

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1726

TITLE EAST RIVER STEAMSHIP COPP., ET AL., Petitioners V.
TRANSAMERICA DELAVAL INC.

PLACE Washington, D. C.

DATE January 21, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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EAST RIVER STEAMSHIP CORP., :
ET AL., :
Petitioners, :
V. : No. 84-1726
TRANSAMERICA DELAVAL INC. :
-----x

Washington, D.C.

Tuesday, January 21, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:41 o'clock p.m.

APPEARANCES:

THOMAS E. DURKIN, JR., ESQ., Newark, New Jersey; on behalf of the petitioners.

ROBERT SMITH, ESQ., New York, New York; on behalf of the respondent.

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1 grievous, if I may refer to it as such, is the references
2 in the opinion written by Judge Hunter that the one ship
3 involved, the Bay Ridge, never left the lock.

4 Indulge me for a moment to succinctly outline
5 the differing factors of the first of the three ships and
6 the Bay Ridge. The episode all started by the problem
7 that was encountered by the Stuyvesant. At the time the
8 Stuyvesant encountered that particular problem, there was
9 then under construction at a shipyard in Brooklyn the Bay
10 Ridge.

11 The shipyard that constructed the four of these
12 supertankers was the same. The supplier of the turbines
13 that were installed in these particular supertankers was
14 also the same.

15 Now, at the time the Stuyvesant experienced its
16 problem, there was a decision made -- The basis for the
17 decision I will review very shortly -- that the
18 circumstances required an exchange of the ring that was
19 then at the Bay Ridge, and have it transported for
20 installation into the Stuyvesant.

21 Thereafter, as far as the Bay Ridge was
22 concerned, there was manufactured a ring different than
23 the original four rings, which newly constructed ring
24 incorporated the recommendations of these plaintiffs'
25 experts, and that ring was thereafter installed in that

1 Bay Ridge.

2 It is that plaintiff's position relative to the
3 Bay Ridge that at the time that Bay Ridge left that
4 shipyard and while it was en route to its destination,
5 the problem encountered by that ship had absolutely
6 nothing whatsoever to do with the manufacture of the ring.

7 What happened, at the time that properly
8 constructed ring was being installed in that turbine of
9 the Bay Ridge, some of the appurtenances that had to be
10 installed in order for that turbine to be functional,
11 more specifically a guardian stern bow, was installed in
12 reverse and this installation occurred under the
13 supervision of the representatives of Delaval.

14 As a result of that valve being installed in
15 reverse, improper steam got into that turbine and it was
16 the improper steam that got into that turbine that caused
17 the disintegration of the components of that particular
18 turbine. At the time of the episode with the Bay Ridge,
19 when that ring was taken out it was thereafter, it being
20 the first ring, it was thereafter installed in the
21 Stuyvesant.

22 Now, it may be appropriate now to note that the
23 opinion of the Third Circuit, the Third Circuit made
24 mention on page 7, part of it is carried over to page 8
25 of its opinion, that the plaintiff did not seek to order

1 a new part from Delaval but in lieu of doing that,
2 obtained the ring out of the Bay Ridge.

3 QUESTION: Are you asking us to make some
4 factual determinations in this Court that -- don't we
5 take the facts as we find them in the court of appeals
6 opinion, or not?

7 MR. DURKIN: Well, on the point that I just
8 mentioned, I thought if the fact would be a fact
9 obtainable from the record and the specific circumstance,
10 in the court of appeals opinion -- the court of appeals
11 expressly states that it's making its findings on a
12 hypothesis that that ship never left the pier.

13 That ship not only left the pier, but that ship
14 was in the middle of the ocean when it encountered this
15 difficulty, when it was in total distress. And that was
16 never a circumstance --

17 QUESTION: I don't know that you -- I thought
18 we were just going to deal with the questions you raised
19 in the petition for certiorari.

20 MR. DURKIN: I am, sir, but there are two.
21 That one has to do with the question of the negligence,
22 and the other has to do with the specific circumstance of
23 the applicability of strict liability and tort. Now,
24 what is suggested by the question that's submitted,
25 factually outlined, is this.

1 May the manufacturer of a turbine, which
2 turbine is to be the power unit of a 225,000 DWT ton
3 tanker, represent to the shipyard that if that
4 manufacturer can supply a turbine to that particular ship
5 so as for that ship to acquire propulsion, and thereafter
6 when that ship is completed and that ship is sold and
7 that ship is chartered, should that charterer as was the
8 fact here, be responsible without redress to collect in
9 damage approximately two million dollars paid by these
10 plaintiffs to this defendant, Delaval, for that defendant
11 then to do that which that defendant was obligated to at
12 the time of the particular initial construction.

13 Differently stated, the split in the circuits
14 seems to suggest, according to the Third Circuit, this
15 plaintiff may not collect this type of damage in strict
16 liability in tort, even though the damages that were
17 caused to this particular charterer are without question
18 damages caused by the negligent or improper construction
19 of the turbine at the time of original construction.

20 There has been much suggested in all opinions
21 relative to this phrase, "economic loss." The damages
22 that were sought to be collected here were basically four
23 in nature. One, those monies paid by these plaintiffs
24 directly to Delaval, an amount just the right side of two
25 million dollars, which monies were paid to Delaval to do

1 to those rings that which the law imposed upon Delaval to
2 do in the first place.

3 Two --

4 QUESTION: Well, that's ordinarily a contract
5 measure of damages. Isn't that ordinarily a contract
6 measure of damages, what you just talked about?

7 MR. DURKIN: No, sir. No, sir. There is
8 nothing here involving quota contract. This charterer --

9 QUESTION: But you just described something in
10 terms of a failure to perform, I thought, and that is
11 ordinarily a contract concept.

12 MR. DURKIN: Let me state it again, sir. That
13 which this plaintiff paid to that manufacturer, the
14 amount I refer to, roughly two million dollars, was for
15 that manufacturer to give to that charterer a turbine
16 which that manufacturer, not by means of contract but by
17 operation of law was required to supply in the first
18 place.

19 QUESTION: You've stated it three times but you
20 haven't made it any clearer to me.

21 MR. DURKIN: At the time that the turbine was
22 originally manufactured, extra to any contract term, the
23 requirement of that manufacturer was to manufacture a
24 product --

25 QUESTION: Why was it the requirement on the

1 manufacturer?

2 MR. DURKIN: Sir, I'm sorry?

3 QUESTION: You say there was a requirement on
4 the manufacturer to manufacture in a particular way.
5 What's the source of that requirement?

6 MR. DURKIN: Well, the particular turbine was
7 manufactured in New Jersey and the law of new Jersey
8 imposes an obligation upon a manufacturer of a particular
9 commodity, which commodity is thereafter to be introduced
10 into the general course of commerce, a conduct to make
11 that particular turbine reasonably safe.

12 QUESTION: So then, the Admiralty borrows New
13 Jersey law in that respect?

14 MR. DURKIN: Well, I won't say, sir, that they
15 borrow the New Jersey law.

16 QUESTION: Well, then why did you mention New
17 Jersey law?

18 MR. DURKIN: Only, sir, because you asked me a
19 specific question. The turbine was manufactured in New
20 Jersey.

21 QUESTION: But certainly, this case was tried
22 in Admiralty, wasn't it?

23 MR. DURKIN: Yes, sir.

24 QUESTION: Well, then if there is a requirement
25 on the manufacturer to make the turbine this particular

1 way, as you say it is, and you say the source of the
2 requirement is from the New Jersey law, Admiralty must be
3 borrowing New Jersey law, isn't it?

4 MR. DURKIN: Well, not only New Jersey law.
5 Admiralty has invoked the laws of many land-based
6 authorities on the same question, not solely limited to
7 New Jersey. New Jersey law comports with many
8 illustrations of the federal court in exercising
9 admiralty jurisdiction, adopting in certain phases of
10 admiralty law, law that's followed by certain state
11 jurisdictions.

12 Now, when this plaintiff, this charterer,
13 experienced the circumstance that it experienced, if that
14 charterer was required to expend monies, actual dollar
15 expenditures, two million of which went to the defendant
16 for the work that was required to be done by the
17 defendant on the particular turbines involved, in
18 addition --

19 QUESTION: Mr. Durkin, could I interrupt you.
20 I have sort of the same problem Justice Rehnquist has.
21 Wasn't there a general contractor, in effect, involved?
22 They didn't deal directly with your client and Delaval,
23 did they?

24 MR. DURKIN: When you say "they," sir, I'm not
25 following.

1 QUESTION: Your client is the charterer, right?

2 MR. DURKIN: My client, the charterer --

3 QUESTION: That ordered a ship built by

4 somebody.

5 MR. DURKIN: No, sir. No, sir. The entity
6 that ordered the ship under contract with the shipyard
7 was an entity totally disassociated from the plaintiff in
8 this case.

9 QUESTION: How did the plaintiff get involved,
10 then?

11 MR. DURKIN: The plaintiff in this case
12 thereafter, after a sequence of transfers of title, my
13 clients chartered, bareboat chartered that vessel from
14 the then owner. And under the term of the charter and
15 during the term of the charter, anything that happens to
16 that ship, I, the charterer, assume the responsibility
17 because I take it in an as-is condition.

18 When the circumstance occurred involving the
19 Stuyvesant it was the charterer, not anyone else, who had
20 to attend to the repairs and --

21 QUESTION: So, the two million dollars you're
22 talking about is repair cost, not original cost?

23 MR. DURKIN: Oh, yes, sir.

24 QUESTION: I'm sorry, I didn't understand.

25 MR. DURKIN: Only part of the repair costs that

1 were encountered by the charterer in getting the work
2 done. In addition to that two million dollars the
3 charterer had to pay more money to the shipyard.

4 QUESTION: So, you're saying you're a
5 subsequent owner of a ship that was defectively
6 constructed and you say, just like I buy a used car that
7 somebody, when they originally built it, built it
8 improperly, I can sue the person who made the original
9 mistake?

10 MR. DURKIN: If in your hypothesis you suggest
11 that the new car --

12 QUESTION: Used car.

13 MR. DURKIN: Used car was a day or two old,
14 because at the time my charter commenced, my charter
15 commenced the day that ship left that shipyard.

16 QUESTION: And your only contractual
17 relationship was with your immediate predecessor in title?

18 MR. DURKIN: Absolutely.

19 QUESTION: Not with the shipyard?

20 MR. DURKIN: No, sir.

21 QUESTION: Was this a barebottom?

22 MR. DURKIN: Sir?

23 QUESTION: Barebottom charter?

24 MR. DURKIN: Yes, sir. Yes, sir.

25 QUESTION: A barebottom charter and a charter

1 of an automobile are two different animals.

2 MR. DURKIN: I'm sorry, sir. I didn't get the
3 second part.

4 QUESTION: The barebottom charter and the
5 leasing of an automobile are two different animals.

6 MR. DURKIN: Oh, absolutely. Oh, absolutely.
7 The lessor in no way -- the illustration of the
8 automobile has any right of title. Under your prior
9 holdings in many, many cases, I as a bareboat charterer
10 for purposes such as these maintain a position for these
11 purposes as if I were the owner.

12 Now, in order to get Delaval -- that's not the
13 correct way to say it --

14 QUESTION: And the owner's position, the owner
15 would have had a contractual relationship, not with
16 Delaval but with the builder of the boat?

17 MR. DURKIN: Yes, sir.

18 QUESTION: The boat or the ship, pardon me.

19 MR. DURKIN: That is correct. Now, the owner,
20 GECC, had no damage because GECC through the trust
21 company got from me as the charterer the per diem or the
22 weekly or the monthly amounts that it was required to get
23 under the charter, whether or not the ship was
24 operational or non-operational.

25 They sustained no damages. The only one here

1 who sustained the damage was the charterer who had
2 absolutely nothing to do with the building of the ship or
3 the entering into any contract for the acquiring of the
4 turbines or anything else.

5 Now, in addition to the two million dollars, I
6 say that in round figures, in order to put the ship in a
7 condition for that particular work to be done, the
8 charterer had to pay the shipyards hundreds and hundreds
9 of thousands of dollars on top of that to equip the ship
10 so as for the work that was required to be done on the
11 turbine's done.

12 And, sir, the third claim of the damage that
13 comes is the amount that we had to pay to the owner under
14 the term of our charter, and the fourth claim of damage
15 would be that amount that we would be able to collect
16 from our time charterer on our time charter in this case,
17 specific case with Sohio.

18 Now, there in the fourth --

19 QUESTION: What contractual remedy would you
20 have against the owner from whom you chartered the ship?

21 MR. DURKIN: None, sir.

22 QUESTION: Because you didn't bargain for it or
23 something, or what?

24 MR. DURKIN: Well, I'll give you the exact
25 fact. In most -- I have to say most because my

1 experiences with charters are limited, but I have never
2 yet seen a charter of this type where the term of the
3 charter document itself did not require the time
4 charterer to accept the particular vessel in an as is
5 condition.

6 QUESTION: Well, you just gave up any -- you
7 just took the risk that it was, then?

8 MR. DURKIN: The risk as between myself and the
9 owner?

10 QUESTION: Yes.

11 MR. DURKIN: I would think so, but I'm not so
12 sure, even if I didn't do that, under the facts of this
13 case the owner would assume any of the responsibilities
14 that are imputable to Delaval because that owner had
15 nothing to do with the particular contract for the
16 acquiring of those turbines.

17 That was all done with the shipyard, and the
18 shipyard in turn had a contract, which contract was
19 assigned in this particular case to GECC via a trust
20 holding, and it was from that particular entity that the
21 charter was enunciated.

22 QUESTION: Could you just clarify one other
23 thing for me?

24 MR. DURKIN: Surely, sir.

25 QUESTION: Does the charterer in this situation

1 get a contractual protection from anybody that the ship
2 is seaworthy? Does anybody give any -- when you say,
3 take it in as is condition, they just take the entire
4 risk that something's wrong with it?

5 MR. DURKIN: No, it isn't that -- there is
6 nothing in the charter, and the charter of course is part
7 of the record, that I can invite your attention to, that
8 would permit the charterer to claim against that owner
9 because of any claimed defect. I can't go that far as to
10 say that there wouldn't be imposible as a matter of law
11 upon that type of a contractual arrangement, that the
12 ship --

13 QUESTION: No, I diin't mean -- I'm trying to
14 stay away from legal obligation, just contractual. You
15 mean the -- your client in a situation like this enters
16 into a transaction like this with no contractual
17 protection against the danger that the ship may be full
18 of holes or something like that?

19 MR. DURKIN: Well, sir, that presupposes that
20 the charterer didn't conduct the usual full inspections
21 prior to the time --

22 QUESTION: But he relies just on the visual
23 inspection of the ship and so forth, and then takes the
24 risk?

25 MR. DURKIN: No, sir. It's not solely on the

1 visual. These type of inspections are in depth.

2 QUESTION: But, I mean, he doesn't have any
3 contractual protection, that's what I'm asking, so he has
4 to insure against this risk, is the only thing he can do?

5 MR. DURKIN: Well, it would be almost
6 impossible to even understand what the particular risk
7 that would be the subject of the particular coverage
8 involved. Here the question is going to hone itself down
9 --

10 QUESTION: Did something go wrong with the
11 turbine, might be one risk. It's what happened, isn't
12 it? I mean, it's not totally unforeseeable there'd be
13 something wrong with the product?

14 MR. DURKIN: No, and when you say it's not
15 unforeseeable, I guess that would also include the
16 manufacturer who represented that if the manufacturer
17 could build turbines to the specification of those new
18 tankers being built.

19 Now, here's a circumstance where a subsequent
20 charterer, a subsequent charterer who absolutely, no
21 fault of his, absolutely no fault of his, is required to
22 expend very substantial monies to repair a turbine which
23 by all allegations was improperly manufactured.

24 Now, according to all of the circuits except
25 the Third, that charterer should not be put in that

1 particular position and that charterer should be able to
2 claim, if his proofs are sufficient to sustain the proofs
3 required in a damage claim. The Third Circuit says that
4 those particular claims are not collectible because in
5 varying ways they say the turbine doesn't fit into that
6 classification of unreasonable risk.

7 QUESTION: It wasn't a safety question and it
8 didn't threaten persons or property?

9 MR. DURKIN: Yes, sir, and I have yet to ever
10 hear, sir, yet to ever hear one man who's ever been at
11 sea and had the power unit go out on a ship and
12 thereafter indicate that that wasn't safety -- or an
13 unusual risk involved.

14 Any time, as was suggested --

15 QUESTION: Even if it were, though, that
16 wouldn't justify collecting economic loss for the delay
17 or loss of profits?

18 MR. DURKIN: I'm sorry. Would you say it again
19 for me, please.

20 QUESTION: What kind of -- the Third Circuit
21 said you couldn't collect economic losses.

22 MR. DURKIN: The Third Circuit held this, that
23 unless there is damage done other than the damage to the
24 turbine or personal injury, no matter what else is
25 involved, in this circuit you cannot maintain this type

1 of action.

2 Now, the Third Circuit for the first time seems
3 to further restrict the rule that may have been claimed
4 in certain state courts. Certain state courts seem to
5 indicate, including Sealey in California, that the damage
6 that they require as a condition precedent to maintaining
7 this action is a personal injury to someone other than
8 the plaintiff, or property damage other than to this
9 plaintiff.

10 The Third Circuit specifically, not only in
11 Judge Hunter's opinion but also in Judge Becker's
12 opinion, indicates that it must be the particular
13 plaintiff involved that must add that additional property
14 damage or that personal injury, and as is obvious, any
15 time that you have a --

16 QUESTION: Well, don't you think the Third
17 Circuit thought it was merely following what the general
18 rule was in situations like this, not just in Admiralty
19 but in other actions?

20 MR. DURKIN: I can't really respond --

21 QUESTION: In manufacturer's liability or
22 product liability cases?

23 MR. DURKIN: Well, the Third Circuit did say
24 that they were adopting what they perceived to be the
25 majority rule for on-land cases.

1 QUESTION: Right.

2 MR. DURKIN: But one of the things that's
3 intrinsically --

4 QUESTION: Do you challenge what it thought the
5 general rule was?

6 MR. DURKIN: Only in this respect, the general
7 rule as I understood it previously --

8 QUESTION: In product liability cases on land.

9 MR. DURKIN: Only in product liability cases on
10 land, if somebody other than the plaintiff were to be
11 injured as a result of the involved episode or somebody
12 else's property were to be damaged as a result of the
13 particular episode, under those cases I read them to mean
14 that that would satisfy the condition precedent.

15 As I read the Third Circuit, the Third Circuit
16 and specifically in Judge Becker's opinion, he puts in,
17 in italics before, that where plaintiff -- that there has
18 to be additional property damage to the plaintiff and
19 additional or personal injury to the plaintiff in order
20 for the condition precedent to be established and
21 maintained.

22 QUESTION: Well, that narrowing is sort of
23 irrelevant to this case, isn't it?

24 MR. DURKIN: Well, everything is irrelevant to
25 this case factually because there has never been a

1 contention throughout that if the rule of the Third
2 Circuit that the risk is not the test but the occurring
3 of the actual damage is the test, there has never been a
4 contention in this particular case that even with the
5 steam emissions and so forth that there was in fact
6 anybody who sustained personal injury nor was there any
7 particular property damage.

8 So, if that particular rule of the Third
9 Circuit were to be adopted as the rule with Admiralty,
10 any other fact involved would have no consequence
11 whatsoever. And if I may, I would reserve the remainder
12 of my time, please.

13 CHIEF JUSTICE BURGER: Mr. Smith.

14 ORAL ARGUMENT OF ROBERT E. SMITH, ESQ.

15 ON BEHALF OF THE RESPONDENT

16 MR. SMITH: Mr. Chief Justice, and may it
17 please the Court:

18 The issue before the Court is whether under
19 federal maritime law damage to a product caused by a
20 design defect is recoverable in tort. The product in
21 this case is the main propulsion units for four vessels.

22 Both the district court and the Third Circuit
23 en banc held that petitioners do not have federal
24 maritime tort claims. Now, I would like to say at the
25 outset that although the case is within the Court's

1 federal maritime jurisdiction, essentially in our view it
2 is about a non-functioning product.

3 It happens to arise in a maritime context but
4 it has no other particular maritime flavor. What is
5 involved here is an interface between product liability
6 law and contract law, particularly exemplified by the
7 Uniform Commercial Code. And what we are doing in this
8 case is asking this Court to follow the Third Circuit in
9 adopting as the rule the majority rule in land-based
10 courts.

11 This type of case has been handled --

12 QUESTION: For both strict liability and
13 negligence?

14 MR. SMITH: Yes, sir.

15 QUESTION: In this kind of a case, like a
16 design defect in a product?

17 MR. SMITH: Exactly, Justice White. We draw no
18 distinction between strict tort liability for negligence
19 and product liability law, that's correct.

20 This is exactly the type of tort that appellate
21 courts in both the states and federal appellate courts
22 have dealt with many times. It is not an unusual
23 matter. It is a routine matter for them, and what they
24 have held in the overwhelming majority of jurisdictions
25 is that recovery is denied in tort where a product itself

1 simply fails to function properly but is not unsafe. In
2 these circumstances, they leave the parties to their
3 contractual remedies.

4 At the commencement of this action there were
5 ten plaintiffs. In addition to the four petitioners
6 there Sea Train Lines which is a large, substantial
7 corporation, its wholly owned subsidiary, Sea Train
8 Shipbuilding which built the four vessels involved and
9 which contracted to have them built with the respondent,
10 four wholly owned subsidiaries of Sea Train Lines which
11 were the original owners of the four vessels involved.

12 Respondent had an extensive agreement with
13 Shipbuilding for the design and manufacture of the main
14 propulsion units. The contract contained an express
15 warranty. It disclaimed any warranties other than the
16 warranty expressly set forth. It provided for certain
17 remedies such as repair and replacement. It expressly
18 excluded liability for consequential damages.

19 Respondent moved for summary judgment and on
20 the motion asked for dismissal of the breach of contract
21 and the breach of warranty claims on the basis of the
22 statute of limitations and various contractual provisions
23 which limited plaintiff's remedy, and the disclaimer of
24 warranties other than the warranty that was expressly
25 granted under the contract.

1 The claims, Sea Train Lines Shipbuilding and
2 the four other Sea Train subsidiaries which are not now
3 before the Court, all were dismissed with prejudice. In
4 addition, all the contract claims and warranty claims
5 were dismissed with prejudice. Therefore, we had -- the
6 current owners, as you know, are not before the Court, so
7 what we have is that the four petitioners, the present
8 charterers of the vessels, are the only remaining
9 plaintiffs and their claims are exclusively in tort. All
10 of their contract and warranty claims have been dismissed
11 on the merits and with prejudice.

12 There are five counts in the complaint that
13 this Court is asked to review. The first four counts
14 involve a particular component of the main propulsion
15 units for the guide bucket ring, and in each of these
16 counts which relates to a particular vessel, that each of
17 the charterers is a charterer of one of those vessels,
18 the complaint is that there was a malfunction of the
19 guide bucket ring.

20 On the fifth count one of the owners claims --
21 this is the Bay Ridge which is the ship that's involved
22 in counts four and five -- there was a negligence claim,
23 the only negligence claim before you, and the claim is
24 that the respondent failed to supervise the installation
25 of the stern guardian valve which was installed in

1 reverse.

2 And I would just point out as an aside, the
3 record reveals that the Bay Ridge was the fourth ship
4 built. The same part had been installed properly by Sea
5 Train Shipbuilding in the three prior ships.

6 In any event, the damage was confined to the
7 main propulsion units themselves in all of these counts,
8 but consisted only of internal deterioration and
9 breakdown. There was no damage to persons or other
10 property. There was no unreasonable risk of harm to
11 persons or other property. And as Mr. Durkin has
12 candidly said, what is sought here is consequential
13 damage in the form of nature of cost and replacement and
14 lost profits from down time, primarily.

15 QUESTION: At least on the negligence side of
16 it, what do you do about Ingram River Equipment, in that
17 case? Aren't there some courts of appeals that have
18 looked the other way in this --

19 MR. SMITH: Your Honor, we do disagree with
20 Ingram River and Ingram River has permitted recovery in
21 federal maritime law for negligence. I should say, Your
22 Honor, that the judge there also stated by fiat that he
23 disagreed with the Third Circuit. Ingram River followed
24 the decision of the Third Circuit. And without any
25 extensive reasoning, he disagreed with them.

1 But let me --

2 QUESTION: How about any other circuits?

3 MR. SMITH: On negligence, Your Honor, I think
4 that there is no other case in point.

5 QUESTION: How about strict liability?

6 MR. SMITH: Strict liability, the only case in
7 point is Emerson Diesel in the Ninth Circuit, and Your
8 Honor, I think neither of those cases are ones with which
9 we would agree. And I would point out that neither one
10 involves an analysis of the --

11 QUESTION: Well, that may be, but they don't
12 agree with you either.

13 MR. SMITH: They don't agree with us. That's
14 absolutely so.

15 Your Honor, I could -- I don't want to go off
16 onto either Ingram River or Emerson unless Your Honor
17 wants me to go off onto them. In the presentation what I
18 intend to do is raise the arguments that I think they
19 themselves in their opinions don't adequately state, and
20 we believe we have satisfactorily distinguished them in
21 our briefs.

22 Your Honor, the construction of the Stuyvesant
23 which is the Stuyvesant ship and its events are the
24 seminal events in this case. The Stuyvesant's
25 construction was completed in 1977, and I should add that

1 the construction contract which I described before is a
2 1970 contract.

3 In December '77, as the Stuyvesant was entering
4 the port of Valdiz in Alaska, it had a steam escape
5 problem of some dimension. The problem was solved in the
6 port. There is no allegation that that steam escape
7 problem led to any damage of any kind.

8 The Stuyvesant then proceeded to load the oil
9 on the ship and proceeded two days later on its voyage
10 down to the Panama Canal. On that voyage it experienced
11 a problem with its turbine, and I want to say that I
12 heard in the opening argument a reference to a ship
13 without power being in trouble.

14 The Stuyvesant was not without power. The
15 Stuyvesant operated at a substantial amount of power at
16 all times. What occurred with the Stuyvesant was that it
17 was not able to attain its normal speed.

18 The record shows that the guide bucket ring and
19 the main propulsion units did not function the way they
20 were supposed to function. There was a malfunction of
21 the main propulsion unit. But even as it is suggested on
22 the record that the Stuyvesant encountered high seas and
23 some drifting on this voyage down the West Coast off the
24 Panama Canal Zone, nevertheless it made sufficient
25 headway even in a storm that is described by petitioners

1 as having some severity, it had enough power to weather
2 the storm and it made the voyage successfully and in fact
3 offloaded its oil at the Panama Canal Zone and then
4 proceeded back without incident to the port of San
5 Francisco.

6 QUESTION: Well, Mr. Smith, is the test there
7 one of risk or one of whether the risk materialized?

8 MR. SMITH: Your Honor, I think that the test
9 really is one of risk. I agree with the test enunciated
10 by the Third Circuit, and as I understand the majority of
11 land-based rule, one could have a risk without the harm
12 occurring. It is very difficult, I think in most
13 instances, to imagine liability without harm actually
14 occurring but I suppose it would be conceivable under
15 some circumstances that risk alone might give rise to
16 liability.

17 But, Your Honor, both the district court and
18 the court of appeals for a practical matter have
19 determined that there's no triable issue as to risk.
20 They have so held. So, I really don't think that that is
21 left in this case.

22 When the Stuyvesant reached San Francisco an
23 inspection of the engine revealed damage to this guide
24 bucket ring, and it was then replaced as we know with a
25 part from the Brooklyn. That part did not perform

1 terribly well. The Stuyvesant resumed operation with
2 it. There was no further malfunction, but ultimately the
3 guide bucket ring was replaced with a newly designed
4 guide bucket ring.

5 That was the story of the Stuyvesant, and
6 really it is the only ship which involves much of any
7 incident at all. As far as the counts two and three of
8 the complaint at concern, they involve the ships which we
9 call the Brooklyn and the Williamsburg.

10 Both of these ships have been constructed prior
11 to the Stuyvesant. They were older ships. They had
12 already seen substantial service at the time that the
13 Stuyvesant encountered the high seas leaving the port of
14 Valdez. These ships never had a malfunction. They never
15 had any problem with their engines.

16 After the Stuyvesant incident, and only because
17 of the Stuyvesant incident, both of these ships had their
18 engines opened in port and there it was discovered that
19 there was a low level of deterioration which one could
20 contend showed that they had the same problem as the
21 Stuyvesant guide bucket ring.

22 Those guide bucket rings were replaced with
23 newly designed guide bucket rings, ultimately. Simply
24 nothing happened. There was simply repair and
25 replacement of the guide bucket rings.

1 QUESTION: At some expense?

2 MR. SMITH: At some expense. But, Your Honor,
3 let me be quick to say that in our view the case is not a
4 case of a question of damage. It's a question whether
5 there's a valid tort claim.

6 The fourth count, Your Honor, involves the Bay
7 Ridge and again involved an alleged defect in the guide
8 bucket ring. May it please the Court, the Bay Ridge
9 never left port with a defective guide bucket ring. It
10 was the last ship built. Since it was built after the
11 Stuyvesant incident, all that happened was that by the
12 time it left port it had the newly designed guide bucket
13 ring.

14 Nothing ever happened on the Stuyvesant. There
15 is simply no allegation concerning the Stuyvesant that
16 could give rise to liability, and that also was so held
17 by both the circuit court.

18 QUESTION: You mean, the Bay Ridge?

19 MR. SMITH: Excuse me, the Bay Ridge.

20 QUESTION: Was the new ring installed on the
21 Bay Ridge the one that was installed in reverse?

22 MR. SMITH: No, Your Honor. I have not been to
23 sea, I would suppose, any more than Your Honor may have
24 been. The guide bucket rings, as I understand it, are
25 not related to the fifth count. The fifth count is in a

1 stern guardian valve which is separate and distinct, but
2 part of the main propulsion unit. They're both parts of
3 a main propulsion unit.

4 No one has claimed that the guide bucket ring
5 -- excuse me, that the stern guardian valve was defective
6 in any way. It was simply installed in reverse.

7 I want to make one further point, if I may, and
8 that is that as far as we're concerned the Richmond,
9 which is the petitioner involved on the fourth count,
10 simply has no standing. The record discloses that the
11 guide bucket ring problem occurred in the past during
12 1978 and the Richmond became the charterer of the vessel
13 on March 15, 1979.

14 QUESTION: But your major issue as you see it,
15 I take it, is whether there is any tort remedy at all in
16 this case or whether there's either a contract remedy or
17 there's nothing?

18 MR. SMITH: Yes.

19 QUESTION: Well, it is arguable, I suppose,
20 that on count five there is a valid negligence claim?

21 MR. SMITH: Your Honor, I don't believe so
22 under the majority land-based rule which was applied by
23 the Third Circuit, and that is that once again the damage
24 that we're talking about, the cause of the negligent, or
25 the alleged negligent installation, and in our case

1 supervision of the stern guardian valve involved
2 deterioration and breakdown of that valve, of that part,
3 same as the guide bucket ring that deteriorated.

4 There's no one tort incident. There's no
5 collision. And in fact, as part of the record there's
6 the deposition of the former machinery superintendent of
7 the --

8 QUESTION: Wouldn't that be foreseeable, that
9 there'd be some down time to replace it and do the work
10 over?

11 MR. SMITH: Your Honor, as I understand the
12 majority rule, and I think it's really quite clear on
13 this point, it isn't the possibility that the damage
14 could occur. It is the risk and the high potential of
15 risk.

16 QUESTION: Well, isn't it totally foreseeable
17 that if it's installed in reverse that it will require
18 down time to correct it?

19 MR. SMITH: Your Honor, but that's not the risk
20 that the rule is speaking of. The rule is seeking to
21 demarcate between contract and tort law and it doesn't
22 focus on the damage. It's the risk -- what the rule
23 seeks to demarcate is a high probability of a safety
24 risk, not that there will be damage and losses, but that
25 persons or property other than the product itself will be

1 damaged. That's the risk that is talked about.

2 QUESTION: It just seems like count five is
3 just an ordinary, garden variety negligence claim. You
4 install something negligently and it's entirely
5 foreseeable it will have to be done over again.

6 MR. SMITH: Your Honor, I don't think there is
7 any safety implication to the fifth count.

8 QUESTION: But why should you import this
9 product liability type of limitation into what Justice
10 O'Connor seems to me to rightly describe just as a
11 straight negligence count?

12 MR. SMITH: The reason, Your Honor, would be
13 that that is in fact the majority rule on land.

14 QUESTION: Well, does it have anything better
15 to commend it?

16 MR. SMITH: Your Honor, I think it does. I
17 think there are very substantial reasons to commend it.
18 The fact of the matter is, and I think it's the reason
19 for the majority rule -- I think the majority rule is
20 well based. There's a reason for distinguishing between
21 the contract interest to be protected and the tort
22 interest to be protected.

23 The reason, I think, Your Honor is -- and I
24 must say this, is because the contract expressly protects
25 against economic expectations and damaged economic

1 expectations. The tort is a rule that is implied in
2 law. The law imposes it on people to protect against
3 safety defects. But if there's no safety defect, Your
4 Honor, what we say is that this area should be left to
5 the parties in a private bargaining context.

6 And, Your Honor, this case exemplifies it in
7 many ways. To begin with, we were party to an extensive
8 contract and there's no doubt that all the parties in
9 this case are substantial commercial entities that can
10 protect themselves and bargain for the types of terms and
11 conditions they thought were appropriate.

12 In this case we were subject to such a bargain,
13 and we made such an agreement back in 1970. All those
14 contract claims, all those warranty claims, have now been
15 dismissed without prejudice. We are being asked to
16 function almost as a --

17 QUESTION: Without -- I thought you said with
18 prejudice.

19 MR. SMITH: With prejudice.

20 QUESTION: Is that because of the statute of
21 limitations that run?

22 MR. SMITH: We had moved on that ground. What
23 actually happened procedurally is that after the motion
24 had been made on that ground, and on other grounds such
25 as contractual grounds that the warranties expired, what

1 occurred was that the petitioners served their second
2 amended complaint.

3 It did not contain those claims. They
4 themselves elected to go forward on the complaint that is
5 now before the Court, which is exclusively a tort claim,
6 and at that time the Court entered the order dismissing
7 all contract and warranty claims as a matter of law, with
8 prejudice.

9 So that, what we say is that contract properly
10 protects the expectations of the party. Tort properly
11 protects against the risk of harm that might be caused by
12 a product. And in this particular case there is no risk
13 of harm. What we're talking about is the contractual
14 area.

15 And I want to make one further point, which I
16 think Justice Stevens was asking the counsel for the
17 petitioners about. The charterers had an opportunity to
18 protect themselves by contract and they entered into an
19 extensive charter agreement, one charter for each of
20 them, which is contained in the record and that charter
21 allocates the very risks that we're talking about here.
22 As a matter of fact it requires, if it is true that under
23 the charter the charterers are required to make the
24 repairs to the vessel, but that was a bargained for
25 matter.

1 It was a matter that was within the realm of
2 contract. So, there can't be any credible claim but that
3 the exact claim that is made here could not have been
4 protected as a matter of contract right.

5 QUESTION: Would they acquire the right to
6 assert any warranty claims that their predecessors in
7 title could have --

8 MR. SMITH: I don't believe so, Your Honor. I
9 don't think there's anything in the record about it.

10 QUESTION: May I ask one other question. I
11 understand your argument about, the contractual remedy
12 should cover both the negligence and strict liability
13 claims, but basically it's the same argument. But I'm
14 not quite sure I understand fully your answer to your
15 opponent's argument that the power failure on an
16 ocean-going vessel, almost by hypothesis, could create a
17 serious risk of harm or at least enough to withstand
18 summary judgment motion.

19 MR. SMITH: Well, I'm glad Your Honor asked
20 that question. I thought I had responded. There was not
21 a total power failure, Your Honor.

22 QUESTION: Well, I understand that, but was not
23 there a risk -- if we're talking about risk rather than
24 actual events, would not a manufacturing defect of this
25 kind create a substantial risk of a total power failure

1 which in turn might create the risk of a navigation
2 hazard?

3 MR. SMITH: I don't think so, with the
4 immediacy, Your Honor, that tort law implicates. There
5 are cases involving -- the most innocuous type of product
6 can be dangerous in some contexts, and the courts don't
7 permit plaintiffs by conjuring up what might happen to
8 make a claim in tort. And there are a substantial number
9 of cases which we cite in our briefs involving engines,
10 including airplane engines, and the courts have found
11 that unless there's some sort of immediate, very very
12 concrete and severe risk of harm, that you're not stating
13 a case --

14 QUESTION: Let's assume there is this kind of a
15 risk, or there is an actual damage to the person or the
16 property so that this so-called precondition is
17 satisfied. What can you recover then?

18 MR. SMITH: Your Honor, if there's a tort
19 claim, we're not arguing against it. We're not claiming
20 that the type of damages that are sought here could not
21 be claimed in a tort action. What we say is that the
22 petitioners don't have a tort claim.

23 QUESTION: Do you think if somebody had been
24 hurt by this defective design --

25 MR. SMITH: Yes.

1 QUESTION: -- then you think all of these
2 damages could have been recovered?

3 MR. SMITH: Your Honor, that would be for a
4 trial. The discovery in the case --

5 QUESTION: Well, I'm just asking you.

6 MR. SMITH: As a kind of damage in tort? I
7 doubt that even then, it could be recovered. Some of
8 them seem to me not to follow up with tort theory at
9 all. They seem to me to follow from breach of contract.

10 QUESTION: What about loss of profits, and
11 things like that?

12 MR. SMITH: It would be extremely difficult, it
13 seems to me, to recover it in court, certainly debatable.

14 QUESTION: So, it may not make any difference
15 what kind of an action this is, with respect to the
16 recoverability of some of these damages?

17 MR. SMITH: I beg your pardon.

18 QUESTION: It may not make any difference what
19 kind of action it is. Some of these damages may not be --

20 MR. SMITH: Your Honor is quite right. I would
21 not concede the recoverability of any of the damages
22 specified, just as a matter of tort law. But I do want
23 to reiterate that in our view --

24 QUESTION: You just don't want to have to
25 litigate it?

1 MR. SMITH: Yes, Your Honor.

2 QUESTION: That's a very apt and fair comment.

3 MR. SMITH: I did want to mention one fact as
4 well that I think is very important, about the tort
5 aspect and the incorporation into admiralty of the
6 majority rule. The majority rule, both in terms of
7 strict tort and negligence, was incorporated into
8 admiralty in a series of cases where the reason they were
9 incorporated in was that the federal court, sitting as
10 maritime courts, felt they were the better rule.

11 That's the reason they were incorporated into
12 admiralty to begin with, so it seems to us ony logical
13 that starting with that premise, if those rules were
14 incorporated in because they were in fact the widespread
15 rules in the state, the version that is the majority rule
16 ought to be incorporated along with them and not a
17 disfavored rule.

18 On that, I want to point out to the Court that
19 the leading case against us in the state courts has
20 traditionally been the Santor case decided by the Supreme
21 Court of New Jersey. That has been the most aggressive
22 case asserting that there can be liability when a product
23 just is defective in quality. It involved, in fact, a
24 defective rug that didn't harm anybody. It had waves in
25 it that shouldn't have been in the rug.

1 The Supreme Court of New Jersey --

2 QUESTION: What case is this?

3 MR. SMITH: Santor, S-a-n-t-o-r.

4 QUESTION: How long ago was that?

5 MR. SMITH: It's a fairly ancient case.

6 QUESTION: Ancient as I am?

7 MR. SMITH: 1965. But may I say, Your Honor,
8 that in a decision this year, not in '86 but in '85, a
9 full 20 years later, the Court has undercukt Santor
10 explicitly in Spring Motors which we cite in our brief,
11 and has said that at least as between large commercial
12 entities, claims involving defective products which don't
13 present a safety problem, they're quality defects, should
14 not give rise to tort liability.

15 And the Court is very explicit in its language,
16 and as a matter of fact they say very succinctly in a
17 quote that I think summarizes our position very well,
18 they say, quote, "underlying the UCC policy is the
19 principle, the parties should be free to make contracts
20 of their choice including contracts disclaiming liability
21 for breach of warranty. Once they reach such an
22 agreement, society has an interest in seeing that the
23 agreement is fulfilled. Consequently the UCC is the more
24 appropriate vehicle for resolving commercial disputes
25 arising out of business transactions between persons in a

1 distributive chain.

2 That's precisely what we have here. We have
3 the distributive chain. There are contracts between
4 every link in the chain. Everybody in the chain had an
5 opportunity to bargain.

6 We say it would be unfair for us as a matter of
7 tort law. The contract that we entered into was a 1970
8 contract. Quite a few many years later, to be held to a
9 standard of guaranteeing that product when there's no
10 safety implication but the argument is that the product
11 was qualitatively defective.

12 Indeed, I would say that if the majority
13 land-based rule isn't used, it's difficult to see where
14 the function of tort law, or I should say where the
15 function of contract law would really function in this
16 area. It seems to me that it would be tantamount to
17 saying that the product manufacturer is a guarantor of
18 this product.

19 There's another point that I want to make that
20 I think also supports the view that the majority
21 land-based rule should be used, and that is that in fact
22 on the contract side, the Uniform Commercial Code which
23 is what we're talking about predominantly on the contract
24 side, has been adopted in 49 of the states and even in
25 the 50th it has been adopted in rather substantial part.

1 This is an opportunity for the Court to
2 determine the federal maritime law would be uniform with
3 land-based law and I would point out that there's
4 basically no difference between ship engines and car
5 engines. In many cases you have the same manufacturers
6 of both kinds of engines. In many cases the same engines
7 are used in both applications.

8 The Third Circuit itself said, and I'm quoting
9 them on this point, "The charterers have not offered and
10 we do not discern any persuasive difference between an
11 action which seeks recovery for a defective ship engine
12 and an action which seeks recovery for a defective car
13 engine. In both cases the law seeks to leave the parties
14 to their bargain, while at the same time protecting
15 consumers of both ships and cars from hazardous defects
16 in the engines."

17 And we believe that there is no persuasive rule
18 for a different rule on land and sea.

19 QUESTION: What about the fact a big, over the
20 road truck or any other land vehicle has a defective
21 engine and it just stops, no great risk except the driver
22 or the people on it might get cold, but when you have a
23 vessel at sea and the moving power stops, aren't you
24 exposed to a great deal of different and greater hazard,
25 the ship that's wallowing around with no steerage?

1 MR. SMITH: Your Honor, I think that every case
2 of a claim of tort, one is going to have to look at the
3 facts very closely.

4 QUESTION: No, look at those facts. The ship
5 is out at sea and the engine stops and of course --

6 MR. SMITH: Your Honor, I think it depends upon
7 what -- first of all, let me immediately say that that's
8 not our case. I can't say too frequently that the power
9 -- all that happened in our case, and with only one of
10 the four engines, we're talking about, is that it failed
11 to attain full power. It attained very substantial power
12 because it powered right through whatever storm it
13 reached.

14 The second question that Your Honor raises,
15 which I regard as a hypothetical question, as to whether
16 or not a ship bereft of any power on the seas, one would
17 wish to know what seas they were in, whether or not there
18 were tugs available to them. Yes, there is some risk.
19 The question would have to rely upon the facts as to
20 exactly how great a risk there is.

21 But your point you're making is, that is not
22 this case?

23 MR. SMITH: Not this case, and it has been so
24 determined not to be this case, Your Honor, by the Third
25 Circuit en banc and the district court.

1 QUESTION: You say we apply the same rule for
2 ship engines and automobile and truck engines. What
3 about airplane engines?

4 MR. SMITH: I would say the same with airplane
5 engines. I didn't mean to confine the engines to land
6 and sea. I think in all three instances, Your Honor --
7 and I think it has the desirable effect that the
8 manufacturers have some idea what their standard of
9 liability is, their purchasers know, and that whole area
10 is left to contractual bargaining, particularly as
11 between large commercial entities.

12 It really seems to me that this is a matter
13 that's better left to the area of contract law rather
14 than tort law.

15 QUESTION: Rarely have I seen a more confusing
16 case.

17 MR. SMITH: There's one further consideration
18 that I wanted to state, and that's frequently as a basis,
19 the product tort liability law, the courts have said the
20 manufacturer has a greater ability to distribute the
21 risk. I think once again that as between large
22 commercial entities, that rationale doesn't really
23 operate.

24 I think as between large commercial entities,
25 they both have the ability to insure or to otherwise

1 spread the risk to their customers in the form of higher
2 prices. That rationale simply makes no sense here.

3 And as a matter of fact, I would suggest that
4 in many cases, actually the large commercial user of the
5 product is in better shape to distribute the risk to the
6 manufacturer. It knows the particular use to which the
7 product will be used. It knows the particular voyages
8 that will be undertaken. It knows the particular hazards
9 to which it intends to subject the product. So, I think
10 that that rationale doesn't hold up here at all.

11 We urge the Court to adopt the majority
12 land-based rule. We believe that at least as between
13 large commercial entities, the user of a defective
14 product who is complaining about the quality of the
15 product below, should be left to his complaint in
16 contract law and not tort law.

17 Commercial entities similarly situated should
18 be left to their contractual remedies, those they can
19 bargain for in the commercial context. We say that
20 unless safety is implicated, the tort principle simply
21 shouldn't interfere with their contract.

22 We ask the Court to confirm that petitioners do
23 not have Federal Maritime Court claims, and we ask that
24 the judgment of the United States Court of Appeals for
25 the Third Circuit, dismissing this action, be affirmed.

1 CHIEF JUSTICE BURGER: Do you have anything
2 further, Mr. Durkin?

3 MR. DURKIN: Very briefly, sir.

4 ORAL ARGUMENT OF THOMAS E. DURKIN, JR., ESQ.

5 ON BEHALF OF THE PETITIONERS -- REBUTTAL

6 MR. DURKIN: In response to the questions that
7 Justice O'Connor asked of my adversary, no matter what
8 else we may disagree on, both of us fully agree that at
9 the time that that Bay Ridge left that shipyard, that
10 ring was 100 percent good. There was nothing wrong with
11 that ring at all.

12 When that turbine was being installed, not
13 under any strict liability in tort or anything else,
14 there is a valve that's required to be installed to
15 govern the input of steam to that particular turbine.
16 The valve was put in negligently. It was put in, in
17 reverse.

18 When that ship had traveled almost to Chile,
19 because of that valve being put in wrong the turbine
20 malfunctioned. Our claim on that Bay Ridge couldn't be
21 more addressed to a straight negligence cause of action
22 if we tried. And the only damages that we're claiming
23 there are the damages that are permitted under any rule
24 when that negligence is established.

25 And the second, and hopefully the last point,

1 with Justice Rehnquist, we're taking a position
2 throughout that the rule that should govern is the rule
3 of the risk. As long as the Third Circuit drafted a rule
4 other than that, there is no way that we could rebel
5 against the granting of a summary judgment.

6 What the circumstance or the applicability of
7 that risk is, of course is a factual question, or record
8 of which is never in the shape it should be at this
9 particular posture. If the Third Circuit's rule in
10 rejecting the risk theory is that there must be the
11 actual, then concededly there is positively not fact
12 issue in this case. There wasn't any injury, and there
13 wasn't any additional damage.

14 But if the risk rule is to be adopted and
15 applied in admiralty, then we respectfully request that
16 the matter be remanded for a plenary hearing or fact
17 determinations consistent with that participation.

18 QUESTION: It sounds to me like you would not
19 follow the land based rule?

20 MR. DURKIN: Land based rule, as to the
21 question of risk, sir?

22 QUESTION: Yes.

23 MR. DURKIN: No, no --

24 QUESTION: That there's some special risk
25 factor in admiralty?

1 MR. DURKIN: No. What I would like, to state
2 it affirmatively, what I would like to do is to follow
3 the same rule that the Fifth, Eighth, Ninth and Eleventh
4 Circuits have followed, both as to the question as to the
5 liability and the question of the damage, one of which
6 was decided subsequent to the Third Circuit, the other
7 three of which, and others were legion and there was some
8 question as to whether or not it was restricted to
9 fishing vessels.

10 But this which we are expostulating here today
11 has been imbedded in maritime and admiralty law for a
12 considerable period of time.

13 Thank you.

14 CHIEF JUSTICE BURGER: Thank you, counsel.

15 The case is submitted.

16 (Whereupon, at 2:38 o'clock p.m., the case in
17 the above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-1726 - EAST RIVER STEAMSHIP CORP., ET AL., Petitioners V.

TRANSAMERICA DELAVAL INC.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

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