ORIGINAL

In the

Supreme Court of the United States

STANLEY D. EDMONDS,

Petitioner,

v.

COMPAGNIE GENERALE TRANSATLANTIQUE,

Respondent.

No. 78-479

Washington, D. C.
March 19, 1979

Pages 1 thru 41

Hoover Reporting Co., Inc.

Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

STANLEY D. EDMONDS, Petitioner,	:	
v.	:	No. 78-479
COMPAGNIE GENERALE TRANSATLANTIQUE, Respondent.	:	

Washington, D. C.
Monday, March 19, 1979

The above-entitled matter came on for argument at 2:17 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THORGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

CALVIN W. BREIT, ESQ., Breit, Rutter & Montagna, 720 Atlantic National Bank Bldg., 415 St. Paul's Blvd., Norfolk, Virginia 23510, on behalf of the Petitioner.

CHARLES F. TUCKER, ESQ., 2050 Virginia National Bank Building, Norfolk, Virginia 23510, on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-479, Edmonds against Compagnie Generale Transatlantique.

Mr. Breit, you may proceed.

ORAL ARGUMENT OF CALVIN W. BREIT, ESQ.

ON BEHALF OF THE PETITIONER

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

This matter comes on out of the Fourth Circuit, arising out of a decision which was then in conflict with the Ninth and now with the Second and Fifth Circuits, as well, concerning the rights of a longshoreman who was injured aboard the Defendant's vessel, as a result of the combined negligence of the longshoreman himself, the stevedore and the ship owner.

The major issue before the Court is whether or not the longshoreman has a right to recover in full his damages under the long-established common law principle of joint and several liability from the various tort-feasors who caused his harm, or whether that right has been abrogated by statute, under the Longshoremen and Harbor Workers' Compensation Act.

The history of the right in both maritime and land based law is extensive. The Court has ruled in Halcyon v. Haenn, it has ruled in Pope and Talbot v. Hawn, it has more recently ruled in Cooper v. Kopke, in ACL v. Erie, and numerous

other cases, that the injured party has an indivisible right of recovery in full.

The question now posed is whether Congress intended to abrogate that rule when it amended the Longshoremen and Harbor Workers' Compensation Act in 1972. Prior to 1972, it was clear that Halcyon v. Haenn, Pope and Talbot v. Hawn was the law on that particular issue. Congress made no act which would suggest that it intended to change that law.

There is an apparent, but not actual, discrepancy between two sentences in 905(b) of the Act, which has been taken to suggest that the Congress was intending proportionate fault.

Nothing could have been further from Congress' mind at the time. Respondent, in page 11 of his brief, concedes that the purpose of the second sentence of 905(b) was intended to preserve the doctrine established by this Court in Reed v. Yaka, namely that a ship owner could not, by hiring his own longshoremen and thus become the stevedore, avoid the harm that he does to that stevedore.

It was in the context of Reed v. Yaka, that the second sentence was passed in the '72 Amendments. And the purpose of it was solely to retain the doctrine as espoused by this Court in Reed v. Yaka.

On pages 43 and 44 of Respondent's brief, it is suggested that 933 of this same Act was passed so that the

longshoremen could not effect a double recovery and receive double compensation.

Well, it is inconceivable that he could have received double compensation, unless in the first instance he is compensated in full by the ship owner, tort-feasor, who has caused his harm.

Napoli in the Second Circuit, Anderson v. Iceland in the First, both have stated that the purpose of that sentence in 905(b) was to preserve the doctrine of Reed v. Yaka.

But, more important than that, Congress itself was not silent on the point. Congress specifically stated that the longshoremen's right of action in negligence against the ship owner "shall survive." That right of action against the ship owner is the right to recover 100% of his damages from the ship owner or any other person who independently or concurrently created the harm that he has suffered.

The congressional record is replete with dozens of cases that it intended to overrule that were in existence at the time.

This Court, in an active role -- which it is permitted to do in matters maritime -- under the doctrine of Seas Shipping v. Sieracki, provided for the longshoremen a cause of action which created in effect an absolute right of recovery for any unseaworthy condition, regardless of fault.

Interestingly enough, the unseaworthy condition was

almost always caused by the negligence of the stevedore. The Court had held in Halcyon v. Haenn that there was no cause of action over against the stevedore for contribution in tort. And this Court then went on to extend the seas doctrine, under a contract theory, when in Ryan it held that there is, not contribution, but indemnity.

The Congress spent a great deal of time on those issues, and in doing so in its reports it clearly established what it was intending to do. It set forth specifically the names of the cases that it intended to overrule. Particularly, under the Section of Elimination of Unseaworthiness Remedy, it cites Seas Shipping v. Sieracki as one of the cases it intended to overrule.

No longer does the longshoreman have a cause of action merely because he was injured and merely because there was a defective condition. He now is reduced to the common law negligence action, instead of an action under unseaworthiness.

The Congress went on further to suggest "further," and then reciting Ryan Stevedoring v. Pan Atlantic, "the third-party action, the triparte cause of litigation, which had burdened the courts and had expended large sums of money by the stevedore and his carrier and the ship owner alike, is better put to use paying compensation."

And so, Ryan was specifically overruled. Cromity,

Algonnes, Italia Societe v. Oregon Stevedoring, all cases which had established the cause of action for unseaworthiness were specifically overruled. And finally, under the same suggestion, the elimination of unseaworthiness remedy, we finally come to the sentence which is the crux of this case,"the vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore."

Respondent and the Fourth Circuit, I suggest, erroneously have interpreted that statement to mean that a percentage of negligence requires only a percentage of payment. When, in fact, what was intended here by the vessel not being chargeable with the negligence of the stevedore, was to do away with Seas Shipping, which said that in effect the ship owner is vicariously responsible for the acts of the stevedore, and thus becomes liable when the stevedore commits an act of negligence.

Today, under the Amendments, the act of negligence must be committed by the ship owner, himself. But that does not mean that there cannot be more than one approximate cause of an injury. And nowhere was it intended by Congress that the ship owner would become liable in tort if it were the sole and exclusive tort-feasor. To suggest that is to defeat the purpose of the Act, and as Congress has said to cause the ship owner to remain responsible to his obligations in tort to the injured longshoremen.

QUESTION: Mr. Breit, supposing this case had arisen in just a common law tort situation, and the trial court had mistakenly submitted interrogatories regarding comparative fault to the jury, and they had found 20% on one party, 70% on the other. The highest court in the state says the trial court was wrong, "We don't have comparative fault here, we just have traditional, ordinary negligence."

Could it uphold a verdict against the 20% liable party for the entire amount?

MR. BREIT: If we are talking about comparative fault of others besides the injured person, clearly, under every case that has ever been decided, it must give that injured person 100% of the recovery, with the exception of those states which have incorporated it into a statute, under the doctrine of comparative negligence, under the common law doctrine of ordinary negligence, both land and maritime, the injured person always was entitled to the whole, because his harm is indivisible, even though two or three or four may have contributed to the cause. The broken leg is the broken leg, and if three people concurrently aided in breaking it, he still has one harm.

And so, my answer to you, sir, is that every case has always held that the injured party is entitled to the full recovery, at common law.

QUESTION: I get the feeling that in most of these

maritime cases there is one insurance man that pays it all, so why do they have all this litigation? Doesn't Lloyd pay it anyway?

MR. BREIT: Mr. Justice Marshall, I have argued in my brief that the ultimate economic loss is going to be shared between the stevedore and the ship owner, somehow or other, in any event, that the sole purpose that we are here is because they are both in concert suggesting that the injured person suffer the economic loss, and he is the least able to bear that loss.

You are correct, sir, that regardless of this Court's ruling, provided it gives the injured longshoreman his full recovery, sooner or later, in the course of dealing between the stevedore and the ship owner, the cost will be passed on to the ship owner and the ultimate consumer. There is no question about that.

The issue then is do we take it away from the injured party, so that their respective losses are less? Common law doesn't permit that.

QUESTION: Your submission, Mr. Breit, as I understand it, is that the statutory language in question was intended to do no more than to preserve the rule of Reed v. Yaka?

MR. BREIT: Yes, sir. That's correct, preserve the rule of -- the conflict in the statutory language. The second sentence was intended solely to do away with Reed v. Yaka. The

issue of the vessel not being chargeable with the negligence of the stevedore referred to the unseaworthiness vicarious liability, which had come as a result of Seas Shipping v. Sieracki.

QUESTION: Would you state it for me again. Did you say it was to preserve or to overrule Reed v. Yaka?

MR. BREIT: To preserve -- Well, let me modify that. Reed v. Yaka had two rules. One rule was that the ship owner, who is a stevedore -- is his own stevedore -- is responsible, as a ship owner. That rule was intended to be preserved.

QUESTION: There the stevedore was the bear boat charterer, I think.

MR. BREIT: Yes.

And the second portion of Reed v. Yaka which followed Seas Shipping, which said that unseaworthiness is a cause of action. That was intended to be overruled. So, really, they were modifying Reed v. Yaka, but retaining the portion which said, "If you are a ship owner and a stevedore at the same time, you are responsible as a ship owner, not as a stevedore."

QUESTION: For unseaworthiness?

MR. BREIT: No, sir. Only for negligence as a ship owner.

QUESTION: But wasn't Reed an unseaworthiness case?

MR. BREIT: Reed v. Yaka was an unseaworthiness case, and Reed v. Yaka was the case which held that the ship owner

could not abort the law by hiring his own longshoremen. It held that if he were a stevedore and a ship owner he was responsible as a ship owner.

QUESTION: For unseaworthiness?

MR. BREIT: For unseaworthiness or for negligence, certainly.

QUESTION: The thing that puzzled me -- I didn't understand the case to decide any negligence issue.

MR. BREIT: Reed v. Yaka did not.

QUESTION: But it held that when a stevedore was both stevedore and ship owner you could sue him as ship owner, despite the then statute.

MR. BREIT: That was the holding, and that was the purpose --

QUESTION: And whether his liability depended upon unseaworthiness or negligence was really not the issue in the Yaka case, although it was an unseaworthiness claim. Now, that unseaworthiness has now been eliminated by Congress, but your contention at least is that this statutory language at issue in this case was to preserve the rule of Reed v. Yaka, the fundamental rule that when a person is both stevedore and ship owner he can be sued as ship owner?

MR. BREIT: Yes, sir. And I think every court of appeals that has ruled on that point has so held. The Fourth Circuit did not touch the point in its argument and concluded

that the only way you could reconcile the two sentences was to come up with a rule of proportionate fault. A rule of proportionate fault, as between tort-feasors, is really not a rule at all as to the injured person. Proportionate fault should speak to the degree of liability as between the tort-feasors.

QUESTION: And you concede that the damages should be reduced by the percentage of the Plaintiff's fault, do you not?

MR. BREIT: Yes, sir, that's specifically within the statute.

QUESTION: That's not at issue here?

MR. BREIT: That is not at issue here. We concede -- There was a $100,000 verdict here, we concede that 10% of that is a reduction as a result of the longshoreman's own fault.

QUESTION: I hate to reveal my stupidity so frequently, but the second sentence is what's critical here -- It's a critical part of your argument, as I understand it. And I just want to be sure I do catch it. Because the sentence says, "If such person was employed by the vessel to provide stevedoring service, no such action shall be permitted if the injury," and so forth.

And you are saying it was to preserve the action, rather than to prevent it.

MR. BREIT: It is to preserve the action against the ship owner who was likewise a stevedore.

QUESTION: But it says no such action shall be permitted against him. That's why I am so puzzled. Maybe I am reading the wrong sentence.

QUESTION: "If such person was employed by the vessel."

MR. BREIT: To provide stevedoring services. "No such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services."

What they were saying is that the ship owner, as a ship owner, remains liable. As a stevedore he does not. He's got two heads at that moment.

If it is the stevedoring services that are the sole cause of this man's injury, or that creates an unseaworthy condition aboard that vessel, then there is no right of recovery. But if the ship owner, as a ship owner -- for instance, bringing in grease and oil from another port and leaving it on the deck, or having a defenctive winch, which was not part of its stevedoring operation, he remains liable.

QUESTION: But you construe that sentence as primarily preserving a claim, rather than destroying a claim?

MR. BREIT: Preserving Reed v. Yaka.

QUESTION: I understand. Okay.

MR. BREIT: The Committee Reports have said so.

QUESTION: It's a very odd way of doing it, isn't it? You would grant at least that it's inartfully drafted, I suppose.

MR. BREIT: Oh, I think it's very poorly drafted, yes, sir. I think it was just a very simple matter for them to put in proportionate fault if they had intended. And if they had intended it by these sentences, it is grossly inartfully drafted. But I don't think that was the intent of Congress, because at the time proportionate fault was not a doctrine known in maritime law. At the time, in '72, when these Amendments were passed and before this Court had ruled in Reliable, the only proportionate fault that ever existed was the old fifty-fifty rule, which later this Court amended. But, of course, when the Court acted in Reliable, it did so changing a common law doctrine, and not a matter that had been heavily debated by the Congress.

QUESTION: An admiralty law doctrine, not common law.

MR. BREIT: Yes, admiralty law.

QUESTION: May I ask one more question about this example. Say the Plaintiff is an employee of the ship owner performing stevedoring services. And he wants to sue the ship owner for negligence unrelated to the stevedoring services. You say he can or he cannot?

MR. BREIT: He can, under Reed v. Yaka, and he can under this preservation and the amendment.

QUESTION: Even though he is an employee, he may sue for negligence?

MR. BREIT: Yes.

QUESTION: I understand your position now.

MR. BREIT: On page 11 of the Committee Report, the Committee recognizes the need for special provisions to deal with the case where a longshoreman, a shipbuilder or repairman is employed directly by the vessel. In such case, notwithstanding the fact that the vessel is the employer, the Supreme Court in Reed v. Yaka and Jackson v. Lykes held that the unseaworthy remedy is available to the injured employee. It then goes on to say that it wants to retain that right of action against the ship owner.

Throughout something like 1200 pages of testimony, there was never once a statement of proportionate fault propounded to the Congress. One speaker, a gentleman by the name of Kaplan, who spoke on behalf of a plaintiff's bar, in passing mentioned that it may be a harsh rule to put all of the burden on either the ship owner or the stevedore and perhaps some proportionate fault would be appropriate and he was immediately shot down. And that was the only time it was ever mentioned in the reports.

QUESTION: Who shot him down?

MR. BREIT: Multiple other speakers. Actually, it was the Senator who was questioning him who shot it down. I've forgotten, quite frankly, who -- Mr. Eagleton, yes, that's correct -- shot it down and it was never heard from again.

Mr. Vickery, in his article which was cited by Judge Haynsworth, suggests that Congress had intended that. However, he was on the witness stand for a substantial length of time. His testimony is many pages long and he never once throughout his entire testimony mentioned the issue of proportionate fault, or anything that resembled it.

Now, they did put in a comparative negligence rule. But the comparative negligence rule was a rule aimed at aiding the injured longshoreman, so that he did not suffer the harsh common law rule of being barred in the event he is contributorily negligent in any degree.

QUESTION: Hasn't that kind of comparative negligence always been part of admiralty law?

MR. BREIT: Yes, sir, and it was specifically retained by statute here.

QUESTION: Why did it have to be?

MR. BREIT: Why? Because in the legislation they said that the right of recovery by the longshoreman shall be identical to land-based law; and, therefore, to preserve it they added the comparative negligence, the lack of assumption of risk, other doctrines that were not land-based.

In short, what we have here --

MR. CHIEF JUSTICE BURGER: I don't know whether you saw your light -- white light, warning you of your rebuttal?

MRL BREIT: All right, sir. I will take just one or

two more moments and then -- I did not see it.

The other issue which I would like to bring out is this. In effect, what we are asking the Court to do is to legislate, because the statute seems clear that it never intended a doctrine of proportionate fault. In Section 933, it specifically said that when the stevedore files suit, he is entitled as the first order of business to recover his expenses and every penny that he has paid. And his suit, of course, is derivative.

This Court in Higginbothom declined to legislate or go further when it was posed with a statutory interpretation. This Court just a few weeks ago, in Rasmussen -- I think Mr. Justice Rehnquist wrote it -- declined to go further in interpreting the Act.

It is suggested that this Court again should not attempt to legislate when it became clear what Congress had intended.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Tucker.

ORAL ARGUMENT OF CHARLES F. TUCKER, ESQ.

ON BEHALF OF THE RESPONDENT

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

The question before the Court for determination, it seems to me, is one of fairness and equity. And it is whether

or not a ship owner, which has been found by a jury to be only 20% at fault for an accident, shall be required to pay full damages to the Plaintiff, while the stevedore employer found to be 70% at fault, recovers the full amount of its compensation lien, and thus shares none of the financial burden of the loss.

Now, I think it is important to understand or consider what the Congress was trying to do in adopting the 1972 Amendments to the Longshoremen and Harbor Workers' Compensation Act. It is clear that they acted in order to correct a number of inequities which had developed over the years. Primarily, of course, it was to provide a liberal system of compensation for longshoremen, the injured parties, but secondarily it was certainly to more equally distribute the financial burden occasioned by an accident among the three parties involved, the longshoreman himself, the ship owner and the stevedore.

And I think here it is important to recognize what had happened under litigation which had developed under the Longshoremen's Act, and Mr. Breit has referred to the Sieracki case and the Ryan case. And it had developed, as you know, that longshoremen were given the warranty of seaworthiness and could recover against a vessel owner, not only for negligence but for unseaworthiness, which, in effect, almost made the ship owner an insurer for the safety of the longshoremen.

In order to correct this inequity, or in an attempt

to, the Ryan doctrine allowed the ship owner to claim back over against the stevedoring company for indemnity. And the stevedore ended up in that type of three-party litigation by not only paying compensation but by paying full damages, assessed by a jury or the court. This was recognized by everyone as being quite inequitable.

If you adopt the position of the Plaintiff, Petioner in this case, we are going right back to the same old inequity, except it now falls on the ship owner instead of on the stevedoring company. And I don't believe, as Judge Haynsworth stated in his opinion, that it was ever the intent of the Congress, while taking away on the one hand the right of the ship owner to recover any indemnity from the stevedoring company to then saddle the ship owner with full liability for an accident when it may well have been only slightly at fault and the stevedoring company greatly at fault.

This was not the intent of the Congress, as shown by the legislative history, and could not have been, we contend, in light of the historical background of the Longshoremen and Harbor Worker's Compensation Act, as it existed prior to 1972.

Now, there was also one other intention of the Congress, I believe, in the 1972 Amendments. And that was to provide a liberal compensation scheme, whereby the longshoremen could look to the Act, to compensation, for full satisfaction for his injuries, and would not have to file a third-party action

against anyone, except under unusual circumstances, in order to recover compensation.

The result, as suggested by the Petitioner, would do away with this intention of the Congress.

Now, the decision of the Fourth Circuit, the en banc decision, serves to further the purposes of the Amendments, by balancing the equities among the three parties. As this decision has indicated, the ship owner will pay its proportionate fault. In this case, the jury found they were 20% at fault for the accident. The longshoreman recovers not only his statutory benefits under the Act which this case serves to show were quite liberal. He has already received in excess of $50,000 in compensation payments. But in addition, he will recover the 20% liability damages which the jury has said are attributable to the ship owner.

QUESTION: Reduced by the percentage of his own negligence?

MR. TUCKER: Yes, sir. Well, he was found to be 10% at fault, and I don't think that anyone contends that --

QUESTION: Apparently, there is no issue about it.

MR. TUCKER: That's correct.

QUESTION: In any event, that liability would be reduced --

MR. TUCKER: It would be reduced. The total judgment was $100,000. It would be reduced to $90,000.

QUESTION: And your contention is that it ought to be $18,000?

MR. TUCKER: No, sir. The ship owner's liability is 20% of the whole, 20% of $100,000.

QUESTION: $20,000, reduced by -- to $18 -- isn't it?

MR. TUCKER: No, sir. I don't think so. I think the reduction is in the total award, which would mean $90,000.

QUESTION: Under these circumstances, the longshoreman had no action against the stevedoring, because the compensation was a substitute for the tort act?

MR. TUCKER: The longshoreman received compensation from his employer, yes, sir.

QUESTION: And he could not, therefore, have sued in tort.

MR. TUCKER: Correct, no. The employer is statutorily immune from liability.

QUESTION: These numbers have me confused now, Mr. Tucker. I wonder if you would recapitulate. Dollars and percentages. Who pays what?

MR. TUCKER: The judge propounded interrogatories to the jury. He first asked them was there any fault -- was there any negligence on the part of the ship owner, and if so in what percentage.

The jury said 20%. He then said, "Was the stevedoring company negligent in any way, and if so in what

percentage." And they answered 70%. And he then said, "Is the Plaintiff, himself, negligent in any respect, and if so in what percentage?" And they answered 10%. And then they answered in total damages $100,000.

The district judge entered judgment reluctantly for $90,000, and it then went to the Fourth Circuit and the Fourth Circuit then reversed.

QUESTION: Under the District Court's judgment of $90,000, $50,000 would have been paid by the stevedore, is that right?

MR. TUCKER: No, sir. Let's assume the judgment was reinstated.

QUESTION: Wouldn't it be credited against the $90,000, the $50,00 received in compensation?

MR. TUCKER: Well, they would recover that back. The ship owner would pay $90,000 to the Plaintiff. The Plaintiff would be required to pay back $50,000.

QUESTION: Therefore, the net payment by the ship owner would have been $40,000, is that it?

MR. TUCKER: Yes, sir, that's correct. No, I'm sorry, that's not correct. The net payment by the ship owner would be $90,000. I am sorry.

You see, the ship owner pays the total $90,000. Out of that judgment, the Plaintiff is required to reimburse the stevedoring company for what it has paid.

QUESTION: So, the stevedore is coming home free, basically?

MR. TUCKER: That's exactly right. And that has been our point, Your Honor, that it is certainly most inequitable for the stevedoring company, which is the party in this case most at fault, which will come home free. They will not pay one cent.

QUESTION: In land-based negligence law, if you have two joint tort-feasors and the plaintiff elects to sue only one of them and collects for all his damages, even though that one is only 20% at fault and somebody else who is not sued is 80% at fault, the person not sued gets off scott free.

MR. TUCKER: The difference here, Mr.Justice, was that these people, the stevedore and the ship owner, are not joint tort-feasors. They are not jointly liable.

QUESTION: You acted so shocked at the inequity and my question was directed: isn't there a similar inequity in ordinary tort law, land-based?

MR. TUCKER: There is -- The party, Your Honor, that does pay the entire amount is not restricted in any manner from recovering over, if he can, from one of the other parties.

QUESTION: Normally, under the old common rule, there was no contribution among joint tort-feasors.

MR. TUCKER: That is correct, sir, except -- and I will get to this -- we feel that the case law, as it has

developed in this Court, has now modified that rule and we feel it no longer applies in this situation. We think that in all fairness and equity, which we believe the Court has tried to do in many of its decisions that affect this, such as Cooper Stevedoring and Reliable Transfer -- certainly indicate that proportionate fault is what we should be aiming for. And this is just the next step in this type of litigation which will take the burden and apportion it among the parties involved.

Just to finish up that statement, as to how it would be apportioned, the ship owner would pay its proportionate share as found by the jury, the longshoreman receives his compensation, which in this case exceeds $50,000 to date, and he is still receiving it, by the way -- plus, he receives the 20% from the ship owner. And the stevedoring company never pays more than its statutory obligation under the Act and is protected by the Act from any claim of indemnity by the ship owner.

Now, to me, that is the fairest --

QUESTION: Now translate that, Mr. Tucker, into figures again. Under that approach, the ship owner would pay how much to the --

MR. TUCKER: The ship owner would pay $20,000, Your Honor.

QUESTION: To the longshoreman?

MR. TUCKER: To the longshoreman.

QUESTION: And the longshoreman would receive from the stevedore the --

MR. TUCKER: He has already received the $50,000 and he is continuing, as I understand it, to receive --

QUESTION: So the consequence is that instead of under the District Court judgment, where the stevedore pays nothing, in fact, he now will be paying the $50,000, plus?

MR. TUCKER: He would be paying his statutory obligation under the Longshoremen's Act, yes, sir.

QUESTION: But, under the Court of Appeals' rationale would the stevedore have any subrogation rights against -- to get any part of this $20,000?

MR. TUCKER: Well, that, Your Honor, the Court of Appeals left to the District Court and did not meet that. We have suggested in our brief two possible ways that that could be handled. The Fourth Circuit did not get into it. They suggested that that should be handled on the District Court --

QUESTION: It is a great big interesting question.

MR. TUCKER: It is an interesting question, and that has been discussed in our briefs, and in particular the brief of Mr. Coleman in the amicus brief; there are two approaches to that, and if you would like I would be happy to --

QUESTION: I will rely on your brief, unless you

want to talk about it.

QUESTION: That issue is not covered by the question presented by the certiorari petition either, is it?

MR. TUCKER: It was not specifically covered, Your Honor, no, sir.

QUESTION: But your argument you have been making to us is based upon the right of recovery by the stevedore, under the District Court's theory. I mean your point is that the ship owner, under the District Court's construction, pays it all. And he pays it all because the stevedore has a right of subrogation to get back this $50,000. And you have been arguing that to us.

MR. TUCKER: Right. The stevedoring company pays its statutory obligation.

QUESTION: But then gets it back from --

MR. TUCKER: Under the District Court, yes.

QUESTION: -- under the District Court theory.

MR. TUCKER: They would get it back from the judgment paid by the --

QUESTION: And that's an important part of your equitable argument.

MR. TUCKER: It certainly is, yes, sir. It is quite important.

QUESTION: Even though that, perhaps, is not specifically governed -- covered by the question.

MR. TUCKER: It is not, and I do think it certainly is --

QUESTION: It also is not clear, as a matter of law, that when the stevedore is 70% negligent that it will have the right of subrogation, is it? That hasn't been settled, has it? I know it was by the District Court, but I mean there is debate in the scholarship about this, isn't there?

MR. TUCKER: Well, there is. Under the present law, as I understand it -- under the District Court's decision, the ship owner pays the full judgment, $20,000. Under existing law, the stevedore has a lien, equitable lien, to recover all the money that it has paid to that longshoreman.

QUESTION: Isn't there a debate on whether that lien may be enforced when the stevedore is 70% negligent?

MR. TUCKER: Well, we say it is in this situation, Your Honor. When the Court -- but what you see has happened under other cases --

QUESTION: All I am asking is, isn't there a difference of opinion on that issue?

MR. TUCKER: I don't think there is a difference of opinion in -- under the existing law. I think the stevedoring company always receives its full compensation.

QUESTION: What if the liability of the ship owner is limited to the degree of his fault? If there is $100,000

damages, and it's determined that the ship owner is negligent for 25% of it, then he has to pay $25,000?

MR. TUCKER: That's correct, sir.

QUESTION: Then the stevedore gets his money back?

MR. TUCKER: That is what the Fourth Circuit left to the District Court.

QUESTION: You just said always he is going to get his money back.

MR. TUCKER: The question, though, was under the existing law, without regard to the percentages of proportionate fault.

QUESTION: On the face of the statute, he would get his money back.

MR. TUCKER: I am sorry?

QUESTION: Just on the face of the law, he does have a lien on the recovery.

MR. TUCKER: As it stands now.

QUESTION: Up to a ceiling of --

MR. TUCKER: Of what he has paid.

QUESTION: So, then, if he has paid more than the $25-- he gets it all?

MR. TUCKER: In our briefs, --

QUESTION: That's the way it looks on the face of the law.

MR. TUCKER: Well, at the moment, he does. Under the

proportionate fault argument, where a court has asked the jury to apportion the fault between the parties, among the parties, then our contention is the ship owner is responsible only for its proportionate fault. The question of how much of the damages paid to the --

QUESTION: So your answer to Mr. Justice Stevens, really, is yes, there is difference of opinion.

MR. TUCKER: Well, I may have misunderstood his question. I assumed he meant as the law existed prior to the Fourth Circuit opinion in this case. And it is true. There is a difference of opinion, however, under the proportionate fault argument.

QUESTION: Are we going to be able to know the whole story of this allocation until the District Court acts?

MR. TUCKER: Well, the District Court has stated. It has not acted. And, Your Honor, what we have stated is that there are two ways of looking at it, one, if, under what we contend is an equitable credit, if the percentage of fault of the stevedoring company reduces the plaintiff's judgment by more than the amount of the recovery, then they receive nothing back on their lien.

QUESTION: So, you might want to be back here again after the District Court acts; isn't that possible? Someone. I am not sure which one of you.

MR. TUCKER: Well, I don't think that would necessarily

be an issue. If the Court decides --

QUESTION: Not necessarily, but it's possible.

MR. TUCKER: It is possible, but I don't see that it would be an issue for this Court, because it would have decided the basic issue of proportionate fault, and leaving up to the District Courts the method of handling the repayment of the compensation lien.

QUESTION: Let's assume a fair measure of the damage in an accident is $100,000, and the stevedore's limit, however, -- under the Act -- I mean the absolute limit of what he has to pay is whatever the Act provides. Is that right?

MR. TUCKER: That's correct.

QUESTION: Now, I suppose that if the proportionate fault rule obtains and the ship owners, say, were limited to liability for $25,000, and the stevedore only had to pay, under the Act, $25,000, the employee is out $50,000 from what he could have obtained from the ship owner, except for apportionment.

MR. TUCKER: The difference is that the ship owner --

QUESTION: Is that right or wrong?

MR. TUCKER: Yes, sir, but the difference is --

QUESTION: Which way -- Is it right or is it wrong?

MR. TUCKER: It is certainly right that under the status of the law he is out the $25,000.

QUESTION: How is it -- The stevedore is never going

to be liable for any more than --

MR. TUCKER: That's correct, never.

QUESTION: And if the ship owner pays only his proportion of the fault, and if the two of them together equals less than the damages, somebody is out.

MR. TUCKER: The ship owner pays his proportion of the total damages, the stevedore pays his statutory damages. The two added together are what the plaintiff receives.

QUESTION: Even though he suffered more damage than he receives?

MR. TUCKER: Even though he suffered more damages, and there are cases where he will get less, but that is restrictive of the compensation scheme, whereby he recovers compensation without the necessity of proving any fault.

QUESTION: So, you would construe the Act then as changing the ordinary rule of liability of a tort-feasor?

MR. TUCKER: No, because I don't think we are dealing with joint tort-feasors in this situation.

QUESTION: I didn't say joint tort-feasors. I said tort-feasor.

MR. TUCKER: I don't think so. The tort-feasor, the ship owner in this instance, has been found to be 25% at fault, or 20% in our case. He is paying damages proportionate to his fault.

QUESTION: But that's contrary to the ordinary rule

of the tort-feasor, where he would pay, even though only 25% negligent -- would be required to pay if there were a judgment against him 100% of the damages.

MR. TUCKER: But that is only in a situation where you are dealing with more than one tort-feasor. You've got to have another tort-feasor in order to have proportionate fault.

QUESTION: Maybe that tort-feasor is way beyond the jurisdiction and the plaintiff is not interested in suing him, for one reason or another. He only sues one tort-feasor and if that tort-feasor is only 10% at fault, he is nonetheless liable for 100% of the plaintiff's damages.

MR. TUCKER: He is where you have two possible tort-feasors liable to the --

QUESTION: He's the only one sued.

MR. TUCKER: I understand that.

QUESTION: Didn't the Court here find that, that there were two tort-feasors?

MR. TUCKER: Not two joint tort-feasors, in the sense --

QUESTION: They decided that one contributed 25% and one another percent, whatever the percentage was.

MR. TUCKER: But one is not liable for the --

QUESTION: There were three percentages, weren't there?

MR. TUCKER: Three percentages, yes, sir.

QUESTION: The employee, the ship, the stevedore.

MR. TUCKER: One is not liable. The stevedoring company is not liable.

QUESTION: He may not be liable, but he violated a duty.

MR. TUCKER: He violated a duty, yes, sir.

QUESTION: He violated a duty, so he is a tort-feasor.

MR. TUCKER: But not liable to the plaintiff, and as I understand --

QUESTION: I know, but that's what makes him a tort-feasor.

MR. TUCKER: True, but the rule only applies where you have two or more persons jointly and severally liable to the plaintiff, and we do not have that situation here.

QUESTION: Mr. Tucker, let's get away from semantics a minute.

The Maritime Bar doesn't recognize the word "tort" at all, let alone a tort-feasor. Am I right? It is something else, it is not quite a tort.

MR. TUCKER: Well, a tort, as I understand it, is a wrong, and I think in that context it would be recognized.

QUESTION: I mean do you have joint wrongers?

MR. TUCKER: You do.

QUESTION: That's what I thought, you just don't

like to use the word "tort."

I am not condemning you for it, but I just --

QUESTION: Some people call it a wrong, or instead of negligence call it a fault. But it is still the same concept.

MR. TUCKER: Yes.

Your Honors, I'd like to speak for a moment with regard to the issue of proportionate fault, because I feel that that, along with the fairness and equitable argument in this case, is the basis upon which the Fourth Circuit decided this case.

The legislative history, contrary to what counsel for Petitioner claims, clearly states that the vessel shall not be liable in damages for the acts or omissions of the stevedore. They said it on page 4703 of the Congressional Report, quote, "A vessel shall not be liable in damages for acts or omissions of stevedores."

It could not be clearer.

This Court has stated in recent decisions, and the Fourth Circuit is now in accord with the doctrine of comparative fault. The Cooper Stevedoring case permitted contribution among joint tort-feasors in a situation, admiralty situation and in non-collision cases, which was done in order to correct the inequity of one bearing the entire loss, though the other may have been equally or more to blame.

So the old rule against no contribution in non-collision cases was changed by this Court.

In Reliable Transfer, in collision cases, the old rule of equally divided damages was changed to one requiring allocation in proportion to fault. And this Court said that the standard should be adopted allocating liability according to fault wherever possible.

And this is exactly what the Fourth Circuit has done and which we contend is the fairest and most equitable rule for this Court to adopt.

QUESTION: Mr. Tucker, do you have a comment on your opponent's argument that the second sentence of the statute was merely intended to preserve the rule of the Yaka case?

MR. TUCKER: Yes, sir. Clearly, it was intended to recognize the special situation where the longshoreman is employed by the vessel owner to run the stevedoring or ship repair services. But we contend that that was not the only reason for placing it in there, that it was placed in there to emphasize what seemed to be clear in the congressional intent that the ship owner should not be liable for the acts or omissions of the stevedore. And it says that quite clearly, as I recall. The sentence involved: "If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the

vessel."

It seems perfectly clear.

In our brief, we have commented on the fact that the two sentences -- the first sentence and the second and the third -- if you read them literally, cannot possibly mean what they seem to say, because, if you read them literally, it would indicate that if the longshoreman is employed by an independent contractor to provide stevedoring services, and if there is any negligence on the part of the vessel owner, then he recovers 100%. Whereas, if you read the second and third sentences that way, you find that if he is employed by the ship owner to render stevedoring services, then any fault of the stevedoring -- people providing stevedoring services cause the accident, then he recovers nothing. And I don't think that anyone could contend that the Congress intended to do that. And the only way to reconcile the two sentences is to read them to mean to the extent the injury was caused by the fault of the vessel or the fault of the stevedoring -- people employed to render stevedoring services. And if you read it that way, it is entirely consistent and also consistent with the language of the Act and the legislative history, which indicates that they shall not be responsible for acts or omissions of the stevedore.

QUESTION: May an employee waive his benefits under the Act, and sue the ship owner?

MR. TUCKER: Well, he is not required to do so.

QUESTION: May he?

MR. TUCKER: I assume he may.

QUESTION: But you would still say apportionment?

MR. TUCKER: He could not sue the ship owner for unseaworthiness, because --

QUESTION: I didn't ask that. He's suing for negligence, may he recover all of his damages from the ship ower, if he waives his right against the stevedore?

MR. TUCKER: I am not sure that has ever come up. If he took himself out of the Act and said, "I am no longer covered," he could do that, yes, sir.

MR. TUCKER: You mean -- You would then say that he may recover from the ship all of his damages even though the ship didn't cause it?

MR. TUCKER: If the Act does not apply and you are looking to a common law action, that's correct.

QUESTION: But he can't decide whether the Act applies, can he?

MR. TUCKER: I don't think so.

QUESTION: So, then your answer is no to Mr. Justice White.

MR. TUCKER: I was trying to answer it in a hypothetical sense, but I don't think he can decide whether the Act applies.

QUESTION: I didn't ask you that. He just tells the

stevedore "don't send me any checks."

MR. TUCKER: I understood you to say that.

QUESTION: "Just don't send me anything, because I know what I am going to get from you, which is very little, and I know what I can get from the ship. I can recover $100,000 and I'll only get $25,000 from you."

MR. TUCKER: I took it to be a hypothetical question in that way.

QUESTION: Third party actions are very normal in this business, but is it not correct the statute doesn't give him that option?

MR. TUCKER: It doesn't give him the option if he is paid compensation benefits; he has no --

QUESTION: If he is a longshoreman, within the meaning of the Act.

MR. TUCKER: Yes, sir.

QUESTION: Does he have an option not to be a longshoreman?

QUESTION: Not, but he has an option not to apply for benefits. And he certainly can sue the ship under the Act, because he did here and you don't say that he can't.

MR. TUCKER: He can sue the ship, under the Act, for negligence, yes, sir.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Breit?

REBUTTAL ORAL ARGUMENT OF CALVIN W. BREIT, ESQ.

ON BEHALF OF PETITIONER

MR. BREIT: Just one very brief comment. I realize it is beyond the normal time for the Court.

In Cooper v. Stevedoring in 1974, this Court held that Halcyon v. Haenn was still good law under the facts. Those facts are identical in all respects with the case here, a stevedore who is immune from suit by the injured party and sues the ship owner and recovers in full. There is no contribution in tort from that immune employer. The statute intended to keep that. When the statute said that "the employer shall not be liable to the vessel for such damages, directly or indirectly, and any agreements or warranties to the contrary shall be void," it was specifically intended by Congress, regardless of the equities as argued here, that the stevedore not play a part in the tort action or not suffer contribution by waiving what would normally be the lien that it should recover.

And in exchange for that, the stevedores have paid two, three and sometimes four times as much in weekly compensation as they did before the Act. They gave up what was a relatively small payment and the triparte litigation and got in exchange higher payments, but absolutely no litigation. That was the purpose of the statute. And if we follow the Fourth Circuit, we must then implead the stevedore in this case,

and in every case, to find out what is the percentage of their fault.

This was an ex parte determination of 70%, in which they played no part or hearing, and clearly if they were there advocating their position, as they must do under the Fourth Circuit in every other case from here on in, they become a party to the litigation. It's exactly what Congress was intending to avoid.

QUESTION: What do you have to say about whether this case might be back here -- could conceivably be back here -- after the District Court acts?

MR. TUCKER: If the Court rules that the longshoreman is entitled to his common law remedy of 100% recovery from the ship owner, which we have espoused and the other circuits have held, then no one will ever be back here, because he will be required to repay his lien to the stevedore and receive a credit against future compensation which may be payable. We don't know now what the lien is. We may never know what the lien is until this man dies, because it is an on-going lien and each year it is subject to change under a formula devised by Congress geared to inflation. So that each year his formula changes.

We suggest that there would be no further litigation except if this Court says that the Fourth Circuit is correct. And we would have to go down to the District Court and fight

over the distribution, and then every case thereafter will have to be fought, with the stevedore involved, to determine whether they are 70, 60, 50 or 30% at fault. And Congress did not intend that.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 3:14 o'clock, p.m., the case was submitted.)