVES: On the wharf. I --

Q Would your argument be different?

MR. REEVES: Yes, sir, I think that it would be different. And I think that it would be different because, first off, I don't think the lift machine was -- ever became a part of this vessel. There is a split of authority between the circuit courts, between, I believe it's the Second and the Sixth Circuits have held that this type of equipment was never

intended to be on the vessel; and other courts have said no, this is too fine a line, that it is included, and that you cannot escape the responsibility because you choose to use a more dignified or improved type of equipment.

Q The district court, as I understand it, in this case verbalized its position a little bit differently from the way you are, isn't it that -- didn't he says that the plaintiff was not engaged in loading the vessel?

MR. REEVES: I'm coming to that, Mr. Justice --

Q Therefore it was not within the scope of protection --

MR. REEVES: Yes, sir; I'm coming to --

Q -- covered by the warranty of seaworthiness; was it not?

MR. REEVES: Yes, sir, Mr. Justice Stewart, I am coming to that part of my argument; I have tried to break the argument down to the shore-based equipment and whether or not the individual was in the service of the ship.

Q Very good.

MR. REEVES: The Fifth Circuit reached, had to reach both of these conclusions.

Q Right.

MR. REEVES: And we submit that in both respects it was wrong with regard to both the shore-based equipment and as to the individual being in the service of the vessel.

Before I get to respond to your question, Mr. Justice Stewart, if this lift machine which never went aboard this vessel is held to be an appurtenance of the vessel, we respectfully submit that any equipment or means of conveyance that is bringing cargo to a vessel for subsequent loading will be held to be within the warranty of seaworthiness.

The hypothetical fears that were expressed in Gutierrez come closer and closer to reality.

There is a very recent case out of the Eastern District of Pennsylvania, which I have cited in the supplemental brief, of McNeil vs. A/S Havtor, to show just how far this doctrine now goes. In that case the fork lift driver was working exclusively in a warehouse. He would pick up pallets and set them in another position in the warehouse, and from there other longshoremen would come in with lift machines, pick it up, take it out alongside the ship. He was injured when he ran over some undetermined defect on the warehouse floor, which caused the steering wheel knob to spin and hit his wrist.

The court said that he was in the service of the ship, that the fork lift machine, if used entirely within the warehouse was an appurtenance of the vessel and, relying on this case and also the Fifth Circuit's case of Chagois vs. Lykes Brothers, held that he was within the warranty and extended to him the warranty.

Q Now, this accident wasn't within the longshoremen's coverage either, was it?

MR. REEVES: No, sir.

Q Because the Longshoreman's Act only covers accidents on the ship?

MR. REEVES: Yes, sir. Under the Nacirema --

Q That was completely void in this case.

MR. REEVES: Yes, sir.

Q So that the State workmen's compensation act applies here?

MR. REEVES: The State workmen's compensation act did apply here, yes, sir.

Q And the question is whether -- and it can't be a Jones Act case --

MR. REEVES: No, sir.

Q -- because it's not a seaman; is that it?

MR. REEVES: Yes, sir.

Q And so it's a question of seaworthiness, strict liability, replacing the workmen's compensation or supplementing it?

MR. REEVES: Well, the question is: can he sue this vessel for unseaworthiness.

Q Yes. And it would be the standard for unseaworthiness?

MR. REEVES: Yes, sir.

Q And the recovery would make -- the recovery wouldn't be limited to workmen's compensation amounts, I take it?

MR. REEVES: That's correct; yes, sir.

Q And then there would be a warranty de novo?

Q The payments.

MR. REEVES: You mean the indemnity act de novo? Yes, sir. Well, it's practically --

Q If there was a breach of it?

MR. REEVES: If there was a breach. But, as a practical matter, under the facts of this case, if it please the Court, the stevedore really has no alternative but to defend. Because here is his lift machine, it is his lift machine on the dock; if it is defective, certainly nothing can be attributed to the ship.

Q The vessel doesn't really get in here at all except as a nominal defendant on whom to hang the liability of unseaworthiness.

MR. REEVES: The conduit through which the workman passes.

Q Through which this man sues his own employer.

MR. REEVES: Yes, sir.

Q And gets the recovery from his own employer.

MR. REEVES: Yes, sir.

Q That is all I have.

Q The same way as in the area where the Longshoremen's Act applies?

MR. REEVES: Yes, sir.

Q Yes.

Q Has he had any State workmen's compensation award?

MR. REEVES: He has been -- has he been paid?

Q Yes.

MR. REEVES: Yes, sir.

Q Has he had an award?

MR. REEVES: There's been no award, but he has been paid for workmen's compensation under the Alabama State Compensation Act, Your Honor.

Q Oh, I see.

MR. REEVES: But now, as the Court can see, under the decision of Victory Carriers vs. Bill Law, the vessel assumes a passive secondary role in extending this seaworthiness warranty.

Conceivably a vessel not even yet at the dock could be held unseaworthy if these men are out moving the cargo in preparation for the loading of the vessel, or if the vessel has already left and they are still moving the cargo from the dock into the warehouse.

The court has simply pushed the vessel aside and really, in this case, I respectfully submit, the vessel's

only association with this accident was the fact that she lay alongside the pier.

Now, there's the one other question of: Was Mr. Law in the service of the ship? I respectfully submit there is no justification for extending the strict and rigid standard of seaworthiness to persons similarly situated as the respondent Mr. Law in this case.

The appellate court found that he was intimately involved in the loading process, and was subjected to the perils and the hazards of the sea.

Now, in Mahnich vs. Southern Steamship Company, this Court said the justification for the rigid standard of seaworthiness as to a seaman, let's say a true-blue going-to-sea seaman, he is subject to the rigorous discipline of the sea and all the conditions of his service constrain him to accept, without critical examination and without protest, working conditions and appliances as commanded by his superior officers.

This was the reason given for, or the justification for setting a strict rigid standard of unseaworthiness.

In Sieracki, where the seaworthiness warranty was given to the longshoreman who was aboard, loading and unloading, the court said that loading and unloading was within the perils and hazards to which the seamen were exposed. But here, this respondent, in driving this fork lift truck on the dock, was

no more subjected to the perils and hazards of the sea than any fork lift operator in any warehouse in the United States. He just happened to be one step closer to the movement of this cargo. He would move it from one point to where it would be set down, set it down, and subsequently loaded aboard the vessel.

Those individuals who are operating fork lift machines in other locations, in other warehouses, have certainly not been extended any shield of protection similar to the shield given to longshoremen on board vessels or to seamen who are subjected to the hazards and perils of the sea.

Now, we do not contend that Mr. Law was not performing some service for this vessel, but he was performing no more service for this vessel than innumerable other people would perform to prepare a vessel for a voyage. I believe this is what the district court said. And also the district court said that somewhere there had to be a beginning to this loading process, and somewhere there had to be an ending.

MR. JUSTICE DOUGLAS: We will continue in the morning, Mr. Reeves.

MR. REEVES: Thank you, Mr. Justice Douglas.

[Whereupon, at 3:00 p.m., the Court was recessed, to reconvene at 10:00 a.m., Tuesday, October 19, 1971.]

IN THE SUPREME COURT OF THE UNITED STATES

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VICTORY CARRIERS, INC., et al.,

Petitioners,

v. : No. 70-54

BILL LAW,

Respondent.

- x

Washington, D. C.,

Monday, October 18, 1971.

The above-entitled matter came on for argument at 10:00 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice [presiding]
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

W. BOYD REEVES, ESQ., 1101 Merchants National Bank Building, Mobile, Alabama 36602, for the Petitioner Gulf Stevedore Corp.

ROSS DIAMOND, JR., ESQ., 610 Van Antwerp Building, Mobile, Alabama 36601, for the Respondent.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mr. Reeves, you may proceed. We are ready. You have thirteen minutes.

ORAL ARGUMENT OF W. BOYD REEVES, ESQ.,

ON BEHALF OF THE PETITIONERS

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

If I can continue with my argument of yesterday, we submit that there must be a beginning and an ending to the loading and discharging process, insofar as the obligation of the vessel's warranty of seaworthiness is concerned.

This is necessary for the guidance of litigants as well as for the lower courts.

What started principally as a humanitarian policy by this court in Sieracki to include those shore-based workers on a vessel who were performing work traditionally performed by seamen within the strict and rigid warranty of seaworthiness, has now been taken onto the pier and extended to the shore-based worker who is operating exclusive shore-based equipment, and, as I stated yesterday, in the recent case of McNeil, has even been carried into the warehouse.

Q The McNeil case was a Pittsburgh case?

MR. REEVES: The McNeil case was out of the Eastern District of Pennsylvania. It was within the past two or three months.

Q Is that in your brief?

MR. REEVES: It is in a supplemental brief which we filed.

Q Was that a District Court or Court of Appeals?

MR. REEVES: It was a District Court opinion, sir.

There must be a limit to the extent of the vessel warranty.

We submit that the limits imposed by the District Court in this case are both realistic and reasonable. That is, that loading the cargo, insofar as the vessel warranty is concerned, commences when the vessel's tackle becomes attached to the cargo and that unloading terminates when the cargo has landed on the dock or into a vehicle into which it is being discharged.

This has long been the test of liability between the ship and shipper, and has often been referred to as tackle to tackle.

Such a limitation does no offense to Sieracki or to Peterson or to the Gutierrez case because the dockside worker who is actually injured by the ship's own gear, equipment, cargo containers or its crew would still remain within the warranty.

The Circuit Court below in this case held that the District Court's limitation of the warranty represented a minority view which defined loading in an exceedingly narrow

and mechanical fashion and chose to allign itself with other cases which had defined loading and unloading, to quote, in a realistic sense rather than hypertechnical terms of art.

In so holding, the Court of Appeals below has, in effect, completely disregarded the basis upon which the seaworthiness doctrine is premised. That is, to afford protection to those individuals who are subjected to the rigorous discipline of the sea, going back to Mahnich v. Southern Steamship Company.

Further, the Court below, as we argued yesterday, disregarded the extension of Admiralty Jurisdiction Act.

We would invite the Court's attention to the opinion of Judge Watkins in a recent case from the District Court of Maryland, which is Green vs. Pope & Talbott, we have also cited in our supplemental brief. Where, after he gives a historical discussion of the seaworthiness doctrine, comments on the -- this Bill Law case and Chagois vs. Lykes Bros. and the 9th Circuit case of Gebhard vs. S.S. Hawaiian Legislator.

And, after saying what those cases hold, if I may quote, this liability without theory ignores the situs of the injury, ignores causation, ignores whether realistically the ship is being loaded or unloaded, and ignores the true status of the injured party.

Now last term, in the case of Usner vs. Luckenbach Overseas Corp., this Court held that it would be erroneous

when no condition of unseaworthiness existed to hold a shipowner liable for third party's single and wholly unforeseeable act of negligence.

We submit that similar logic and reasoning suggest the conclusion that a shipowner and his vessel should not be held liable for an accident which occurs solely on the dock as a result of exclusively shore-based defective equipment which is being used for the purpose of moving or shifting cargo on the dock, and over which the vessel has no control.

The justification for the imposition of the unseaworthiness doctrine with its rigid standard is absent under the facts of this case.

As I stated yesterday, Mr. Law, under the facts of this case, was not subject to the perils and hazards of the sea nor was his lift machine that he was operating an appurtenance of this vessel.

We are not suggesting a reversal of the Gutierrez case because there there was actual vessel involvement in that dockside injury.

We do urge that a limitation be placed on the extension of seaworthiness warranty by limiting the principls which are set forth in Gutierrez to those instances where the vessel itself, its own gear, its own equipment has caused the shoreside injury, rather than shore-based equipment over which the vessel has absolutely no control.

Before I sit down, I would like to say I understand that predicable as of Friday the American Trial Lawyers Association has filed a motion for amicus curiae brief in this case. I have not seen it. I am not in a position to make any response to it. I don't know what the Court's action would be on it.

But we would respectfully submit that the Fifth Circuit has gone beyond the holdings of this Court in extending the warranty of seaworthiness on out onto the dock to this shore-based equipment, that if limitations and guidelines are not placed we believe that the hypothetical situations which the Court expressed in Gutierrez which the court below says we do not reach this particular type of situation, however it does leave the door open by saying we will reach that case when it comes before us.

I respectfully submit that for the reasons that were stated the Fifth Circuit has erred and suggest and request that be reversed.

Thank you.

Q Mr. Reeves, we do have filed a brief on behalf of the National Maritime Compensation Committee as amicus curiae. It was filed September 15th.

MR. REEVES: Yes, sir, and the Court denied the motion for leave to file amicus curiae brief on behalf of the Maritime Committee.

Q That motion was denied?

MR. REEVES: Yes, sir, it was denied. And I understand that either Friday or perhaps it was yesterday the American Trial Lawyers filed a motion for amicus curiae brief. I have not seen it and have had no opportunity to review it. I don't think this Court has ruled on that brief, sir.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Reeves.

Mr. Diamond.

ORAL ARGUMENT OF ROSS DIAMOND, JR., ESQ.,

ON BEHALF OF THE RESPONDENT

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

I would like to talk about the facts just a minute.

Bill Law was a member of the ILA, International Longshoremen's Association, Local 1410. He was a member of the gang of Willie Kaiser that was selected in the makeup gang early that morning in front of the union hall on Davis Avenue in Mobile to load this particular hatch of this particular vessel, S.S. SAGAMORE HILL.

When he got to the dock, he was assigned by his foreman Willie Kaiser to operate the forklift machine on the dock taking the landing mats from its storage pile on the open pier some fifty (50) feet from the cargo hook and delivering it to the cargo hook from where it was taken onto the vessel.

The word subsequently loaded to the vessel by other longshoremen has been used and I think it could be misleading. It was a continuous operation. The landing mats were set out on targets and it was thus taken onto the ship.

Q Who was the directing authority? Who was the person who had control over this man's activities in his work?

MR. DIAMOND: It was the foreman -- they have a working boss and a walking boss. A stevedore, they call him in Mobile, and a gang foreman. He would have two.

Q And they both work for the stevedoring company?

MR. DIAMOND: Yes. And the mates of the ship would be in control of the loading and unloading operation, generally. The ship's officers always maintain supervision and control of the vessel in the loading and unloading operation.

Customarily, it is my understanding that they do not interfere with the stevedoring contractor's control unless they see something that is wrong in the manner of storage or something wrong in the manner of loading or discharging.

Q In practice, is the stevedoring company an independent contractor?

MR. DIAMOND: Yes.

I would like to mention one fact that may be considered pertinent that is not in the record, if I may.

This case was heard on a motion for summary judgment. Only the deposition of Bill Law was taken. The fact that I would like to mention is that the -- Bill Law's fellow workers had worked this vessel the day before, had loaded landing mats into the hold of this particular hatch, in the wings of this hold. They had worked out to the hatch square. The forklift that was used in the hold of the ship the day before for taking the landing mats into the wings of the ship was not necessary when they were landing in the square of the hatch, and that morning it was taken out of the hatch onto the dock and it is the machine that Bill Law was using.

Q That is not in the record?

MR. DIAMOND: That is not in the record, Mr. Justice.

I think that it is commonly accepted in the industry and everybody recognizes that most of the cargo that requires a lift machine to get it to the hook requires a lift machine in the hatch to get it to its place of storage in the hatch, unless it can be landed directly into the square of the hatch.

Q That would be not the usual situation though, would it be?

MR. DIAMOND: Yes, sir.

Do I understand your question?

Q Well, would they -- the first stage after it

reaches the vessel when it comes down in the sling, does it normally get to its final resting place in the hatch at that point or must it be moved and loaded by people who are on the ship's crew? Must it be put in place?

MR. DIAMOND: It must be put in place unless they can swing it to its place by the pendulum of the cargo fall. If it is going into the wing, it must get into its place in some fashion either by men carrying it there, rolling it there, pushing it there or by forklift machine and taking it into the wings.

Q Wouldn't it be fair to say that most of the cargo has to be moved after it's removed from the sling on most vessels?

MR. DIAMOND: I imagine there would be more space in the wings than there would be in the hatch square, yes, sir.

Q Mr. Diamond, suppose that the storage was on the pier and slipped and struck somebody, would the same doctrine apply?

MR. DIAMOND: The storage of the landing mats on the pier, if they did what, sir?

Q Shifted.

MR. DIAMOND: Shifted during the loading operation? Had they shifted and got Bill Law?

Q If they were sitting there and shifted and struck Bill Law, would you make the same argument?

MR. DIAMOND: I think so. I think so.

Q I want to warn you I am going to take those mats back to the factory in a minute, and see how far you go.

MR. DIAMOND: I agree with Mr. Reeves, Mr. Justice, that there has got to be a beginning and an end.

Q Where do you think it is?

MR. DIAMOND: I think that the beginning and end can be approached from several concepts or tests. I think that the beginning and end could be considered from a loading or unloading concept, from a work traditionally done by seamen concept, from a remoteness in time and place concept, in the service of the ship concept.

Q The truck that unloaded it on the pier?

MR. DIAMOND: No, sir.

Q Why not?

MR. DIAMOND: I think that just what Your Honor is indicating, that it must have a beginning and end. I think that the delivery man delivering it onto the pier is just that a delivery man delivering it.

Q Suppose the delivery man delivering it struck Law?

MR. DIAMOND: I do not think -- I think you would have -- we are talking about unseaworthiness. We would have to have some unseaworthiness involved for Law to have a cause of action. I think the unseaworthiness would have to be

related to the cargo of the --

Q Would it have to be related to the ship?

MR. DIAMOND: Yes, sir.

Q Well, suppose the ship was out in the channel?

MR. DIAMOND: I think that remoteness in time and place -- I think that the vessel should be at the pier.

Q Would it have to be tied up?

MR. DIAMOND: I think the loading and unloading operation should be in actual progress and for it to be in actual progress I suppose it would have to be tied up, sir. I think this vessel should be at the pier. The loading or discharging operation should be in actual progress. I think the day before, the day after is too remote in time, and the place, I think that it must be within the area of the dock. We get into some hypothetical there that would depend on the various customs in the ports and the locations of the ports.

Q The ship is tied up. The stuff is cleared out of the storage area and the truck backs up. The forklift is all the way on the pads to be forklifted off the truck and Law is running the forklift up to the truck. On the truck, he picks up the material --

MR. DIAMOND: It would depend -- if the forklift itself, the headache rack came down and got Bill Law, I think that it would, sir.

Q Why?

MR. DIAMOND: Because he is loading the vessel. He is doing work traditionally done by seamen. He is in the service of the ship --

Q Is that traditionally done by seamen today?

MR. DIAMOND: It's not traditionally done -- it is done by seamen today in some instances, but it has not been completely --

Q In the United States?

MR. DIAMOND: In some instances, I would suppose. I don't know of any in the Port of Mobile. But in times of war the crews customarily discharge ships in foreign ports.

Q How about in times of peace?

MR. DIAMOND: It's done by the longshoremen, customarily, yes, sir.

Q With machinery?

MR. DIAMOND: With machinery, yes.

Q And I don't imagine the seamen could operate the forklift, could they?

MR. DIAMOND: Seamen -- it might be considered in line with the reasoning of --

Q Would the ILA let a seaman operate a forklift on the pier?

MR. DIAMOND: Yes, sir --

Q They do?

MR. DIAMOND: No, no. I misunderstood your question.

Q Do you know any piers that ILA doesn't control in the United States?

MR. DIAMOND: Only those piers on the West Coast that are controlled by the West Coast Union, sir.

Q Saved by the union.

MR. DIAMOND: Yes, sir.

Q Would your position mean that the Federal Law of Admiralty would preempt this area of the pier as long as the activity was in the service of the ship?

MR. DIAMOND: I think that it would.

Q And State law then -- you move the line shoreward, within that area -- and within the area of that activity, there would be no cause of action under State law?

MR. DIAMOND: I don't know that you could have concurrent jurisdiction. It would be my position, Your Honor, that the general Maritime Law should not be confined by the pier's edge, that the general --

Q I understand that, but the consequence of your not confining it would be to preempt State law in some respects.

MR. DIAMOND: It could be, yes.

Q Let's assume that that Law had -- that there is a defective plank in the pier. He was walking along.

He just got off the forklift and fell in a hole in the pier. Would you make the same argument here?

MR. DIAMOND: I find it a little difficult to distinguish between the defective plank and the plank with the beams on it.

Q So the ship is responsible for any pier that it ties up to?

MR. DIAMOND: If it is within the loading operation and loading is going on, and it's tied up and it's in close proximity --

Q Let's assume that Law was riding along on his forklift and he was run into by another forklift run by another longshoreman loading another ship.

MR. DIAMOND: I don't think -- I think the doctrine of warranty of seaworthiness going to Bill Law would not cover him injured by the other forklift operator.

Q Why?

MR. DIAMOND: Because this --

Q This is operational negligence. The seaworthiness just doesn't reach it. Is that your view?

MR. DIAMOND: My view, Your Honor, is that the appurtenance of the other forklift serving another ship is not in the service of this ship --

Q So you would say that would be a State law matter, or would it be -- it couldn't be a Jones Act. It

couldn't be a Maritime Negligence Act, could it?

MR. DIAMOND: It could not be a Jones Act and I imagine it would be covered by State law.

Q So you've got this -- so it would depend on what kind of an accident he had on the pier as to what would be the governing law?

MR. DIAMOND: I think he would either have to have negligence of the vessel or an unseaworthy condition of the vessel, appurtenance of the vessel.

Q Well, why wouldn't it be the negligence of the vessel -- I mean if the pier is the ship's responsibility and the ship has the obligation to provide a safe place to work, why shouldn't it be responsible for a mere negligence on the pier, by third parties?

MR. DIAMOND: I agree with the holding in Usner entirely. We never did have operational negligence in the Fifth Circuit.

Q That's your answer then. I mean that's the answer you would say rather than --

MR. DIAMOND: Yes, sir.

Q -- You would still say Maritime Law applies, but it just doesn't give a remedy for that kind of negligence. But the answer would be then also that State law couldn't supply a remedy, because it's within the area of Maritime jurisdiction.

MR. DIAMOND: It may be that. I am not sure.

Q Well, Mr. Diamond, as I understand it, Mr. Law has been awarded and has accepted State Workmen's Compensation payment?

MR. DIAMOND: There was no award as such. He was paid compensation for temporary total disability for the period of time he was disabled.

Q That's under State law?

MR. DIAMOND: Yes, sir.

Q Is that consistent with your view that there would be no State law remedy in this instance, but rather a Federal Maritime remedy?

MR. DIAMOND: I think that under the holdings of this Court in Nacirema that State law definitely would go to the longshoreman on the dock and when he leaves the dock going toward the ship it, of course, would come under Longshoremen Harbor Workers Act. I don't know if I have answered your question.

Q Well, your answers to Mr. Justice White indicated that you thought this would be an area of Federal Maritime jurisdiction which would preempt any State law remedy. In this very situation --

MR. DIAMOND: I feel that it would be an area of General Maritime -- or the General Maritime Law of the United States would have jurisdiction. I don't necessarily feel it

would preempt the State law.

Q So we are back in the twighlight zone daze?

MR. DIAMOND: Perhaps. I see no conflict if we are there. I see no reason why you couldn't have contrary jurisdiction. I don't think necessarily one precludes the other.

Q Mr. Diamond, in response to Mr. Justice White's question you were dealing with operational negligence, one forklift in relation to another. Suppose instead of operational negligence, if the injury occurred as a result of defective steering gear of one of the forklifts which let it run wild and hit either another man or his forklift. The same answer?

MR. DIAMOND: I think the answer would be the same, sir.

Q There is no significance then in the operational negligence aspect?

MR. DIAMOND: I think we would have an unseaworthy machine, if it went to Ship B. But since Law was loading Ship A, the SAGAMORE HILL, it would not be an appurtenance of the SAGAMORE HILL and it would not be an unseaworthy condition for which Bill Law could recover against the SAGAMORE HILL or against the Ship B because he was not engaged in the service of that ship.

Mr. Reeves mentions the perils and risks of a

seaman.

In 1954 the National Academy of Sciences conducted a study of the various dangerous occupations in the United States and in that study the longshoremen's industry was by far the most dangerous occupation, far exceeding the logging industry, the sawmill industry and the steel erection occupation.

Q Even more than coal mining?

MR. DIAMOND: I don't recall. This study is reported in Volume 75 of the Yale Law Journal and it is reported as the most dangerous industry, Mr. Chief Justice.

Q That might suggest that the whole doctrine of unseaworthiness ought to be reexamined if the perils of the sea in the eighth decade of the Twentieth Century are akin to what they were back in the Seventeenth, Eighteenth and Nineteenth Centuries.

MR. DIAMOND: I think going to sea is still a hazardous occupation. I think everyone will agree to that but I think the longshoring industry is more dangerous --

Q Then we ought to put seamen under the Longshoremen Harbor Workers Act?

MR. DIAMOND: I hope not, Mr. Justice, I hope not.

I think the reason for the rule that the work is dangerous is still there. That's one of the reasons for the rule; they are in the service of the ship is the other reason

for the rule. And the third reason, that the industry is better able to distribute the loss, more so than the injured seaman or the other injured longshoreman, is certainly still there.

Q Well, another reason for the rule was that the seaman is rather helpless.

MR. DIAMOND: They are not as helpless as they were in days gone by.

Q Even if they are relatively helpless, how about the longshoremen?

MR. DIAMOND: They are not any more so, helpless.

Q No, they certainly aren't, are they?

Q They are shore-based and in close relations with their employer all the time, aren't they?

Q They have rather strong bargaining position, don't they?

MR. DIAMOND: They have the same position that most industries have in their bargaining setup in the country today.

Q Who tied up all these ports a few months ago? Was that a ship or a union?

MR. DIAMOND: That was the International Longshoremen's Association.

Q And do they need protection?

MR. DIAMOND: I think this: Let me phrase it this

way, if I may. --

Q In the good old days, the seaman was at the mercy of the captain. The captain could do anything he wanted to. Now isn't it true that the captain is at the mercy of the union, or close to it?

MR. DIAMOND: No, sir. I think the master of the ship still runs the ship.

Q He has power of life and death over the crew?

MR. DIAMOND: I would think not. I don't think that he should have, and I agree that he should not have.

Q What power does he have over the longshoremen?

MR. DIAMOND: He has the power of control of the ship. They never relinquish the control of the ship. The --

Q What power did he have over Law -- did the captain of this ship have over Law?

MR. DIAMOND: I think that an inquiry to an officer of the ship would reflect that the ship never relinquishes control over the loading and discharging operation. They are in control.

Q What power did he have over Law?

MR. DIAMOND: Mr. Justice, Law was under the direct supervision of Willie Kaiser, his gang boss, who is a member of the same union. He was under the indirect supervision of the stevedore superintendent, a man named Mr. Bernie Knowles,

in this instance. And he was under the supervision of the mate in control of the ship. As a practical matter, the mate never instructs these longshoremen in the way that they do their work. He doesn't tell them what to do or how to do it, but he is in control, supervising. He is paid to be there and watch the operation. He sees that the cargo goes in its proper place on the ship. If he sees an improper method or an unsafe condition going on he's got a duty to correct it and stop it.

Q On the wharf?

MR. DIAMOND: Yes, sir, if it is loading his ship.

Q If there is an unsafe condition on the wharf, is it the mate's duty to see that it is corrected?

MR. DIAMOND: If it is in the process of loading the ship, yes, sir.

Q You don't mean that --

MR. DIAMOND: I think I do.

Q What you mean is that if it is a sling or something that would damage the ship or damage the stowage, he has the right, but if the forklift is broken or has a faulty steering mechanism, would he have anything to do with that at all?

MR. DIAMOND: Under my interpretation of the law, it would be an appurtenance in serving this vessel and if the doctrine of seaworthiness extends to the appurtenances of

the vessel, it would extend --

Q Could the mate repair the forklift? Ovviously --

MR. DIAMOND: I don't think so, nor would he repair the rope slings or the pallets, no sir.

Q He could order the rope sling repaired because that's a part of his ship.

MR. DIAMOND: And he could order the forklift machine corrected, I think.

Q There is nothing in the record on this -- that bears on this question, is there?

MR. DIAMOND: No, sir. On one summary judgment on the pretrial discovery deposition of Bill Law which was taken before the motion for summary and not in anticipation of the motion for summary judgement but was taken --

Q And this deposition goes to what he was doing, extent of his injuries and what his pay --

MR. DIAMOND: Yes, sir.

Q Mr. Diamond, looking at the relationship between the master of the vessel and the stevedoring company, is the master's control substantially like or is it different from control which a general contractor exercises over the employees of a subcontractor in the general field of construction or any other area?

MR. DIAMOND: Mr. Chief Justice, I think that it

could be likened to that, the general contractor over the subcontractor's employees on a general construction job. I am not thoroughly familiar with the -- how that setup goes.

Q You had said before that the stevedoring company is an independent contractor in his relations with the vessel and its owners.

MR. DIAMOND: That's correct.

Q And I suppose a subcontractor is an independent contractor with respect to a general.

MR. DIAMOND: Yes, sir.

I don't think that the doctrine of seaworthiness should be extended to the beans and the corn from the bag in the warehouse in Denver. I don't think that it should extend to the longshoreman who has taken a truck of the stevedoring company to go downtown and get some rope. I think if we come to a logical conclusion and apply these concepts or test remoteness in time and place, loading and unloading, work traditionally done by seamen and in the service of the ship, we can come to some realistic guidelines, if we may call them that, by which to apply the rule.

I was stating a minute ago that I felt that the ship should be working cargo, either loading or discharging. It should be at the dock. I think that the area would be within the area of the confines of the loading operation.

We all know that these vessels carry huge amounts

of freight. It would be impossible to place all the freight that they carry underneath the hook and have it ready there to be loaded on the ship when it docks. It's got to be at a storage place on the dock or in the adjacent warehouse. And that is customarily what is done in the industry. The cargo that is going to be loaded to this vessel that's coming in is on a storage pile on the dock or in the warehouse adjacent to the place that the vessel is going to dock. It has to be brought from that point to the cargo hook. And again, they carry great quantities of cargo, and on discharge it would be physically impossible to leave it all under the hook. It must be taken from the hook to a storage place on the dock or in the adjacent warehouse right in close proximity to where the vessel is docked.

Customarily, that is what is done in the loading and unloading operation. The vessel contracts to do just this. This is part of the cost of carrying the goods. It is customary in the trade. You can have a special discharging or loading agreement, but by great preponderance, when the vessel contracts to carry goods, they agree to bear the cost of bringing it from its storage point on the dock or the adjacent warehouse, and agrees to pay the cost of taking it from the hook to its storage on the dock or warehouse immediately adjacent to the dock.

Until these functions are completed, the vessel

does not earn any freight at all.

The seamen in the olden days did this work. They had to do just the same thing that Bill Law did. They had to take it from the storage pile on the dock to the hook, and they would have to take it from the hook to the storage point on the dock.

Q Do you really think that seamen ever did the work of loading and unloading? I know what is said in Sieracki --

MR. DIAMOND: Yes, I think so. From what I've read, it would seem to me --

Q From what I've read, in this Court's opinions this is the traditional work of seamen, but from what I've read historically, going back to the Phoenicians, as soon as a ship tied up at the dock the seamen went ashore and relaxed, to use a good euphemism, and somebody else loaded and unloaded the ship.

MR. DIAMOND: I've read some -- possibly I have not read as much as Your Honor has -- the reading I had seems to bear that the stevedoring, longshoring specialization had its advent late in the 19th Century. I imagine there was an overlap where there was some specialization and some seamen did it. I am sure that if the seamen did do it that they would have to do it in this fashion, that they would have to take it from its storage point.

Q Whoever did it would have to do it that way.

MR. DIAMOND: Yes, sir.

I think any interpretation of loading and unloading that doesn't recognize that these functions are part of the ship's work and doesn't recognize that it has to be taken from this pile to the hook and from the hook to this pile, defies the English language. I don't see -- it's an unrealistic cutoff to say that it's loaded or unloaded at the hook.

Q Your point is simply that the loading is necessarily at least a two-stage process.

MR. DIAMOND: Yes, sir.

Q Now that we are past the middle of the 20th Century, shouldn't the -- shouldn't we look at what has been an almost uniform practice during this entire century with respect to loading and unloading ships and seamen's part in it?

MR. DIAMOND: We can't ignore the present, Your Honor. I think we should recognize it. I say this, that the reasons for the rule are still there. Any of us who have visited a freighter, general cargo freighter, at one of our docks in any port that is loading at two or more hatches, several hatches, will recognize the danger that exists.

There are pallets, drafts of cargo, swinging overhead, coming here and there. There are forklift machines

running here and yon. There seems to be a feeling of urgency in the air. It is perhaps contributed to by the fact that the stevedoring companies work on a tonnage basis in most ports rather than an hourly basis and that the vessels themselves are on a strict schedule. There is a feeling of urgency in the air and there is a danger that exists.

Q If it's dangerous -- your question really is, or the issue really is whether it is the State or the Federal law that is going to provide a remedy. I don't suppose you would be here if the State remedy were as adequate as the remedy under --

MR. DIAMOND: General Maritime Law. You are right, sir. That is a correct statement.

Q And you -- and surely in this instance the ship isn't going to end up paying the bill anyway, is it?

MR. DIAMOND: The shipping industry itself will pay the bill.

Q Yes, but it will end up on the stevedore --

MR. DIAMOND: Over the years -- well, the stevedore is involved --

Q Not in this very case --

MR. DIAMOND: Mr. Reeves is here representing the insurance carrier for the stevedoring company, yes. That's correct, but we have also got to recognize that the whole

industry pays the cost and not just the stevedore, because the stevedore has got to look at their accident experience and what it cost them --

Q But the State law -- according to State law, the relationship between the stevedore and his employer is governed by the Workmen's Compensation law.

MR. DIAMOND: Under Nacirema, the Gulf Stevedoring in this case, and Bill Law governed by the Workmen's Compensation Act of Alabama.

Q Unless you win and preempt out of it.

MR. DIAMOND: I don't think that the doctrine of seaworthiness that is extended to the longshoremen loading and unloading the vessel would preempt the State law on the compensation --

Q Does that mean that if Mr. Law prevails here he keeps both recoveries --

MR. DIAMOND: No, sir. The State law has a provision of subrogation just as the Longshoremen and Harbor Workers Act has. In fact the State law, as does the Longshoremen and Harbor Workers Act, provides for those situations where the injured worker has a cause of action against a third party.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Diamond.

Mr. Reeves, you have about seven minutes.

REBUTAL ARGUMENT OF W. BOYD REEVES, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. REEVES: I'll just take a couple of minutes, if I may, Your Honor, if I may pick up on the last question of who must bear the cost.

The Court will recall the Longshoremen and Harbor Workers Act was passed so that the injured longshoreman would have his remedy for the vessel side or the water side of the dock.

Now the Court has held that this is the longshoremen's exclusive remedy against his employer, is under the Longshoremen and Harbor Workers Act.

I think the Court has in its questions touched upon the problem that we have here. As a practical matter, Mr. Law, Gulf, his employer, if he prevails here, with whatever he receives -- it's sometimes in the industry known as two bites from the apple. He has had one bite for his compensation. He then brings his action against the vessel for this shoreside injury --

Q Incidentally, I gather there has never been a claim that this injury was compensible under the Longshoremen's Act, was there?

MR. REEVES: No, sir, there has never been a claim for that. It was voluntarily paid under the Alabama State Compensation Act.

Q The Longshoremen's Act doesn't cover this kind of thing --

MR. REEVES: The Longshoremen and Harbor Workers Act, under Nacirema, would not apply to this type of injury, as it happened on the dock.

Mr. Diamond spoke of the survey of the dangerous type of work that longshoremen do. As I recall reading the Yale Law Journal article, it says with the possible exception of logging and other industries, they discuss all type of construction, heavy labor, any type of work where man is exposed to walking the beams of constructing buildings, on the dock, whatever he may be doing, is dangerous work.

Nowhere, under any of the law, is any workman given the shield of protection as a longshoreman has been given, especially in this case who is exclusively on the dock. As the Court will recall, the Pope and Talbot vs. Hawn teaches us that it's not the label that we put on the man, whether he is a longshoreman, but it is the type of work that he is doing.

One other point that was said was not in the record, the record does state that in response to questions on page 91 that where he got this forklift machine, he said he picked it up at the garage, at Gulf's garage that morning, and drove it down to the vessel to start his work. I don't know where it was the day before. Again, I would respectfully

submit the Court below has extended the doctrine too far and request this Court to place limitations by reversing the Court below.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Reeves.

Thank you, Mr. Diamond.

The case is submitted.

(Whereupon, at 10:45 a.m. the case was submitted.)