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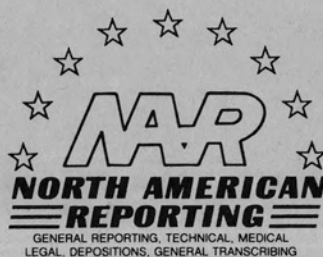
# Supreme Court of the United States

SCINDIA STEAM NAVIGATION CO., LTD.	)	
	)	
PETITIONER,	)	
	)	
V.	)	No. 79-512
	)	
LAURO DE LOS SANTOS ET AL.,	)	
	)	
RESPONDENTS.	)	

Washington, D.C.  
December 1, 1980

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Scindia Steam Navigation v. Lauro de los Santos.

Mr. Staring.

ORAL ARGUMENT OF GRAYDON S. STARING, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case presents to the Court one of the four principal purposes for which the 1972 amendments to the Longshoremen's Act were made, according to the Senate committee report, and that purpose, as the report stated it, was to provide a special cause of action for damages against third parties.

The court below, and the respondent here --

QUESTION: Well, another purpose was to get rid of a Sieracki-type cause of action, wasn't it?

MR. STARING: Yes, Your Honor, it was. I was simply quoting from the four stated purposes, stated principal purposes in the Senate report, and I think that probably that purpose of getting rid of Sieracki was subsumed in that statement in this purpose, to provide a new or specified cause of action. I quite agree that that was the intent. Very much a part of it.

The court below, and the respondent here in defining that specified cause of action would, we submit, impose upon the vessel a responsibility for longshoremen's injury



1 which is without counterpart in any significant body of law,  
2 and let me explain it.

3 First, I'd like to remind the Court of the relations  
4 involved. The longshoreman here, as in most such cases, was  
5 not an employee of the shipowner, and thus the shipowner was  
6 not by virtue of that relationship under those special duties  
7 of care which employers traditionally have toward their direct  
8 employees. The longshoreman was, instead, as usual, an em-  
9 ployee of an expert independent stevedoring company. This  
10 Court in Italia, some years ago, noted that such companies  
11 are usually in the best position to enforce safety for their  
12 employees. This is because the stevedore contractor is in  
13 practical control of the area that's been turned over to him,  
14 is in control of the operations he's conducting there, and of  
15 the men who are doing it.

16 But more than that, the stevedore contractor here  
17 as in other cases has imposed upon him by positive law under  
18 Section 41 of the Longshoremen's Act and the numerous regula-  
19 tions which are issued by the Department of Labor, a primary  
20 and very positive duty of care for the safety of his employees  
21 in the work. And before we get farther into this case, let  
22 me point to the specific regulation which bears most sharply  
23 on this case.

24 There is, or was at the time of this case, as there  
25 still is, a regulation issued by the Department of Labor under

1 the Longshoremen's Act, that any defect or malfunction of a  
2 winch be reported immediately to the officer in charge of the  
3 vessel. But what is much more, the regulation goes on and  
4 says that in the case of an electrical winch, when the electro-  
5 magnetic or other service brake is unable to hold the load, as  
6 is alleged in this case, the winch shall not be used. And  
7 thus the stevedore contractor was confronted with positive law  
8 commanding him to report immediately and not to use the winch  
9 if that defect manifested itself.

10           Against that background, then, we ask what was the  
11 duty of the vessel owner? The respondent here in his brief  
12 says that the essential question is not one of duty but whether  
13 his "interests are entitled to be protected against the defen-  
14 dant's conduct," and to that we ask rhetorically, what conduct?  
15 Because there is a great deal of difference in this field be-  
16 tween conduct and --

17           QUESTION: Isn't even simple negligence traditionally  
18 outlined in terms of duty and breach of duty owed to a parti-  
19 cular person or group of persons?

20           MR. STARING: I think that is -- yes, I do think that  
21 is very common, and I think that in any ordinary negligence  
22 case one must first find the duty based upon some status or  
23 relationship which imposes upon the defendant an obligation  
24 to look out for another. Now, in some instances, the status  
25 or relationship is simply proximity, such as my proximity to

1 another man which puts me in a position to hurt him.

2 QUESTION: Driving an automobile.

3 MR. STARING: Yes.

4 QUESTION: That's not maritime law, though.

5 MR. STARING: I beg pardon?

6 QUESTION: That's not exactly maritime law.

7 MR. STARING: That has not been the traditional  
8 maritime law, no, sir.

9 QUESTION: Well, it is true that a duty could exist  
10 to every single member of the public. That's just another way  
11 of saying it. That's true of maritime law or land-based  
12 tort law.

13 MR. STARING: Well, I think I must agree that such  
14 a duty can exist; yes.

15 QUESTION: Regardless of any special relationship,  
16 just there's a duty to every member of the public to not in-  
17 jure that person negligently.

18 MR. STARING: Yes. But negligence, again --

19 QUESTION: Or with fault, to use the admiralty wording.

20 MR. STARING: A duty not to conduct ourselves in a  
21 way which carelessly or recklessly endangers those about us;  
22 yes. I quite agree with that.

23 QUESTION: For example, if you stumble on a piece of  
24 grease on the stairway going up to your office, you don't  
25 recover the same way as you do if you stumble on a piece of  
grease on the Queen Mary. Is that right.



1 MR. STARING: I believe that's right, Your Honor.

2 QUESTION: Mr. Staring, what in your view, what was  
3 the duty of the vessel owner with regard to the condition of  
4 the winch? Did he have any duty to the longshoreman and if so,  
5 what was it?

6 MR. STARING: If the condition of the winch -- in the  
7 circumstances of this case, I do not think that the vessel  
8 owner had any duty to the longshoreman with respect to the con-  
9 dition of the winch. I would --

10 QUESTION: No duty whatsoever, even if the winch  
11 were defective, he knew it was defective, he knew it was dan-  
12 gerous, he knew that people would be working with it.

13 MR. STARING: Ah, now --

14 QUESTION: And I'm saying, what the duty is, not  
15 what the facts show.

16 MR. STARING: All right. The vessel owner has no  
17 duty, I submit, with respect to the condition of the winch un-  
18 less he was in a position of superior knowledge or superior  
19 means of preventing harm.

20 QUESTION: Not merely knowledge but superior know-  
21 ledge?

22 MR. STARING: Superior knowledge. If, therefore, he  
23 was as --

24 QUESTION: Superior to whom?

25 MR. STARING: Superior to the stevedore company.

1 QUESTION: Supposing they have equal knowledge. If  
2 they both know it's defective? Is there any duty to do any-  
3 thing about it?

4 MR. STARING: I think he has none. I think that in  
5 that situation I would pose the question whether the shipowner  
6 cannot reasonably hire a stevedore who is subject to the legal  
7 mandate that I've described and look to the stevedore to see  
8 that his longshoremen are not subjected to the danger.

9 QUESTION: Well, what is the purpose of the Secretary  
10 of Labor's requirement that defects in the winch be reported  
11 to the vessel owner? Why do they have that requirement, then?

12 MR. STARING: In order that the vessel owner can  
13 then make repairs if repairs should be made.

14 QUESTION: Then he has the duty to repair, right?

15 MR. STARING: Well, he doesn't have a duty as such,  
16 he has an opportunity. He has an opportunity to repair.

17 QUESTION: No duty?

18 MR. STARING: Since the stevedore, if he has obeyed  
19 the regulation, has stopped work, it's a question whether  
20 the shipowner's duties --

21 QUESTION: Maybe the stevedore hasn't. Maybe the  
22 stevedore says, the winch seems to be acting up a little bit.  
23 I don't know much about this particular winch, but it looks  
24 fishy to me. And what does the vessel owner have to do then?

25 MR. STARING: The vessel owner then has, I would say,

1 an opportunity to repair it and certainly --

2 QUESTION: No, but I want to ask about duty. Does  
3 he have any duty?

4 MR. STARING: I beg -- Your Honor. I agree. He has  
5 a duty. In certain circumstances --

6 QUESTION: Well, but if you say he has a duty, then  
7 you've got Sieracki right back.

8 MR. STARING: No, I don't believe so. I believe  
9 that he has a duty, then, to look into the condition of the  
10 winch and exercise due care with respect to whether it is  
11 operating properly before the stevedore goes forward and works  
12 with it further. But he does not have an absolute duty as  
13 under Sieracki to see if that winch is free of defect.

14 QUESTION: What if the shipowner and the employee  
15 had equal knowledge? Do you say that -- do you concede that  
16 the stevedore can recover from the shipowner?

17 MR. STARING: No. Your Honor, is Your Honor using  
18 the term stevedore here to mean the longshoreman?

19 QUESTION: The longshoreman.

20 MR. STARING: If the knowledge is equal, then we do  
21 not concede that a recovery can be had from the vessel. Let  
22 me --

23 QUESTION: Let's suppose, when the job starts, they  
24 hire the stevedore and the shipowner says, by the way, this  
25 winch is acting up a little, but I think if you're really



1 careful with it, it'll be all right. And the stevedore says,  
2 well, I'll watch it. And it does what it did in this case.  
3 Now, all the shipowner's done is to point out a piece of de-  
4 fective machinery and the stevedore says, well, we'll go ahead  
5 anyway, in effect. He goes ahead and somebody gets hurt.

6 MR. STARING: What has happened, Your Honor, in  
7 that case, is that the vessel owner has pointed out a report  
8 of, let us say, a winch that operates less than perfectly.  
9 I don't know whether that's a defect or not, but it doesn't --  
10 maybe not be operating perfectly. And the stevedore, who is  
11 an expert in this field and in the matter of safety for his  
12 employees in this field, is then asked to consider whether it  
13 is or is not a safe operating winch. And he may be looked to,  
14 we submit, to make that determination. And if he thinks --

15 QUESTION: So you -- the short answer is that the  
16 extent of his duty is to make known any unsafe things that are  
17 known to him, the shipowner, that is?

18 MR. STARING: Yes, Your Honor.

19 QUESTION: And that he has no affirmative duty to  
20 repair the winch?

21 MR. STARING: He has no affirmative duty in that  
22 circumstance to repair the winch for the benefit of the steve-  
23 dore and the longshoreman.

24 QUESTION: Or for the benefit of the longshoreman?

25 MR. STARING: That's right.

1 QUESTION: Now, Mr. Staring, where is it in the  
2 statute you said supports this interpretation?

3 MR. STARING: The statute that I point to is not in  
4 the amendments, Your Honor, but is Section 41 of the Long-  
5 shoremen's Act, which has been there somewhat more years than  
6 the 1972 amendments.

7 QUESTION: This being the duties you read us.  
8 I thought you said those were regulations of the Secretary of  
9 Labor?

10 MR. STARING: Your Honor, the statute is the general  
11 direction and the authority for the regulations, and then  
12 regulations have been issued under that statute, Your Honor.

13 QUESTION: And we don't find this in the '72 amend-  
14 ments, we find it in these regulations issued under the older  
15 statute?

16 MR. STARING: That's right, Your Honor. The respon-  
17 dent, here, of course, says no to the question whether the  
18 vessel owner may look to the stevedore in the circumstances  
19 which we have just been discussing; and we say, seeks to im-  
20 pose on the vessel a novel responsibility, one which if accept-  
21 ed would be peculiar to the maritime law. And so it would be  
22 contrary to the legislative history that counsels us that  
23 under Section 5 of the Act, as amended, landbased law is to be  
24 applied, and we are to reject -- and I quote here, "reject  
25 any theory of liability," and specifically to

1 reject any nondelegable duty of a shipowner."

2 I'd like to address for just a moment the  
3 meaning of this term, "nondelegable duty" and what  
4 might be meant by its absence, once it's rejected.

5 We don't ordinarily delegate duties. We dele-  
6 gate powers and we delegate functions, and what in  
7 context this term means is a duty which someone is  
8 required to retain after he has delegated by contract the  
9 function which is related to it.

10 And I submit that in the context of the maritime  
11 industry, and the Longshoremen's Act, what Congress meant here  
12 when they rejected the nondelegable duty was to insure that a  
13 shipowner hereafter would have the capacity to contract work  
14 out free of a retained duty to oversee that work, to protect  
15 workmen involved from the consequences of the work. Now, pro-  
16 vided, of course, that the shipowner has truly delegated the  
17 work, turned over the control of it, which of course means  
18 that he must have disclosed what he had superior knowledge of  
19 or made available the superior means which he might have had.  
20 Because if he has not done that, he has not fully delegated.  
21 But surely Congress intended, if nondelegable duty means any-  
22 thing, that the shipowner was in the future to be in the posi-  
23 tion of contracting work out with those consequences --

24 QUESTION: So in my example to you you would say, is  
25 that the stevedore, if he didn't like it, he didn't want to



1 work with it, if his judgment was that the winch was unsafe or  
2 that he didn't want to take the risk, that he would just not  
3 work. He'd say, either fix it or get another stevedore.

4 MR. STARING: Oh, he would say, fix it, and he would  
5 go on standby and collect his charges for doing nothing until  
6 you have. And -- or until you've got another stevedore.

7 QUESTION: Do you think that's what the restatement  
8 standard means? The Court of Appeals apparently rejected the  
9 landbased restatement standard, duty of the landowner. And  
10 didn't you urge that that should govern or not?

11 MR. STARING: I do urge --

12 QUESTION: Did you in the Court of Appeals urge that?

13 MR. STARING: I did not handle the case in the Court  
14 of Appeals.

15 QUESTION: But was it urged?

16 MR. STARING: At this -- it was urged in the Court  
17 of Appeals.

18 QUESTION: And do you agree that it's --

19 MR. STARING: I agree that that would be a good stan-  
20 dard to apply. But may I say, Your Honor, that --

21 QUESTION: Well, I'm wondering, because the last  
22 part of that standard says, with regard to the landowner, "He  
23 should realize that it involves an unreasonable risk of harm  
24 and fails to exercise reasonable care to protect the invitees  
25 against the danger." Now, you say all he has to do to protect

1 the invitees against the danger is to tell them about it.

2 MR. STARING: Your Honor, if he should, in many in-  
3 stances that's what --

4 QUESTION: Well, in this case, for example, all he  
5 would have to do is tell them about the --

6 MR. STARING: If he had known about it in advance.  
7 But in this case, Your Honor --

8 QUESTION: A fortiori, in this case, if he didn't  
9 know about it in advance but suppose the stevedore told him  
10 that, gee, you've got a defective crane here, and he just  
11 shrugged his shoulders. It's the same thing.

12 MR. STARING: In this case, Your Honor, the stevedore  
13 knows it and is asserted to have known it throughout the rec-  
14 ord and did not stop work, as he was commanded by law to do, .  
15 and it would do no good to tell him. We have no record, and  
16 the judge below had no record to indicate that the vessel knew  
17 this in advance of the stevedore, and it didn't matter, because  
18 the stevedore knew it well in advance of the accident.

19 QUESTION: Mr. Staring, incidentally, on the issue of  
20 superior knowledge, does the shipowner before he turns ships'  
21 equipment over to a stevedoring company, have any duty of in-  
22 spection of the equipment, to find out if there is anything  
23 wrong with it?

24 MR. STARING: None has been established by law,  
25 none is shown in the record of this case. There is no general

1 legal duty of inspecting the premises, inspecting the equip-  
2 ments other than what is imposed by Coast Guard and other  
3 applicable regulations. But they do not enter the record here.

4 QUESTION: Unless he happens to stumble on knowledge  
5 of the defect, he has nothing in the way of a duty to say a  
6 word to the stevedore about it? Does he?

7 MR. STARING: That is generally correct. He has no  
8 way to do this, but he engages the stevedore as was cited in  
9 the Hugen case as an expert in the field who knows that he  
10 meets vessels that come in in all kinds of conditions and for  
11 all sorts -- because of all sorts of stresses, and may encoun-  
12 ter many of these things as familiar conditions.

13 I'd like to dilate a little bit more on this dis-  
14 tinction between latent and obvious or known defects which you  
15 are focusing on. This is very much at the heart of the con-  
16 tention here that the doctrine of assumption of risk is some-  
17 how involved. The key to the question is the validity of the  
18 distinction between latency and knowledge or obviousness.  
19 This Court, years after it had disposed of the question of as-  
20 sumption of risk in the maritime law, has continued to recog-  
21 nize in its jurisprudence the distinction between latency and  
22 knowledge and the significance of those facts.

23 In Weyerhaeuser v. Nacirema in 1958, the Court noted  
24 the significance of latency as giving rise to a need to warn,  
25 and by implication in contrast, to a known, obvious condition.



1           The following year, 1959, in *West v. United States*,  
2 this Court observed the same distinction again. In 1969, this  
3 Court decided *Federal Marine Terminals v. Burnside*, and in that  
4 case quoted in full the portions from the *Hugev* case in the  
5 9th Circuit and the *Mickle* case, which we have relied on and  
6 quoted in our briefs -- quoted them, I venture to say, with at  
7 least a modicum of approval. And those sections of those quo-  
8 tations were explicit on the distinction between latency and  
9 knowledge obviousness.

10           This case quoted them in close conjunction with cita-  
11 tion and quotation, and indeed application of its *Kermarec*  
12 case, which has also been urged here by the respondent, and  
13 incorrectly, we think, as a reason why our formulation cannot  
14 be applied.

15           Let me come back for a moment to a question that  
16 Mr. Justice White focused on which concerned the 343 and  
17 343(a). We do not embrace 343 and 343(a), precisely because  
18 they have been embraced somewhere and rejected somewhere.  
19 When the state court cases which form the body of law from  
20 which these rules must be drawn are examined, we find, of  
21 course, that some of them deal with real property, some of  
22 them deal with other matters. The restatement synthesizes  
23 them and formulates their rules, and if we choose to use the  
24 restatement, as a number of courts below have done, we still  
25 have choices within the restatement. But the result doesn't

1 make much difference, or any at all. Whether you choose from  
2 the restatement those sections which have to do with real pro-  
3 perty and analogize the vessel to real property, or choose  
4 sections which relate to chattels, since the vessel is in law  
5 and in fact a chattel, the result comes out the same way, be-  
6 cause the principle is the same, and it's expressed in both  
7 sections, that the vessel is only liable in those case. The  
8 occupier, the furnisher of the chattel, the vessel is only  
9 liable on the basis of superior knowledge, means, and control.

10 QUESTION: May I ask, when you say "superior know-  
11 ledge," superior to whom, to the stevedore or the longshoreman?

12 MR. STARING: Superior to the stevedore.

13 QUESTION: Because the restatement talks about the  
14 invitee who's injured.

15 MR. STARING: The difficulty about the restatement  
16 formulation is this: --

17 QUESTION: I know you're not relying on the restate-  
18 ment, but it seems to me there's quite a difference, whether  
19 you look at it from the point of view of the boss or the  
20 employee.

21 QUESTION: Superior to the plaintiff, is that what  
22 you mean?

23 MR. STARING: I don't just mean superior to the  
24 plaintiff. I do mean superior to the stevedore and his crew.  
25 Let me say this about --

1 QUESTION: Crew other than the plaintiff, the man  
2 running the winch in this case?

3 MR. STARING: All of them, including the plaintiff.

4 QUESTION: What if the plaintiff himself doesn't  
5 have any knowledge whatsoever? Is he somehow -- the knowledge  
6 of his employer imputed to him?

7 MR. STARING: The employer -- the question of --  
8 Mr. Justice Stevens, it seems to us that if you are going to  
9 abolish nondelegable duty, it has to be possible to delegate  
10 to a contractor as one can under the great body of state land  
11 law the responsibility for protecting your employees from dan-  
12 gers of this sort by inspecting, examining, supervising, and  
13 stopping them from doing unsafe things.

14 QUESTION: I'm sure it's possible if they'd enter  
15 into an agreement that the stevedore would assume all risk of  
16 liability, he could do that.

17 MR. STARING: But if the shipowner is going to con-  
18 tinue then to have a direct duty of care for all these long-  
19 shore employees exactly as though they were his employees and  
20 his seamen, his duty having by this Act been restricted only  
21 as it pertains to that person or that corporation called the  
22 stevedore, then this change in the law was a very, very hollow  
23 change indeed.

24 QUESTION: There's a difference between proving  
25 negligence and proving under -- what was the doctrine before?



1 -- unseaworthiness, there's a difference between negligence  
2 and unseaworthiness, isn't there?

3 MR. STARING: There is, Your Honor. I say that the  
4 shipowner does not have a duty to oversee to prevent the con-  
5 sequences of known and obvious conditions which are known to  
6 or obvious to the employee. But what I'd like to point out  
7 is that the restatement speaks only bilaterally. And that's  
8 one of the shortcomings of its sections. Even 343, 343(a) are  
9 inadequate, as Judge Friendly has pointed out somewhere; they  
10 set too liberal a standard, because they don't take into  
11 account the existence of an intermediary who is an expert  
12 stevedore contractor specially charged with the function of  
13 safety by law and by contract. They don't take that into  
14 account. And they deal with the individual invitee, the indi-  
15 vidual person, always, coming on board without anybody else  
16 to protect his interests except the furnisher of the chattel,  
17 except the furnisher of the premises.

18 And in the case we deal with, we deal with something  
19 that the restatement doesn't contemplate at all, which is the  
20 special circumstance of the existence of this expert contractor  
21 charged by law with a program of safety.

22 I should like to say --

23 QUESTION: Could I ask you just -- I should know  
24 this. In an ordinary negligence action, if there is such a  
25 thing, by a longshoreman against a shipowner claiming

1 negligence, is the defense of assumption of risk available to  
2 the shipowner?

3 MR. STARING: The defense of assumption of risk is  
4 not generally available in maritime law to a shipowner or to  
5 anyone else.

6 QUESTION: Or to anyone else? And the same with  
7 respect to contributory negligence. Except to say they  
8 divide -- it's comparative fault?

9 MR. STARING: Yes, sir.

10 QUESTION: And the statute in '72 said that it  
11 wanted to go to landbased principles of negligence rather than  
12 maritime law?

13 MR. STARING: Yes, sir.

14 QUESTION: Except for that?

15 MR. STARING: Except that it wants to preserve the  
16 elimination of the bar of assumption of risk, and the bar of  
17 contributory negligence.

18 QUESTION: And part of the argument here is that the  
19 ALI standard really recognizes assumption of risk.

20 MR. STARING: That's not my argument.

21 QUESTION: I'm sure it isn't.

22 MR. STARING: But the argument is made and we think  
23 it is fallacious because -- for reasons which we have discussed  
24 in my brief.

25 I want to reserve a couple of moments, if I may, and

1 before doing so, may I just draw one brief parallel --

2 MR. CHIEF JUSTICE BURGER: Mr. Staring, you have  
3 only about two left.

4 MR. STARING: All right. I had better start re-  
5 serving now, then. Thank you.

6 MR. CHIEF JUSTICE BURGER: Mr. Grutz.

7 ORAL ARGUMENT OF JAMES A. GRUTZ, ESQ.,

8 ON BEHALF OF THE RESPONDENTS

9 MR. GRUTZ: Mr. Chief Justice, and may it please the  
10 Court:

11 My name is James Grutz. I represent the respondent,  
12 Lauro De Los Santos, individual longshoreman, who was injured  
13 in the way that is described in the statement of facts in the  
14 brief.

15 I would like to start with what I believe the  
16 amendments, 1972 amendments, did in this case, or as they  
17 apply to this case. First of all, the amendments said that if  
18 there was negligence and that negligence of a shipowner injured  
19 a longshoreman, that he had a suit for negligence against the  
20 shipowner.

21 Secondly, it did away with any indemnity actions by  
22 the shipowner against the stevedoring company for the breach  
23 of the warranty of workmanlike service. That's the Ryan case.  
24 And thirdly, it did away with the doctrine of unseaworthiness.  
25 There is no mention in the statute about standards involving



1 landbased duties. There is no mention in the statute about  
2 invitees. There is no mention in the statute about indepen-  
3 dent contractors, and so forth. There is simply the statement  
4 that negligence actions are permitted by longshoremen who are  
5 injured against shipowners.

6 QUESTION: Well, Mr. Grutz, if we apply landbased  
7 principles of negligence in this area as set out in the re-  
8 statement or in some other treatise or some other line of  
9 cases, do you lose this case?

10 MR. GRUTZ: Landbased, Your Honor, is not a term of  
11 art. It can mean probably 150 different things. For instance,  
12 within the law of invitees, the premises liability areas of  
13 landbased law probably -- there are 50 different tests within  
14 the United States. There are probably three or four different  
15 subtests within each of those tests within the United States.  
16 So, I don't know what landbased means, Your Honor.

17 QUESTION: So you say, Congress has in effect given  
18 us no guidance and we've simply got to choose from among the  
19 various courts of appeals, or --

20 MR. GRUTZ: No, I think Congress has given us some  
21 guides, Your Honor. I think the Congress intended and I think  
22 the statute is clear, and unambiguous. The statute does  
23 away with unseaworthiness, with the warranty of seaworthiness.  
24 It preserves the maritime negligence action which existed  
25 prior to the amendments.

1 QUESTION: But it doesn't say what the extent of the  
2 duty of the shipowner is, though.

3 MR. GRUTZ: It doesn't say what it is but I think  
4 that it's --

5 QUESTION: That's the argument.

6 MR. GRUTZ: That's correct. It doesn't say what it  
7 is, Your Honor, but I think that we can assume that Congress  
8 was aware of the negligence cases which existed prior to the  
9 amendments, and that they are said then to have adopted what  
10 the courts had said about what those duties were.

11 QUESTION: Is there anything at all in the legisla-  
12 tive history which --

13 MR. GRUTZ: Yes, Your Honor, there is. Now, I would  
14 take the position that the statute is clear and the legisla-  
15 tive history is not necessary. But all the courts that have  
16 examined the question have found it helpful to go to the legis-  
17 lative history.

18 The legislative history, I maintain, is perfectly  
19 consistent with my position. That is, the legislative history  
20 discusses several items. Number one, they wanted a uniform  
21 national federal standard, and I would submit that prior to  
22 the amendments there was a national, uniform federal standard,  
23 and it was the general maritime law --

24 QUESTION: With respect to the duty of the shipowner?  
25 Was there a uniform national federal standard?

1 MR. GRUTZ: Yes.

2 QUESTION: What was that?

3 MR. GRUTZ: I think it was the general maritime law  
4 as it applied to negligence actions.

5 QUESTION: Well, specifically as to duty?

6 MR. GRUTZ: As to duty, it came out of the various  
7 cases that were, that wended their way up the court system in  
8 those decisions.

9 QUESTION: Well, it must have been before --

10 MR. GRUTZ: Pardon?

11 QUESTION: Weren't most cases on the seaworthiness  
12 basis?

13 MR. GRUTZ: I think most cases were on the seaworthi-  
14 ness basis.

15 QUESTION: Well, where do you get much law about  
16 negligence before '72?

17 MR. GRUTZ: Well, you get it --

18 QUESTION: It was between the shipowner and the  
19 longshoremen.

20 MR. GRUTZ: Most of the time it's connected. Most  
21 of the time they overlap. But there are some cases, Your  
22 Honor, and --

23 QUESTION: From this Court?

24 MR. GRUTZ: Well, I think that Pope & Talbot v. Hawn  
25 recognizes a duty that --



1 QUESTION: That was just a refusal to overrule  
2 Sieracki, wasn't it?

3 MR. GRUTZ: But it also recognized the fact that  
4 Sieracki did not do away with the negligence action.

5 QUESTION: No, except most of the cases are seawor-  
6 thiness cases, because from the plaintiff's point of view,  
7 seaworthiness, unseaworthiness is much easier to prove than  
8 negligence.

9 MR. GRUTZ: Much easier to prove? That's correct.

10 QUESTION: So you could always go with unseaworthi-  
11 ness, if you were a plaintiff's lawyer.

12 MR. GRUTZ: That's correct. And so, most of the  
13 cases that come up are in that vein; that is correct. But I  
14 think that --

15 QUESTION: Well, what I was asking, Mr. Grutz, is  
16 there anything in the legislative history that addresses it-  
17 self specifically to the duty of the shipowner to the long-  
18 shoreman?

19 MR. GRUTZ: Absolutely, Your Honor.

20 QUESTION: Well, what does it say?

21 MR. GRUTZ: It says that the shipowner owes a duty  
22 of due care under the circumstances to maintain a safe place to  
23 work and to correct dangerous conditions aboard the vessel.

24 QUESTION: Where does one find this in the -- is it  
25 in that committee report, or -- ?

1 MR. GRUTZ: Yes, sir. It's page I-10 of the appendix  
2 to my brief. I put the whole committee report as --

3 QUESTION: Is it a Joint House-Senate report?

4 MR. GRUTZ: Yes, yes. The language is exactly the  
5 same in both.

6 QUESTION: But it's not in the statute?

7 MR. GRUTZ; It is not in the statute. The language  
8 in the Senate report -- and it's identical in the House report  
9 -- is that nothing -- "Thus, nothing in this bill is intended  
10 to derogate from the vessel's responsibility to take appro-  
11 priate corrective action where it knows or should have known  
12 about a dangerous condition."

13 QUESTION: Well, what's the previous sentence mean,  
14 Mr. Grutz?

15 MR. GRUTZ: And the one before that --

16 QUESTION: "Will still be required to exercise the  
17 same care as landbased person in providing a safe place to  
18 work."

19 MR. GRUTZ: All right. I think it means that the  
20 shipowner has an obligation to exercise reasonable care to  
21 make sure that the working place is safe. The landbased lan-  
22 guage is used -- it's in several instances in the legislative  
23 history. And I would submit, Your Honor, that the landbased  
24 language is not used as a term of art, it is used as a  
25 descriptive term which differentiates it from the Sieracki

1 unseaworthiness cases which are being done away with by the  
2 amendments to the Act.

3 QUESTION: Well, what would be the difference if the  
4 shipowner has an obligation to provide a safe place to work  
5 and Sieracki is done away with?

6 MR. GRUTZ: Well, the difference is, Your Honor,  
7 notice. The difference between a seaworthiness case and a  
8 negligence case is basically notice. And I think that a full  
9 reading of the committee report points out the difference, and  
10 I think this Court in cases has recognized the difference.  
11 In Gutierrez there's a discussion of the difference between  
12 negligence and unseaworthiness. In one case the actor to be  
13 negligent must be put on notice or have an opportunity to know,  
14 either actual or constructive notice, of the the danger.  
15 Otherwise, he cannot be said to have the duty.

16 QUESTION: And to whom must the notice run? To the --

17 MR. GRUTZ: To the shipowner.

18 QUESTION: Well, on the other side, to the stevedore  
19 employer or to the actual longshoreman?

20 MR. GRUTZ: Oh, the notice as regards contributory  
21 negligence or comparative negligence?

22 QUESTION: Well, the notice of the unsafe condition.

23 MR. GRUTZ: It is my position that the notice would  
24 have to run to the individual longshoreman, because he's the  
25 one -- for instance, in this case -- that the district court



1 said, knew and appreciated this particular risk, and sub-  
2 jected himself to it. So that he barred the district court  
3 on a motion for summary judgment barred the plaintiff from any  
4 recovery or from even going to the jury on the basis, simply,  
5 of was there an open and obvious danger?

6 QUESTION: Well, if the plaintiff knew there was an  
7 open and obvious danger, why shouldn't he have been barred?

8 MR. GRUTZ: As a matter of law, Your Honor, he can-  
9 not be barred because the open and obvious danger becomes  
10 assumption of the risk.

11 QUESTION: Well, it could just as well be a fellow  
12 servant or a failure to submit sufficient proof to the dis-  
13 trict court.

14 MR. GRUTZ: Your Honor, it seems to me that if there  
15 is evidence put on that there was negligence, that there was a  
16 failure to remedy the winch, which was an integral part of  
17 the ship, and the shipowner reserved the right by regulation  
18 and by practice to repair that winch, that to simply say that  
19 if a longshoreman recognized some danger, an individual  
20 longshoreman recognized some danger, that he as a matter of  
21 law cannot recover, is simply to say that he then knows and  
22 appreciates a risk, accepts the risk, and then we're into the  
23 assumption of risk argument, which Congress in the legislative  
24 reports has proscribed.

25 QUESTION: Well, I must say, Mr. Grutz, that at page

1 I-10: "Nothing in this bill is intended to derogate from the  
2 vessel's responsibility to take appropriate corrective action  
3 where it knows or should have known about a dangerous condi-  
4 tion" seems to be contrary to the argument of your colleague,  
5 that all they have to do is, if he knows about something, tell  
6 the stevedore about it?

7 MR. GRUTZ: Absolutely. And the oil spill example --

8 QUESTION: That language that my brother Brennan has  
9 read says nothing of liability to anybody else. It's just his  
10 responsibility to do it.

11 MR. GRUTZ: But the responsibility to someone else --

12 QUESTION: No, the next paragraph illustrates what  
13 it --

14 MR. GRUTZ: It illustrates it perfectly.

15 QUESTION: It talks about a longshoreman who slips  
16 on an oil spill on a vessel's deck.

17 MR. GRUTZ: And it talks about the notice.

18 QUESTION: That's the difference between unseaworthi-  
19 ness and negligence; yes.

20 MR. GRUTZ: So the illustration --

21 QUESTION: Why didn't Congress put this in the stat-  
22 ute rather than leaving it all to a joint congressional com-  
23 mittee report if it was this critical?

24 MR. GRUTZ: I think Congress did not put it in the  
25 statute because they assumed that negligence had a meaning,

1 that the significant meaning of negligence -- that there had  
2 been a negligence action preserved in the Longshoremen and  
3 Harbor Workers' Act ever since its inception -- and that it  
4 had a meaning which they were willing to accept.

5 QUESTION: Well, I don't know why you don't rely on  
6 what they said on I-11: "Under this standard" -- that is, the  
7 negligence standard -- "as adopted by the committee, there will  
8 of course be disputes as to whether the vessel was negligent  
9 in a particular case. Such issues can only be resolved through  
10 the application of accepted principles of tort law and of the  
11 ordinary process of litigation, just as they are in cases  
12 involving alleged negligence by landbased third parties."

13 MR. GRUTZ: I think that they're saying that to re-  
14 solve these questions, there are going to be trials, there are  
15 going to be cases submitted to factfinders to decide whether  
16 there was the failure to operate with ordinary care.

17 QUESTION: Well, it sounds like the Committee at  
18 least thought that under ordinary landbased law, the injured  
19 longshoreman would recover on this oil spill matter.

20 MR. GRUTZ: Absolutely.

21 QUESTION: They may have been wrong about what they  
22 thought landbased law was.

23 MR. GRUTZ: That's right. I think --

24 QUESTION: Or thought it was.

25 MR. GRUTZ: That's correct. There's no doubt that



1 they are indicating their belief that Sieracki -- they take  
2 two oil spill examples and juxtapose them. the first one,  
3 they say there is no notice but under Sieracki the longshore-  
4 man could recover. The second one, they describe, as  
5 Mr. Justice Brennan has read here, and what is retained, then,  
6 is the negligence action. And so they believe -- yes -- that  
7 he can recover. And earlier in the discussions they advocate  
8 that this is good, this is something that they want to pre-  
9 serve, because it encourages safety considerations. So that  
10 Mr. Staring's approach would be that if the danger is open and  
11 obvious enough, that a longshoreman walking up the gangplank  
12 could or should have seen grease on the deck or you-name-it,  
13 the winch is rusty, there is a hole in the deck, and so on and  
14 so forth, or there's a sign saying, here are all the defi-  
15 ciencies of this vessel, that at that point they're immunized.  
16 Now, that is not consistent with what the legislative  
17 history says over and over again, that nothing in this bill  
18 is to derogate from their duty to exercise reasonable care to  
19 furnish a safe place for this person to work.

20 QUESTION: Is this a new form of legislative tech-  
21 nique, to draft a skeleton statute and then give us a legal  
22 opinion as to what it means?

23 MR. GRUTZ: I'm not sure, Your Honor. It may very  
24 well be.

25 QUESTION: You've got two or three pages that reads

1 like a legal opinion or a judicial opinion --

2 MR. GRUTZ: That's correct.

3 QUESTION: Telling us what -- now, who's telling us  
4 that? Congress telling us that?

5 MR. GRUTZ: I think it's an advisor to Congress, a  
6 law clerk, perhaps, or a -- I don't know.

7 QUESTION: You mean a legislative clerk?

8 MR. GRUTZ: Legislative clerk of some sort who is --  
9 The problem, though, is that they have misunderstood, I think,  
10 the impact of landbased. Landbased in and of itself doesn't  
11 convey anything. There can be so many meanings for the term  
12 that all it does is confuse, and it's only --

13 QUESTION: Mr. Grutz, can I ask you about the mean-  
14 ing as applied to this particular case?

15 MR. GRUTZ: Yes, sir?

16 QUESTION: Do you agree that there has to be evidence  
17 beyond evidence that the winch was defective? In other words,  
18 doesn't there have to be some evidence of notice to the ship-  
19 owner?

20 MR. GRUTZ: I think there has to be evidence of  
21 either actual or constructive notice of some sort; yes, Your  
22 Honor.

23 QUESTION: So that you would not contend that you  
24 are entitled to go to the jury merely by proving a defect in  
25 the winch?

1 MR. GRUTZ: Absolutely not. I have to come within  
2 the guidelines of the second oil spill example where --

3 QUESTION: Reasonable notice.

4 MR. GRUTZ: -- reasonable notice.

5 QUESTION: And what in this record is there to indi-  
6 cate that the vessel owner had any notice of the defective  
7 winch?

8 MR. GRUTZ: Well, there's this, that the winch had  
9 been malfunctioning for about 2-1/2 days prior to this acci-  
10 dent.

11 QUESTION: Yes, but the stevedore was running it for  
12 more than 2-1/2 days.

13 MR. GRUTZ: The stevedore was running it -- by the  
14 evidence, Your Honor, this was the third report.

15 QUESTION: Is this true, the stevedore had been on  
16 the job more than 2-1/2 days?

17 MR. GRUTZ: I don't think that's in the record as  
18 such. I think that my understanding of the record is that  
19 the stevedore's use of the winch was contemporaneous with tes-  
20 timony about the malfunctioning of the winch. Does that answer  
21 your question?

22 QUESTION: No, I'm still puzzled. Do you have to  
23 prove knowledge on the part of the shipowner before the  
24 stevedore went on the job?

25 MF. GRUTZ: No. And the reason I say that --



1 QUESTION: Well, then, how does the 2-1/2 day testi-  
2 mony tend to prove that the vessel owner knew anything?

3 MR. GRUTZ: It's -- it was there that the --

4 QUESTION: Well, the test is whether he had reason  
5 to know, isn't it?

6 MR. GRUTZ: Whether he should have known.

7 QUESTION: If the condition existed for 2-1/2 days  
8 wouldn't that create a jury question? Whether or not he has  
9 reason to know?

10 MR. GRUTZ: Whether he should have known under the  
11 circumstances that the --

12 QUESTION: It's the ordinary negligence standard,  
13 isn't it?

14 MR. GRUTZ: That's the lettuce leaf on the floor in  
15 the grocery store.

16 QUESTION: If you slip on something in the depart-  
17 ment store, that's all you have to prove, that it was there  
18 long enough that he should have known about it.

19 MR. GRUTZ: Absolutely. It was there long enough --  
20 so that in terms of reasonable care, the owner of the estab-  
21 lishment could have discovered the situation.

22 QUESTION: Well, then that's certainly a rejection  
23 of the landowner-invitee landbased test.

24 MR. GRUTZ: There's no question in my mind, Your  
25 Honor, that the landowner-invitee test is absolutely

1 inconsistent and incompatible with the amendments to the  
2 statute. There's absolutely no question about it.

3 QUESTION: But several circuits have adopted it.

4 MR. GRUTZ: That's correct, and I think they're  
5 wrong. And I think they've recognized their errors. If you  
6 read Gay and Napoli, the thrust of those opinions talks about  
7 adopting 343 and 343(a) but there is a lot of cautioning going on  
8 within the course of their discussions, so that they know  
9 they're treading on very thin ice, and the problem is, is that  
10 you get into situations in which you take from the jury, that  
11 the questions by simply focusing on, was it open and apparent?  
12 And so that, if the inquiry begins and ends with, was it open  
13 and apparent, you foreclose the longshoreman from ever looking  
14 at the negligence of the shipowner.

15 QUESTION: Well, that's just the way the cookie  
16 crumbles under the statute, maybe.

17 MR. GRUTZ: The statute does not talk about invitees,  
18 landbased law, independent contractor, et cetera. It talks  
19 about maintaining the negligence action. The legislative his-  
20 tory talks about retaining the negligence action. And the  
21 retention of the negligence standard, I would submit, means  
22 that if the shipowner has failed to exercise reasonable care  
23 to fix something -- in other words, there is a duty to do  
24 something about it, it isn't simply to warn, it isn't simply  
25 to say, you should have seen it, therefore it's your problem.

1 QUESTION: You seem to think that that would be  
2 enough under landbased law to warn him?

3 MR. GRUTZ: Well, under the 343 --

4 QUESTION: You say, the regular landbased rule is  
5 inconsistent with your submission.

6 MR. GRUTZ: 343 and 343(a) is; no question about  
7 that, Your Honor. I don't know about other landbased law, but  
8 the ones that have been suggested here are definitely incon-  
9 sistent --

10 QUESTION: With your submission and with --

11 MR. GRUTZ: And with the statute.

12 QUESTION: Even though this committee report keeps  
13 referring to landbased standards.

14 MR. GRUTZ: It's been suggested in some of these  
15 cases that the use of that term is not a term of art. It is  
16 simply a descriptive term which differentiates the former sea-  
17 worthiness warranty versus negligence. And I think that's --  
18 if you read the two oil spill examples, it becomes clear, that  
19 what we're talking about --

20 QUESTION: They might have been oil spill examples  
21 in department stores.

22 MR. GRUTZ: They could have been; absolutely.

23 QUESTION: And, in that sense, the landbased rule and  
24 this rule would be the same.

25 MR. GRUTZ: I am reluctant to say, yes, because I



1 don't know what the landbased rule means, Your Honor. I think  
2 that --

3 QUESTION: Well, as a state court judge for a lot of  
4 years, I had a number of them.

5 MR. GRUTZ: I think that the state courts are all  
6 tending toward the duty of a person, of a landowner, to exer-  
7 cise reasonable care under the circumstances, which is exactly  
8 the standard of care which the 9th Circuit adopted in this  
9 case. So that the tendency is that direction, Your Honor,  
10 even though there are remnants of the old, of the feudal idea  
11 that the landowner is king on his premises and nobody shall  
12 tread there, and he's in a special status.

13 QUESTION: Well, if there is any landbased  
14 element or component to this new standard laid down in 1972 or  
15 preserved in 1972, as you say, would you say it changes as  
16 state law changes, or is it fixed as of 1972?

17 MR. GRUTZ: I think if the Court adopts 343 and  
18 343(a), it's dependent on state law, the law of --

19 QUESTION: What if it doesn't?

20 MR. GRUTZ: Pardon?

21 QUESTION: What if the Court --

22 MR. GRUTZ: If it doesn't, I think the 9th Circuit  
23 test and the Kermarec test are statements of a test which are  
24 uniform and federal, and would --

25 QUESTION: Don't all the courts of appeals agree that

1 the statute intended a uniform test?

2 MR. GRUTZ: Absolutely. They want a uniform test.  
3 The problem is that you -- if you incorporate, generally  
4 speaking, the 343 and 343(a) test, we don't know the various  
5 ways in which it's been interpreted by all the different juris-  
6 dictions.

7 QUESTION: But that's true of any number of possible  
8 negligence tests. They may differ now or they may change in  
9 the future.

10 MR. GRUTZ: That may be true, Your Honor, but I  
11 think what we've got with the 9th Circuit opinion is a negli-  
12 gence test that everyone can understand. It's easy of appli-  
13 cation, it's simple, it's practical, and it's correct in the  
14 sense that there preserves the negligence action. It does not  
15 bring into the picture the Sieracki doctrine again. It has  
16 to be notice, either constructive or actual, in order for  
17 a longshoreman to recover. And so that, I would submit, that  
18 the decision and the test which is stated by the 9th Circuit  
19 Court of Appeals is the correct one.

20 QUESTION: Well, I suppose, in federal employer  
21 liability cases, in Jones Act cases, we have a single federal  
22 standard of negligence, don't we?

23 MR. GRUTZ: Yes, sir.

24 QUESTION: And that hasn't been affected by any state  
25 law changes in the negligence standards, if there have been any.

1 MR. GRUTZ: That's correct, but I would assume it's  
2 because --

3 QUESTION: Well, I gather your argument would be, if  
4 we can have it under those two statutes, surely we can have a  
5 uniform federal standard here.

6 MR. GRUTZ: Absolutely. There's no question about  
7 it, but one way of doing it is not to incorporate by reference  
8 feudalism.

9 QUESTICN: Did you yourself advance the theory that  
10 the 9th Circuit adopted.

11 MR. GRUTZ: Absolutely. At the 9th Circuit it  
12 was asked, well what about all of these opinions? Because most  
13 of the opinions were the other direction at that time, and I  
14 stated that I believed that they were in left field and that  
15 they simply were wrong. You cannot reconcile 343 and 343(a)  
16 in its use of assumption of risk and contributory negligence  
17 with what Congress was saying here. Congress said very clearly  
18 in the reports that assumption of the risk has no place in  
19 these cases and that contributory negligence has no place in  
20 these cases, and yet the district court in this case as a  
21 matter of law said that once Mr. Santos saw some danger, he  
22 was forever foreclosed from going any further.

23 QUESTION: Under this standard is summary judgment  
24 really ever possible?

25 MR. GRUTZ: Under the standard of the 9th Circuit?



1 Oh, yes, certainly there is, if there is  
2 -- in other words, if a motion for summary judgment is brought  
3 as a respondent I would have the obligation of putting on some  
4 evidence that there was some notice to the shipowner of a  
5 defect.

6 QUESTION: Mr. Grutz, it's agreed in this case, as I  
7 understand it, that the stevedore had control of the workplace.  
8 Is that correct?

9 MR. GRUTZ: No. It isn't, Your Honor. The Joint  
10 Appendix in, I think it's paragraph 7, page 11, the pretrial  
11 states that the -- I think it says control of the workplace.

12 QUESTION: It says, "and particularly the foreman,  
13 hatchtender and winchdriver" -- oh, the stevedore "through its  
14 employees, and particularly" those employees, "was in control  
15 of the loading at the No. 3 hatch on the evening of plain-  
16 tiff's accident."

17 MR. GRUTZ: Right. That's correct. They were in  
18 control of the loading, but they were not in control of the  
19 winch. They were in control, but they were allowed -- pardon?

20 QUESTION: Is it clear that they were not in control  
21 of the winch?

22 MR. GRUTZ: Yes. I think the regulation that I have  
23 cited in my brief indicates that in the case of a malfunction-  
24 ing electrical winch, the stevedore company has absolutely no  
25 right to touch or try to repair that winch. So the only

1 person or entity that has the power to remedy what we advocate  
2 is going wrong on the ship at the time of this injury is the  
3 shipowner.

4 QUESTION: As to whatever the stevedore had control,  
5 the analogy of a storeowner would be incomplete, would it not?

6 MR. GRUTZ: The analogy of what, Your Honor? I'm  
7 sorry.

8 QUESTION: You discussed at one point a little  
9 earlier in the argument the possible analogy of a landbased  
10 store owner for, say, a grease spot on the floor, but in this  
11 case, to the extent that the stevedore company controlled  
12 the workplace, that would be different from a store, where the  
13 storeowner himself controlled the workplace.

14 MR. GRUTZ: That's correct. That's correct. But,  
15 again, I think what you get down to is, what does the workplace  
16 mean? What is the -- I'm sorry -- what does control mean?  
17 Control over the workplace is different than control over the  
18 winch. In other words, the ability to repair the difficulty  
19 was within -- the shipowner.

20 QUESTION: The finding here was that the stevedore  
21 had control of the loading at the No. 3 hatch on the evening  
22 of plaintiff's injury.

23 MR. GRUTZ: Control of the loading, yes, sir. But  
24 not control of the winch, not control of the ability to remedy  
25 the problem with the winch.

1 QUESTION: Why shouldn't he have quit work?

2 MR. GRUTZ: Why shouldn't he? He probably should  
3 have, Your Honor.

4 QUESTION: And he gets part time while he's waiting,  
5 doesn't he, while he's waiting for the winch to be repaired,  
6 isn't he paid part time or something? Standby, isn't it the  
7 rule?

8 MR. GRUTZ: That's not in the record, Your Honor.  
9 I don't know the answer to that, to be honest with you.

10 QUESTION: Well, but you just gave me the answer  
11 that he should have quit work.

12 MR. GRUTZ: I said, perhaps he should have quit  
13 work.

14 QUESTION: And if he'd have quit work, the longshore-  
15 man wouldn't have been working. If the stevedore had said,  
16 we've got a bad winch here, I've got to tell the shipowner  
17 and wait till he fixes it, because I have no right to fix it.

18 MR. GRUTZ: That's correct.

19 QUESTION: So, what's -- shouldn't it also be open  
20 to question as to whether the stevedore has the duty, as soon  
21 as reasonably possible, to notify a shipowner about a defec-  
22 tive winch? Why should it be left to, "should have known"?  
23 Couldn't the stevedore have told him, as soon as he knew the  
24 winch was defective? He knew it for 2-1/2 days.

25 MR. GRUTZ: I think there is inference from the



1 evidence that he did tell him, but it's an inference, I suppose.

2 QUESTION: Why visit that responsibility on the  
3 injured longshoreman?

4 MR. GRUTZ: Absolutely. I don't think the injured  
5 longshoreman -- in fact, there's evidence in this case the  
6 injured longshoreman didn't even know or appreciate what it  
7 was that the specific --

8 QUESTION: Well, the longshoreman wants the money.

9 MR. GRUTZ: He was trying to do his job, he was  
10 working. He was -- he had a sense of duty to clean up a mess  
11 and that's what he was doing.

12 QUESTION: Well, what if there was something that  
13 -- what if this had gone on for a week? You'll just say, well,  
14 there's all the more reason for the shipowner knowing it?

15 MR. GRUTZ: I think there's -- yes, sir. I think  
16 there's all the more reason for the --

17 QUESTION: You don't think there's ever -- it never  
18 should make a difference if the stevedore didn't give notice to  
19 the shipowner about the defect?

20 MR. GRUTZ: Not in terms of the tort action, the  
21 negligence tort action between the shipowner and the steve-  
22 dore individual.

23 QUESTION: You mean the longshoreman?

24 MR. GRUTZ: Injured longshoreman.

25 QUESTION: Even though the longshoreman is covered

1 by the Work-Pay Compensation Act?

2 MR. GRUTZ: That's correct. And I think that the  
3 statute, the discussion in the legislative reports, support  
4 that, Your Honor.

5 QUESTION: I'm still puzzled. I hate to reveal my  
6 ignorance about this question of notice to the vessel owner.  
7 And, as Justice Powell pointed out, it's not like a store where  
8 you're in a public area. Does the record tell us -- and,  
9 again, maybe I should know this -- whether personnel, rather,  
10 employees of the vessel owner were regularly aboard the ship  
11 during the loading operation?

12 MR. GRUTZ: Yes. There is some evidence in the  
13 record --

14 QUESTION: And the various people who testified, as  
15 I understand it, are all longshoremen?

16 MR. GRUTZ: That's correct. The only persons who  
17 testified are longshoremen. And they testified that the  
18 representatives of the shipowner were back and forth in the  
19 area.

20 QUESTION: I see, were back and forth, on and off?

21 MR. GRUTZ: In the area.

22 QUESTION: In places where they would have seen the  
23 winch, is that the theory that -- ?

24 MR. GRUTZ: Yes.

25 QUESTION: It isn't as though it was a fully manned

1 vessel with a lot of people representing the vessel, is it?

2 MR. GRUTZ: The evidence, again, is -- this was sum-  
3 mary judgment, Your Honor, so there isn't very much evidence.  
4 But the evidence is that the representatives of the shipowner  
5 were back and forth in the area where this was going on.

6 QUESTION: But -- I see.

7 MR. GRUTZ: And there's also evidence that on the  
8 first day the winch driver reported to his supervisor that the  
9 winch was jumpy, it was not holding, the brakes were not  
10 holding, and at that time he was told that the day shift was  
11 having trouble with it too, but that they could not do any-  
12 thing with it. And I think there's an inference that the  
13 "they" that they're talking about was the shipowner.  
14 Because "they" were the only ones who had the ability.

15 Thank you.

16 MR. CHIEF JUSTICE BURGER: Very well. Mr. Staring.

17 ORAL ARGUMENT OF GRAYDON S. STARING, ESQ.,

18 ON BEHALF OF THE PETITIONER -- REBUTTAL

19 MR. STARING: May it please the Court:

20 There was discussion here as to whether the passage  
21 of time should be taken as charging the vessel, passage of  
22 time alone should be taken as charging the vessel with notice  
23 of a defect. That was exactly the problem in the Albanese  
24 case which we cited in our brief, where the trial court charged  
25 the jury that if it determined the condition had existed long



1 enough, to charge the shipowner with notice of it; they could  
2 hold the shipowner. The Court of Appeals for the 2nd Circuit  
3 said, that was erroneous. This Court said, we believe the  
4 judgment of the Court of Appeals was erroneous, and therefore  
5 set it aside, citing as the single case of Gutierrez v. Water-  
6 man Steamship, which was aptly cited for the purpose. This was  
7 one of the cases which was cited as in the legislative history  
8 as one which -- it was not supposed to happen again, in prin-  
9 ciple at least.

10 Now, the Gutierrez case, which had been cited here  
11 as authority for the Albanese case, was a case which itself  
12 explicitly rested upon nondelegable duty. Well, this Court  
13 said, as a basis for its decision, the shipowner had an abso-  
14 lute and nondelegable duty of care toward petitioner and not  
15 to create this risk for him.

16 And you were dealing with negligence at that time.  
17 There are, however, other negligence cases, not so many for  
18 the reason that Mr. Justice Stewart and others pointed out,  
19 but there are other negligence cases before 1972, which we have  
20 cited in the brief and which we submit are harmonious with the  
21 formulation of duty which the restatement would lay down and  
22 which we have adopted here.

23 QUESTION: May I just interrupt you right there?  
24 As I understood your opening argument, you did not buy 100  
25 percent the restatement's formulation of the standard of duty.

1 MR. STARING: No. I said, we don't have to buy it.

2 QUESTION: You don't have to? Well, is there any-  
3 thing in the written materials that tells us precisely what  
4 your position is?

5 MR. STARING: Yes, indeed, Your Honor. We have  
6 stated --

7 QUESTION: Because I sort of had the view you  
8 were adopting the restatement position.

9 MR. STARING: No. We have stated it separately, and  
10 not in restatement terms, and we feel it can be reconciled  
11 or can be supported by the restatement, by any of a number of  
12 other sources.

13 The oil spill was discussed and I'd like to point  
14 out that as we read the oil spill illustration, it illustrates  
15 the difference between unseaworthiness before and negligence  
16 after. And where it refers to notice, what it means is that  
17 in negligence notice is necessary, but it doesn't mean that  
18 notice is always sufficient. There are instances, of course,  
19 in which the vessel owner would be held for the oil spill, and  
20 instances in which he wouldn't. It depends on whether the  
21 spill is obvious or not, whether it's in an area that's under  
22 the control of the stevedore, whether it was created by the  
23 vessel's personnel, when it was created, and so on. If it's  
24 an oil spill in an area over which the vessel has retained  
25 essential control but which longshoremen have to pass through,

1 that presents an entirely different situation and one which  
2 arises in the course of work. So, there's no pat result so  
3 far as oil spills are concerned.

4 Finally, it was suggested -- it's been suggested  
5 that there was a big difference here, whether -- as to what  
6 rule you might apply to the stevedore and to the longshoreman  
7 himself. And I'd like to suggest that, as was explicitly said  
8 by this Court in Federal Marine Terminals v. Burnside, if  
9 Kermarec does mean anything in these circumstances in abolish-  
10 ing the distinction between licensees and invitees and other  
11 irrational distinctions, it means as was pointed out in Federal  
12 Marine Terminals v. Burnside that the same rule of duty, the  
13 same duty of care applies to the stevedore contractor and to  
14 his employees and that that distinction should not be made.  
15 That was quite explicit there.

16 The fortuity, finally, of presence of someone on the  
17 vessel should not determine the duty. There is no duty to be  
18 there and inspect, as this Court recognized in West, and  
19 therefore no special duty because one happens to be there.

20 Thank you, Your Honors.

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

23 (Whereupon, at 2:47 o'clock p.m., the case in the  
24 above-entitled matter was submitted.)



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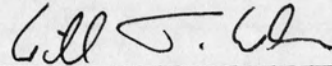
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