IN THE SUPREME COURT OF THE UNITED STATES

COOPER STEVEDORING COMPANY, Petitioner	:	No. 73-726
v.	:	
FRITZ KOPKE, ET AL, Respondents	:	

Washington, D. C.

Tuesday, April 16, 1974

The above-entitled matter came on for further argument at 10:17 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JOSEPH D. CHEAVENS, ESQ., Baker & Botts, 3000 One Shell Plaza, Houston, Texas 77002, for the Petitioner.

BRUCE DIXIE SMITH, ESQ., 800 Bank of the Southwest Bldg., Houston, Texas 77002, for the Respondents.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in No. 73-726, Cooper Stevedoring against Kopke.

Mr. Cheavens, you have 23 minutes remaining.

CONTINUED ORAL ARGUMENT OF JOSEPH D. CHEAVENS

ON BEHALF OF THE PETITIONER

MR. CHEAVENS: Thank you, your Honor.

Mr. Chief Justice, may it please the Court: Yesterday when the argument was interrupted we were discussing the specific district court finding. It will be recalled that the district court found that the vessel was unseaworthy and the vessel owner negligent in three respects: In failing to secure the cargo in Mobile, in failing to dunnage off the cargo in Mobile, and because of the presence of the piece of paper covering the crack which was the immediate cause of the plaintiff's injury.

The district court also found that Cooper was negligent in two respects: With respect to the failure to secure and with respect to the failure to dunnage off in Mobile.

Now, the precise legal significance of these findings has to be rather carefully scrutinized.

First of all, it is to be noted that there is no finding of joint liability of the ship and Cooper to the plaintiff. There is no finding of joint liability because the plaintiff, it will be recalled, did not sue Cooper.

Now, the significance of this is that since the plaintiff did not sue Cooper, there is thus no -- and I am quoting here from Respondents' brief -- no common liability for concurrent fault which is -- and again to use the words of Respondents' brief at page 25 -- which is the sine qua non of contribution. That is, there is no joint liability because the plaintiff didn't sue Cooper.

The second significance of the district court's finding is that Cooper's negligence was found to be negligence vis-a-vis the plaintiff. That is, the acts which Cooper did, the failing to secure and the failing to dunnage off were found on the careful examination of the district court's findings at 163 and 164 of the Appendix, were found to be negligence because this created a risk of harm to the plaintiff and subsequent longshoremen. But these findings are legally immaterial because, again, the plaintiff, for tactical considerations, did not sue Cooper.

The third legal significance to these findings is that under these findings and under the undisputed facts, there is not found to be any breach of duty by Cooper to the vessel because the two things Cooper was faulted for -- failing to secure and failing to dunnage -- as between the ship and Cooper, the ultimate decision there was made by the ship. It was the ship that decided whether or not to dunnage. If the ship wanted it dunnaged, the evidence shows Cooper would have

dunnaged. If the ship wanted the cargo secured, Cooper would have been happy to secure the cargo for, of course, an additional price. But those decisions were decisions of the ship.

Thus, regardless of this Court's treatment of the more general problem before the Court, namely, the right of contribution between joint tort-feasors in admiralty, there are two very specific reasons in this specific case why this is an improper case for contribution.

First of all, because, as we have seen, the party which has been granted contribution, the vessel, has already been fully indemnified. It was fully indemnified by Mid-Gulf Stevedore. So that if we view the case as one where it is the vessel which is suing Cooper for contribution, the vessel's cause of action is extinguished. The Court might feel, but while it isn't the real party of interest here, Mid-Gulf, because Mid-Gulf has stepped into the shoes of the vessel and has taken over the vessel's defense. But if that's the situation, then contribution is doubly unfair because if the plaintiff -- let's change the situation slightly -- had the plaintiff sued Cooper alone -- let's assume, for instance, the ship was not -- you could not get jurisdiction over the ship; or the vessel owner was insolvent or something of the sort. So the plaintiff sues only Cooper.

Cooper, even under the rule urged by the respondent,

would not be able to get contribution from Mid-Gulf because Mid-Gulf is statutorily immune from direct action by the plaintiff.

QUESTION: But if Mid-Gulf indemnified the ship, it would indemnify it only for its actual loss.

MR. CHEAVENS: Its actual loss is measured by the liability of the vessel to the plaintiff.

QUESTION: Yes, but isn't indemnity for out-of-pocket costs? And if the ship ultimately is liable for only half, let's say, it's only out of pocket for half the liability --

MR. CHEAVENS: With all due respect, Mr. Justice White, I think that suggestion is circular.

QUESTION: Well, somebody is going to -- let's assume the vessel secures indemnity from Cooper.

MR. CHEAVENS: Indemnity or contribution?

QUESTION: Contribution, assume contribution.

MR. CHEAVENS: Yes.

QUESTION: Then what?

MR. CHEAVENS: Well, under the judgment of the district court, entire liability was imposed on the vessel; the full amount of the judgment is assessed against the vessel.

QUESTION: Yes. And then?

MR. CHEAVENS: Then the vessel is entitled to contribution.

QUESTION: From?

MR. CHEAVENS: From Cooper.

QUESTION: Fifty percent.

MR. CHEAVENS: Fifty percent.

QUESTION: But then how about Mid-Gulf? Then the vessel is out 50 percent of liability, and then how much does Mid-Gulf have to pay the vessel?

MR. CHEAVENS: But in the first instance, before we reach that point, and indeed that point has been reached, the judgment against the plaintiff is no longer in the case, and the plaintiff's judgment has been satisfied and has been satisfied by Mid-Gulf as the refusal statement in the brief in the Fifth Circuit says.

QUESTION: But isn't an indemnitor ordinarily subrogated to the rights of the indemnitee? That's certainly true in common law; I'm not familiar with maritime law.

MR. CHEAVENS: I am not sure this issue has ever been confronted in maritime law. But in this instance, Mid-Gulf did not take an assignment of the vessel's action.

QUESTION: Of course, subrogation operates without regard to any formal assignment, just by virtue of having paid off the amount, doesn't it? Or assume the obligation to pay it off?

MR. CHEAVENS: That's correct. But, of course, that assumes, of course, in the first instance that there is a right of contribution, which is the more general issue in the

case.

QUESTION: Mr. Cheavens, I am mildly confused here, perhaps substantially confused. Does the record show the amount of the settlement Mid-Gulf made?

MR. CHEAVENS: The record shows the total amount of the judgment, and the refusal statement in the Fifth Circuit brief says that Texas Employers is obligated by a contract of the indemnity to pay any judgment rendered against the vessel. So that they are obligated by indemnity to pay that full judgment.

QUESTION: You mean the record doesn't show how much in fact the vessel has paid the plaintiff?

MR. CHEAVENS: Only indirectly. The record shows how much --

QUESTION: What was the judgment the plaintiff got?

MR. CHEAVENS: I have forgotten the exact amount -- $38,000-odd.

QUESTION: And that's been paid.

MR. CHEAVENS: That's been paid.

QUESTION: By whom?

MR. CHEAVENS: By Texas Employers Insurance Association.

QUESTION: Who represent --

MR. CHEAVENS: Who insured Mid-Gulf Stevedore.

QUESTION: Pardon me?

MR. CHEAVENS: Mid-Gulf.

QUESTION: The vessel paid nothing?

MR. CHEAVENS: That's correct. The vessel got out of the case in advance of the trial and the suit is prosecuted only in the name of the vessel, even though Mid-Gulf did not take an assignment of the vessel's cause of action, whatever that cause of action may be.

QUESTION: Well, if the court of appeals is affirmed, who pays what to whom?

MR. CHEAVENS: If the court of appeals is affirmed, my client, Cooper, would be obligated to reimburse the vessel, actually Texas Employers, for one-half of what Texas Employers has paid.

QUESTION: Texas Employers being Mid-Gulf's insurer.

MR. CHEAVENS: Insurer.

QUESTION: So nobody is going to have a windfall. So Mid-Gulf simply gets back half of what it has paid.

MR. CHEAVENS: That's true, but Mid-Gulf would never even under the rule urged by respondent, would not be able to have done that directly because it surely can't be said to have a right of contribution against Cooper because Cooper had no right of contribution against it. Surely there is mutuality.

QUESTION: But if the court of appeals is right below, then Cooper pays half and the vessel pays half.

MR. CHEAVENS: That's correct. Well, the vessel, in quotes.

QUESTION: I mean Mid-Gulf.

Do I understand, or did you tell us yesterday, that Mid-Gulf had an indemnity agreement with the vessel?

MR. CHEAVENS: That's correct. In advance of trial, Mid-Gulf took over the defense of the vessel. Counsel were substituted.

Let us move to the more general --

QUESTION: Before we move on, may I ask you a question? The respondent's brief disputes your assertion that there has already been full indemnification. Was that issue addressed by the Court of Appeals of the Fifth Circuit?

MR. CHEAVENS: It was not addressed in the Court of Appeals' opinion. It was the subject of the briefs in the Court of Appeals, and in fact it concerned I think the greater part of the oral argument, and I think it is fair to say both counsel were somewhat surprised that the problem was not addressed by the Court of Appeals in its opinion.

QUESTION: The parties are in dispute as to what the facts are?

MR. CHEAVENS: I don't believe that's correct. I think we are in agreement.

QUESTION: That there was indemnification --

MR. CHEAVENS: There was indemnification.

QUESTION: -- in full.

MR. CHEAVENS: That's correct.

QUESTION: Is the record clear on that?

MR. CHEAVENS: Yes, your Honor.

QUESTION: I don't want to interrupt your argument.

MR. CHEAVENS: The record is clear. Mr. Smith testified to that matter at the trial of the case. This question, the point I am urging at this point was raised in the district court. Mr. Smith, the counsel appearing of record for the vessel, previously had been counsel for the stevedore, was called as a witness by Cooper and testified to these matters. It appears of record there and it appears of record in the refusal statement filed in the Fifth Circuit brief.

QUESTION: What was the reason Mid-Gulf paid the judgment recovered by the plaintiff? Was it because it was the insurance carrier of the stevedore which had agreed to indemnify the vessel?

MR. CHEAVENS: That's correct.

The more general issue involved in the case involves the right of contribution in admiralty generally. For purposes of oral argument, I would like to suggest, and I see my time is running short, this problem be approached by seeing what are the conceivable rules that the Court could develop here.

First, and I submit that the existing rule is that

the law draws a distinction between collision cases on the one hand and noncollision cases on the other. In collision cases there is right of contribution; in noncollision cases there is no right of contribution. This is what the Halcyon decision says; this was expressly reaffirmed by the Court two years ago in the Atlantic case. That's the current law.

The law as urged by the respondents is the opposite end of the spectrum as embodied by the Fifth Circuit decision in this case and in its earlier decision in Watz v. Zapata, which is that there is a right of contribution except, generally, except where the party against whom contribution is sought is statutorily immune.

I would suggest that there may well be middle ground between these two polar positions, the middle ground being that a right of contribution could be granted in all instances solely where the parties' relationship was governed by the Ryan indemnity doctrine. Alternatively, a right of contribution could be granted either in all non-personal injury cases or in all non-Harbor Workers' Compensation cases. If I have time I would like to discuss possible rationales for those approaches.

The first approach, that is, the existing law, the Halcyon-Atlantic approach, may appear at first blush to be artificial. Why a distinction between collision and non-collision cases? The distinction is a sound one, and that is

that collision cases which are perhaps the oldest form of maritime litigation had well-developed rules governing these situations long in advance of any legislative activity in the area. These rules even predate the 19th century activity of this Court in the field.

On the other hand, in non-collision cases, as Justice Black's opinion points out so clearly in the Halcyon case, there is substantial legislative activity. That legislative -- this is most pervasive in personal injury, is somewhat less pervasive elsewhere, but is notable, for instance, in cargo damage cases. But all legislative activity in the field has always stopped short of creating a right of contribution. Traditionally contribution can only be created by the legislatures. Indeed, in the States which have adopted contribution, it has almost been invariably done by legislation as opposed to judicial enactment.

QUESTION: Is that so in the maritime field? I mean, the existing law of contribution was --

MR. CHEAVENS. Developed judicially. But it was developed judicially long before any legislative activity generally in the fields which are at dispute in this case. In those areas the legislation has never enacted contribution. And most recently, of course, the rules were substantially changed in 1972 amendments. Those amendments to the

Compensation Act were enacted against the backdrop of the Sieracki, Halcyon, Ryan, Atlantic line of decisions. They were carefully tailored to meet those decisions and make very precise adjustments in the right of plaintiff versus ship versus stevedore.

QUESTION: Your opponents have urged that Halcyon has never been applied broadly to just all non-collision cases, that it only had a narrow application, that courts of appeals have not followed, have not applied it so broadly. I know the Fifth Circuit hasn't. How about the other circuits?

MR. CHEAVENS: The Fifth Circuit applied it broadly until the late '60's, and it was not until 1972 that the Second Circuit went along. This is a very recent phenomenon where lower courts have felt they could disregard the Halcyon, the clear language of Halcyon. All during the '50's and the early '60's --

QUESTION: Well, they didn't disregard the application of Halcyon to the facts very similar to Halcyon.

MR. CHEAVENS: That's correct.

QUESTION: Very dangerous here.

MR. CHEAVENS: I didn't know the perils of argument.

QUESTION: But you have a right of contribution.

MR. CHEAVENS: I should hope.

The disregarding of Halcyon is a recent phenomenon. I don't think it's fair to restrict Halcyon to the specific

facts of Halcyon. This Court simply cannot just brush to one side the whole basis for Halcyon. And likewise, the Atlantic case was a totally different situation because there the party against whom contribution was sought was not statutorily immune and could have been sued.

QUESTION: Is there any indication in connection with the '72 amendments that Congress was mindful of Halcyon or that general, that specific area of maritime law?

MR. CHEAVENS: I cannot recall any specific reference in the legislative history to the Halcyon case as such. There are many references to Ryan, and implicit in the Congress' consideration is that it was Ryan which was the law which governed the reltionships between parties and that there was either all the way indemnity or no indemnity. And in this respect a decision here must take into account the Ryan case because an analysis of the given fact situation under Ryan may yield radically different results than traditional analysis under the contribution rule, because depending on the facts they can yield inconsistent results.

QUESTION: You say that Congress legislated against the background of Halcyon and on the assumption that Halcyon applies to non-collision cases. But when Congress finally acted to change the rules in this area, hadn't the Fifth Circuit already departed on its own course?

MR. CHEAVENS: Yes, that's correct. The Watz case

had been decided. This case had not been decided.

QUESTION: How about the Second Circuit?

MR. CHEAVENS: The Second Circuit case In re Seaboard Shipping had been decided --

QUESTION: Here were two major maritime circuits that were construing Halcyon not to cover certain kinds of non-collision cases. What do you think we should do about that in terms of what Congress intended?

MR. CHEAVENS: I think it's perhaps speculative because I don't recall, at least in the legislative history, reference to Watz or Seaboard Shipping, and I don't think it's really fair for us to conclude one way or another about the matter.

The rule urged by the respondent would represent, we submit, a radical change in the law, maritime law, and it would be an ill-advised change. Briefly, it would work to the disadvantage of plaintiffs; it would discourage settlement; it cannot be harmonized with Ryan; the Court would be called upon -- there is a great body of law under Ryan which would have to be completely rearranged and changed, putting a substantial burden on the lower courts and on this Court.

There are middle grounds which would expand contribution slightly, but these middle grounds would be to grant contribution in all cases save those governed by Ryan or to grant contribution in all but personal injury cases or

in all but cases where the plaintiff was a beneficiary of the Longshoremen's and Harbor Workers' Act.

I would like to reserve my remaining time.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Smith.

ORAL ARGUMENT OF BRUCE DIXIE SMITH

ON BEHALF OF THE RESPONDENTS

MR. SMITH: Mr. Chief Justice, and may it please the Court: First, I want to address myself to the confusion that Mr. Cheavens has created about this full indemnity.

First of all, after the plaintiff sued the steamship company, the steamship company sued the Houston stevedore, Mid-Gulf Stevedore, Inc., on the Ryan theory of indemnity, and they also sued Cooper Stevedoring Company in Mobile on a similar type case but for two separate breaches of what the ship felt like was a breach of the implied Ryan warranty running to the vessel: One, the negligence in the way the vessel was loaded in Mobile, which is entirely separate cause of action that the ship had against the Mobile stevedore, and they also had a separate cause of action against the Houston stevedore.

My firm represented the Houston Mid-Gulf Stevedore. Prior to trial we negotiated out of settlement with our differences with the vessel. And as part of the settlement agreement of that cause of action, we assumed the defense of the vessel. There has been nothing in evidence ever about what

the real, exact terms of the settlement was. This is the first time this ever came up. Cooper filed no cross actions against us, although they were free to do so. They are not statutorily immune, or were not statutorily immune from being sued by another stevedore, and this has happened. But they didn't sue us.

During the trial, Mr. Harmon, the trial attorney for Cooper, put me on the stand quite by surprise and asked me about the terms of the settlement agreement. Well, I didn't even make them. The attorney that was handling the case before I got it is the one that worked out the settlement with the ship. I just went in to try the case and I've handled it since. But at the time I didn't know exactly what the terms were; I had a general idea. But part of the terms of the agreement was that we would indemnify, we took over the defense of the vessel as the vessel. We stepped in the shoes of the vessel, and then dismissed ourselves out of the case and proceeded on and just plaintiff against the ship against the Mobile stevedore. And that is the way the case has come up, and the legal issues involved should be determined on that point.

This can be a very important case, and I think Mr. Cheavens has done a good job to kind of confuse the matter.

QUESTION: Mr. Smith, what were you suing for, how much money?

MR. SMITH: Well, we were pursuing the ship's claim against Cooper for whatever we might have to pay the plaintiff if we lost on the basic suit of the plaintiff against the ship.

QUESTION: You didn't have any idea that it was $38,000?

MR. SMITH: No, not at that time.

That's the way these cases developed, Mr. Justice Marshall. The plaintiff sued --

QUESTION: At that stage would you have settled for $5,000?

MR. SMITH: No.

QUESTION: You wouldn't settle for less than $38,000, would you?

MR. SMITH: No, sir. I thought in the court's findings, it found that the Mobile stevedore breached its warranty of workmanlike service to the vessel, and under the Ryan cases, I think we are entitled to full indemnity and thought so at the time.

But we went ahead and tried the case after the agreement between the Houston stevedore and the ship was negotiated. Then we went on to trial to try the case just as we normally do with all three parties being present and fighting it out among ourselves.

But it's interesting to see, to get back to what the court actually found in the case, that they found that Cooper

was negligent in the way they loaded the ship in Mobile, that as a result of the negligence of Cooper the way they loaded the ship, they breached their Ryan warranty of workmanlike service. The court seemed to find that the ship was negligent, too, in not discovering the negligence of Cooper, is about the best way you can read the court's finding. But the court did not find that the ship was precluded from indemnity and in fact just ignored our claim for indemnity under the Ryan doctrine and just announced he was going to split the damages 50-50 --

QUESTION: When you say "our claim," you mean now the ship?

MR. SMITH: Yes, the ship.

QUESTION: And you are now the ship.

MR. SMITH: Yes, I'm the ship.

QUESTION: Having stepped in the shoes --

MR. SMITH: Stepped in the shoes of the ship.

QUESTION: I see. Right.

MR. SMITH: And going to have to pay off any --

QUESTION: But your client is really Mid-Gulf.

MR. SMITH: Well, was.

QUESTION: Was. All right. Well, Mid-Gulf is out of this case.

MR. SMITH: Yes. Mid-Gulf was dismissed out of it and there were no fact findings that Mid-Gulf did anything

wrong whatever.

QUESTION: By the time it came to trial, it was a tri-partite type case. There had been four parties, now there were three.

MR. SMITH: Correct.

QUESTION: That is, the injured stevedore, the injured workman --

MR. SMITH: Longshoreman.

QUESTION: -- longshoreman, the injured longshoreman --

MR. SMITH: Cooper Stevedoring.

QUESTION: -- the vessel, and Cooper Stevedoring. And now the injured man is out of it.

MR. SMITH: Yes, sir. We paid off the judgment and now we are fighting among ourselves.

QUESTION: It's not all that different from the insurance company of a defendant in a personal injury crossing accident, is it?

MR. SMITH: No.

QUESTION: A third-party complaint.

MR. SMITH: Very standard, really a simple situation when you look at it in the right perspective.

Now, the Fifth Circuit -- we argue the Fifth Circuit affirmed the district court, affirmed that the stevedore was negligent, that it breached its warranty, and affirmed that 50 percent contribution, and more or less assumed in its opinion

that the stevedore -- the ship was precluded from full indemnity because the judge didn't give it to us. There is no fact-finding, there is no really evidence anywhere in the case that the ship was precluded from recovery of full indemnity; it has just been something that has been ignored.

QUESTION: You asked for it but the court didn't give it to you, isn't that right?

MR. SMITH: We asked for it but didn't get it.

QUESTION: That's a pretty direct answer, isn't it?

MR. SMITH: Well, they didn't comment on it. They could have said it's denied because -- but they just didn't address themselves to it, the district court.

QUESTION: How much would full indemnity have been?

MR. SMITH: $38,697.90, I think, plus our attorneys' fee.

QUESTION: And the court gave you how much?

MR. SMITH: Well, half of that. They gave us 50 percent, we're going to split it 50-50. We paid off the plaintiff and now we are asking --

QUESTION: No attorneys' fee. You got half --

MR. SMITH: Well, they didn't address themselves to attorneys' fees.

Normally the way we handle that, Judge, is normally in this type of situation if we get full indemnity, we usually agree on the attorneys' fees between the parties and then if

we can't agree to it, we go back to the district court and he awards it. We usually work these things out.

But our case is up here, and Mr. Cheavens has asked you to, I think, take a limited approach the way you decide this case. As I see it, the Court can take a limited view and they can affirm the case and say there is contribution in this fact situation. But this leaves, I think, as Mr. Cheavens pointed out, some conflicts that are going to cause some trouble in some of the district courts.

You could reverse this case and just hold that under Halcyon there will be no contribution in any non-maritime situation -- non-collision maritime situation. I think this would be a horrible thing to do because for reasons I will get into. I think it would make the law a lot more confused and a lot more arbitrary than it is now.

Or you can take a third solution to the case, and I think kind of leave the law exactly like it is. You can decide on the fact-findings that I was entitled to full indemnity and just under Ryan give me full indemnity. But that won't change the law. It leaves it exactly where it is today. And I don't think the Court granted a writ in this case to do that.

Now, I am going to suggest a rather bold, sweeping approach that the Court can clear up this whole area for generations to come, if you will look at the case from a broad standpoint.

Now, before I get to what I am going to suggest, I would like to review historically the law in this field. In 1946 this Court passed the Sieracki opinion which in effect granted the right of the doctrine of unseaworthiness to cover longshoremen. Longshoremen could sue vessels for an unseaworthy condition which amounts to almost absolute liability without fault. As a result, after the Sieracki opinion, the longshoremen around the country started suing the vessel owners and recovering substantial amounts of money. And it was beginning to get out of hand. And in 1952, the steamship company in the Halcyon case sued the stevedore that caused the unseaworthy condition and started to get some relief. They thought it was kind of unjust that the stevedore could go on board and create an unseaworthy condition and then the steamship company has to pay for it.

So the Court took the case under review, but because of the statutory immunity of the stevedore, denied the right of the ship to collect contribution in the Halcyon case.

QUESTION: Of course, they didn't say in so many words they were denying it because of the statutory immunity, did they?

MR. SMITH: Well, it's in the opinion that section 5 of the Act -- and then there is a lot of dictum in the case. That's why I think there is so much trouble as what Halcyon really means.

But anyway, they didn't let the ship collect contribution against the stevedore. And then things really got into high gear until 1956 when the Court handed down Ryan. It didn't address itself to the contribution issue, but came up with this warranty of workmanlike service theory to grant full indemnity. So where the man's employer, the stevedore employer, breaks this heretofore unknown warranty, that somehow it was a contractual theory and a negligence lawsuit, then it got to be 100 percent. The ship either had to pay 100 percent or the stevedore did. And this is the way it has gone since then. In Yaka in 1963, you extended it even further. Then in 1964, you backed off a little bit with the Italia decision to where the ship was guilty of such conduct sufficient to preclude, then the stevedore wouldn't have to pay 100 percent even if it breaks its warranty.

But here again, both ways, because of the Ryan case which in effect came about because of the Sieracki opinion, you have got two parties many times equally at fault or both at fault, one of them having to pay all the money. And it's inequitable; it has been criticized by many courts, by many scholars, and it got so bad that in 1972 Congress drastically amended the Longshoremen's Act.

One of the things they did was that they took away the longshoremen's right to sue the ship for unseaworthiness. This in effect overruled the Sieracki opinion that came down

in 1946.

Number two, they said that section 5 of the Act means what it says, that the steamship company can't sue the employer either for implied warranty or expressed warranty. Even if they contract that they can sue them, they can't do it. This, in effect, overruled Ryan as it applied to the injured man's employer which was what Ryan came out of, that particular fact situation. So amendments to the 1972 Act effectively reversed two prior leading cases that had caused all this, Sieracki and Ryan.

QUESTION: Neither of those amendments affect the situation here.

MR. SMITH: No, sir, they don't.

QUESTION: Because the vessel was found to be negligent in addition to being unseaworthy, and also because Cooper Stevedoring is not the employer of the injured man.

MR. SMITH: That's right, and even if this accident happened today.

QUESTION: Right. We would still have the same problem.

MR. SMITH: We would still have the same situation. This is what I am getting at. The ship can still sue Cooper Stevedoring Company if the accident happened today. They could sue Cooper tomorrow for a breach of a Ryan warranty of a stevedore that is not the employer. And Ryan wasn't

intended to come up that way anyway.

What I am going to suggest that this Court do is go ahead and abolish Ryan completely. Congress has done so drastically where the situation applies most of the time anyway between the employer, the injured longshoreman, and the ship. But Ryan also has been spread over to cover particularly in the Fifth Circuit area where we have so much offshore activity in maritime situations, that Ryan has been applied and not applied in so many of these other situations where it doesn't fit.

QUESTION: But here what you are asking us to do is to completely overrule a case that was just tailored by Congress two years ago?

MR. SMITH: No, Congress I think effectively overruled the original Ryan opinion in the context in which it arose.

QUESTION: But isn't that a rather strong implication that Congress in reviewing this situation wanted it overruled in that area but left standing where it would apply otherwise?

MR. SMITH: Well, that's a very, very broad thing for Congress to do. I think this Court created the problem, and I think it's best that this Court under the historical context, that this Court ought to step in and correct it.

QUESTION: You say it's a very broad thing for

Congress to do. Surely, it's an even broader thing for this Court to do.

MR. SMITH: Well, not in the law the law is set up now with the amendments to the Longshoremen's Act, cutting out or doing away with Ryan in a big portion of the cases. You are going to have Ryan not applied in most of the cases where it was and then still applying in some other cases where it wasn't intended.

QUESTION: Well, my brother Rehnquist has just suggested that the inference would be that that is precisely what Congress intended when they looked at this problem in 1972 and amended the Act and cut down on Ryan pro tonto, to the extent they wanted to cut down on it.

MR. SMITH: Well, Justice Stewart, I don't believe the legislative history would indicate that there were a lot of maritime interests that this Ryan case could or could not affect were present and negotiated the amendments to the Act. The stevedoring companies, the steamship companies, and the labor unions were the ones that hammered this out with Congress. There are a lot of other interests that are affected by Ryan that I don't think were considered, and I don't think they were trying to correct Ryan in every possibility that it --

QUESTION: Can you suggest any possible reason for leaving Ryan in effect where negligence is at issue but not

unseaworthiness?

MR. SMITH: No, sir. That's my next point.

QUESTION: You think it must have been then just an oversight or just bad legislating if they took care of the seaworthiness thing but didn't reach the negligence?

MR. SMITH: No, sir. That's what's covered. They did this on purpose. There was the steamship industry pushed very strongly to do away with all third-party suits by longshoremen against vessels for unseaworthiness or negligence. And Congress and the Department of Labor expressly rejected this because of the policy they wanted to encourage steamship companies to come in with safe ships.

QUESTION: All right.

MR. SMITH: And if they were to --

QUESTION: We're not talking about ship liability, we are talking about indemnity. They did away with the indemnity on unseaworthiness.

MR. SMITH: Indemnity as to the employer.

QUESTION: Altogether, unseaworthiness or negligence.

MR. SMITH: Well, you can't sue for unseaworthiness. All the steamship companies have got to worry about now is a regular negligence case.

QUESTION: There is no Ryan indemnity left after the '72 amendments except against the non-employer, isn't that right?

MR. SMITH: Yes, sir. And I think to make --

QUESTION: Except for negligence.

MR. SMITH: I think the steamship company can sue any other negligent third party that has caused his own.

QUESTION: But that's not Ryan indemnity.

MR. SMITH: No. But what I am saying is I think that since the plaintiff can sue the ship for negligence and the plaintiff's case is governed by comparative negligence, that if he is 30 percent at fault, his damages are reduced thereby. All right, he no longer has an unseaworthiness remedy. Then go ahead to allow contribution or comparative negligence between the ship or anybody else that the ship may sue or the plaintiff may sue. In this case it's conceivable that the plaintiff could have sued Cooper directly, so he could have gotten a judgment directly against him. The judge could have found that we were both at fault and awarded a 50 percent judgment against Cooper and a 50 percent judgment against the ship. It could have done that, but it just didn't choose to do it.

What I am suggesting is to go ahead and put it in the three party suits or in this whole area of maritime personal injury law, put it on a comparative negligence basis, let the plaintiff sue anybody he thinks is at fault on the negligence theory,comparative negligence as far as contrib. goes. And as to the negligence or the fault of the co-tort-feasors,

let them all pay their fair share. If you have got two or more people --

QUESTION: That would ... both Halcyon and Ryan, wouldn't it, since one said there is no right of contribution and the other said there is an absolute liability on a warranty.

MR. SMITH: That's why you have got this bad conflict. Congress came back in 1972 and says that the employer will be immune because of his payments of compensation, they upped the benefits substantially, and that's all the employer is going to have to pay.

Now, among other guilty parties, I think the plaintiff is free to sue anybody he wants to. And they should be able to sue themselves or each other on a comparative basis. And since there is no more Ryan warranty to the employer, there ought not to be a Ryan warranty to anybody else. And these other situations of where does Ryan apply and where doesn't it apply has really muddied the water.

QUESTION: Mr. Smith, how do we explain that in the opinion? We say that Congress went half of the way and refused to go the other half of the way, so we will go the other half of the way? Is that the way we explain it?

MR. SMITH: Yes, sir. The Moran case, you ruled standing authority that there was no cause of action in maritime law. You just said you overruled in that decision and went ahead and did it.

QUESTION: Well, here we overrule Congress.

MR. SMITH: No, you will not overrule Congress. You are coming in following Congress' lead.

QUESTION: Congress said as of now, this is as far as we want to go, as far as we intend to go. And we say, well, since you didn't go, we will go.

MR. SMITH: Well, in uniformity and fairness, everybody agrees this 100 percent indemnity theory is unjust and Congress thought so because they did away with it in that situation.

QUESTION: It boils down to the proposition you are really asking us to tidy up and finish up the legislative job that Congress began but didn't complete.

MR. SMITH: Yes, sir. Exactly.

QUESTION: I thought that's what it sounded like.

MR. SMITH: It's what I have been trying to say.

QUESTION: It may or may not be unjust and it may or may not have been criticized by the commentaries and so on. But this is an industry, at least I have heard it and read it and perhaps even written it many times, which is peculiarly imbued with insurance arrangements. And the important thing is to know what the rules are, isn't it, and not keep changing them all the time, even though the rules are unsymmetrical or in a perfect world inequitable. But nonetheless, the insurance arrangements are made; it's important

that there be certainty, is it not?

MR. SMITH: Yes, sir. I think there would still be just as much certainty here; there would be a lot more justice in that those that --

QUESTION: Well, the public pays the bill in the end anyway and, as we all know, through insurance. If the arrangements are made, then the problem is handled, isn't that correct?

MR. SMITH: Justice Stewart --

QUESTION: Halcyon and Ryan have been on the books a long time and now we have the action of Congress in 1972 which changed the rules of the game somewhat, but now those are the rules of the game, and shipowners and stevedores and so on should be able to make their arrangements with their liability insurers accordingly, shouldn't they?

MR. SMITH: Yes, sir, but insurance companies are entitled to justice just like anybody else.

QUESTION: Well, it works out the same in the end, doesn't it? I say, we nearly all agree that society pays for these injuries one way or another.

MR. SMITH: Yes, but I think we ought to make the guilty pay for the injuries they do and not encourage --

QUESTION: What do you do with the Atlantic case, incidentally?

MR. SMITH: Nothing.

QUESTION: Well, how do you explain it?

MR. SMITH: Well, it's on the same points as Halcyon.

QUESTION: It's against it.

MR. SMITH: No, sir, it's not. That man was paid -- the Atlantic case, they got into trial and almost through trial before they even knew there was a maritime question.

QUESTION: Well, but by the time the case came here, the question was exposed.

MR. SMITH: In the briefs of his employer, he was paid Longshoremen's and Harbor Workers' Compensation benefits, section 5 of the Act applied; they pled it, they argued it in their briefs, and under the Halcyon situation where the employer has paid his compensation under the Federal Act, there is no conflict at all. The employer was immune from contribution.

QUESTION: Aren't you going much farther than you have to to win this case?

MR. SMITH: Yes, sir.

QUESTION: You are urging us to affirm this judgment on another, much broader ground.

MR. SMITH: Yes, sir.

QUESTION: You could prevail by just going with the Fifth Circuit.

MR. SMITH: Yes, sir.

QUESTION: You don't need to overrule, urge us to

overrule Halcyon and Ryan cases. Need you do that?

MR. SMITH: No. First of all, I am not --

QUESTION: The question is right now if the judgment below is reversed, we are changing the law of two circuits, aren't we?

MR. SMITH: Yes, sir.

QUESTION: Because in the Second and the Fifth Circuits Halcyon has been laid to rest in a certain way.

MR. SMITH: Yes, sir, distinguished very ...

QUESTION: I suppose you would rather win than lose.

MR. SMITH: Oh, yes, sir.

QUESTION: Tell me, Mr. Smith, you said the '72 amendments make unenforceable even an explicit indemnity provision as between employer and shipowner.

MR. SMITH: Yes, sir.

QUESTION: And yet didn't you tell us that your former client, Mid-Gulf, made a settlement with the ship? What was that? A settlement of what? A Ryan indemnity, or what?

MR. SMITH: This was before the '72 amendments.

QUESTION: All right. That's the answer.

MR. SMITH: We were faced with a Ryan indemnity.

QUESTION: Had this happened after the statute, there would have been no settlement obviosuly.

MR. SMITH: No, sir. We would be immune. We could

sit back and watch.

QUESTION: You would still be here, though, probably, wouldn't you?

MR. SMITH: Well --

QUESTION: No.

QUESTION: Do the amendments expressly apply only prospectively, or what?

MR. SMITH: Yes, sir. They went into effect in the last part of November 1972.

QUESTION: I know, but did they have a specific provision as to whether those standards would apply in pending legislation or not, pending litigation?

MR. SMITH: No, sir. I have tried a number of cases since that Act was amended, but the actions that happened before, and we handled them all the way through under the old Ryan warranty.

QUESTION: I take it, Mr. Smith, had they been effective, the ship probably would still be here, but you would be talking for it.

MR. SMITH: Well, probably not, but --

QUESTION: As I understood you, you are here for the ship only because you stepped into the ship's shoes after Mid-Gulf paid off.

MR. SMITH: That's right. That's right, Justice Brennan.

QUESTION: But if the amendments had applied, you wouldn't have had to pay off.

MR. SMITH: But addressing myself back to Justice White's question, contribution, the general theory behind it, is that joint tort-feasors ought to pay their part of the wrong that they caused in injuring somebody. And there is just no logical reason in a non-collision maritime situation where you don't have an employer involved, as we don't have here, is why if the plaintiff just chooses to sue one of them, why they can't sue a co-tort-feasor, one or more, and divide the damages as they are proven up. I just don't think it's fair or just or equitable that you have -- and particularly where you have contribution in so many other areas of tort law -- to single out maritime law and just say we won't have it.

QUESTION: Let's assume we agreed with you that Halcyon should not be read as preventing contribution on these facts, in this kind of a situation. Are you also urging that there should be a different rule of contribution than 50-50?

MR. SMITH: No, sir, I think where you have got two co-tort-feasors, if you have contribution, it's 50-50; if you have three --

QUESTION: You aren't urging comparative negligence.

MR. SMITH: I think comparative negligence would be, if you are going to write in this area, I think comparative

negligence would be the more equitable way to do it.

QUESTION: But the maritime collision rule is 50-50 no matter what.

MR. SMITH: It was divided damages rule, but --

QUESTION: Is that what the Fifth Circuit applied in this case?

MR. SMITH: No. No. They didn't even mention the --

QUESTION: So it's comparative.

MR. SMITH: Well, Judge Singleton, the district court judge, said, "I am going to find you both equally at fault, 50-50." So that's what he did and the Fifth Circuit affirmed.

QUESTION: But in a collision case, all he would have had to find was some fault on both sides.

MR. SMITH: Mutual fault.

QUESTION: And it would have been an automatic 50-50.

MR. SMITH: Where you add up all the damages and divide them by half and the one who is the least damaged pays --

QUESTION: And in ordinary tort law, apart from maritime on tort law, it's 50-50, isn't it?

MR. SMITH: Yes, between two co-tort-feasors.

QUESTION: If they are both co-tort-feasors.

MR. SMITH: Yes, sir, 50-50. If there are three,

they divide it in thirds.

This case can be a far-reaching one, it can be limited. I have I know suggested something that you probably didn't expect. But I think if you give this consideration and at least, your Honors, please affirm this case as to contribution anyway, but I think this could be a very dynamic case in the annals of this whole area of law, if you take this one step further, or at least give it some consideration.

QUESTION: I think any time we amend an act of Congress, it will be very dynamic.

MR. SMITH: Justice Marshall, you will not be amending an Act of Congress.

QUESTION: Why not?

MR. SMITH: No, sir, you would be just kind of dove-tailing and following along behind it.

QUESTION: Going where they wouldn't go.

MR. SMITH: No, sir, just going on in areas they pointed out but didn't quite go that far.

Thank you very much. I have enjoyed being here.

MR. CHIEF JUSTICE BURGER: Mr. Cheavens, do you have anything further? You have two minutes left.

REBUTTAL ORAL ARGUMENT OF JOSEPH D. CHEAVENS

ON BEHALF OF THE PETITIONER

MR. CHEAVENS: I would like to make just a few brief points.

First, the merits of the contribution rule are at best arguable and they are certainly appropriate for legislation, not for judicial action. This is the common law tradition. They are legislative because they vitally affect amongst others the rights of injured plaintiffs. If there is one category of people, Mr. Justice Stewart, who cannot be adjusted, whose rights cannot be adjusted by insurance, it is the plaintiff, the injured plaintiff. And as Professor James points out, a rule of contribution severely restricts the plaintiff's rights. About one-third of the States -- well, first, the States are closely divided on the merits of legislation. I refer your Honors to the Yale Law Review article which analyzes the different State rules.

QUESTION: You mean on the merits of contribution.

MR. CHEAVENS: On the merits of contribution. Only a bare majority even have contribution.

QUESTION: In ordinary common law.

MR. CHEAVENS: That's right. And that is in nearly all of our legislation. And of those, nearly one-third of those, do so only where the plaintiff has as a matter of tactic chosen to sue and has obtained a finding against both defendants. That has not occurred here. So this Court would be doubly asked to create a rule which would work against injured plaintiffs in an area of the law where this Court has been especially solicitous of the rights of injured plaintiffs.

The rules of contribution in the States also frequently do not equally apportion but do so on a comparative fault basis.

A separate matter is that the issue of Ryan indemnity in this case is not before this Court. The Fifth Circuit denied Ryan indemnity and no cross-petition for certiorari was filed.

MR. CHIEF JUSTICE BURGER: Thank you gentlemen. The case is submitted.

[Whereupon, at 11:10 a.m., the oral argument in the above-entitled matter was concluded.]