

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ALBERT HOWLETT, Petitioners v. BIRKDALE
SHIPPING CO., S.A. Respondent.

CASE NO: 93-670

PLACE: Washington, D.C.

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1 P R O C E E D I N G S

2 (11:08 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in 93-670, Albert Howlett v. Birkdale Shipping
5 Company.

6 Mr. Sovel.

7 ORAL ARGUMENT OF CHARLES SOVEL

8 ON BEHALF OF THE PETITIONER

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

11 In Scindia Steam Navigation Company v. De Los
12 Santos, this Court held that a shipowner's duty of care
13 owed to longshoremen extended to unsafe conditions
14 existing at the start of cargo operations and that, as to
15 such conditions, the shipowner had a duty of inspection.

16 The Scindia decision did not specifically
17 address the issue of whether this duty applied to unsafe
18 conditions existing in a cargo stow. Nor did it make any
19 distinction based on who may have created a particular
20 unsafe condition. Rather, the focus of the Scindia
21 decision was on the shipowner's knowledge of an unsafe
22 condition, with the principle issue in Scindia being the
23 ship -- on the shipowner's duty of inspection.

24 Thus, in Scindia, this Court held that, as to
25 unsafe conditions existing at the start of cargo

1 operations, the shipowner had a duty of inspection and was
2 charged with knowledge of those conditions, which would
3 have been discovered by a reasonable inspection, but that
4 once cargo operations began, the shipowner had no ongoing
5 or continuing duty of inspection to discover unsafe
6 conditions which might arise within the confines of those
7 cargo operations.

8 In *Derr v. Kawasaki Kisen K.K.*, the Third
9 Circuit erroneously interpreted *Scindia* as relieving a
10 shipowner from any duty of inspection with respect to
11 unsafe conditions in a cargo stow, no matter when or by
12 whom that condition was created, and without regard to
13 whether a particular unsafe condition may have existed at
14 the start of cargo operations.

15 QUESTION: Is a cargo stow an object or a
16 function?

17 MR. SOVEL: I --

18 QUESTION: Or a -- or a task or a place?

19 MR. SOVEL: I consider it a condition of the
20 vessel. I consider it essentially -- it's -- it's a fact.
21 It's a -- a -- it becomes part of the stow. Part of the
22 stow becomes part of the ship because it is what the ship
23 is being carried.

24 QUESTION: So, when we're talking about a cargo
25 stow, we're talking about a certain place on the ship,

1 plus the functions that were necessary in order to put the
2 cargo in that place?

3 MR. SOVEL: Plus the functions and the
4 operations and how that cargo is held in place or stored
5 in place in the ship. I'm not clear on what the reference
6 is to functions, but longshoremen would place -- take the
7 cargo from the cargo hook, move it into the stow, and
8 place it in the position -- and, presumably, in some
9 manner, that cargo would be secured in place and you'd end
10 up with a cargo stow that would be presented to the
11 discharging longshoreman. And that is -- then becomes a
12 factual, physical condition that exists at the time the
13 unloading longshoremen go aboard the ship.

14 QUESTION: Well, do you argue that the shipowner
15 has a duty to go into the cargo stow area after it has
16 been loaded on board to see the condition of it and to try
17 to determine if there are any hidden defects or problems?

18 MR. SOVEL: No. As a --

19 QUESTION: Is that your argument?

20 MR. SOVEL: No. As a general proposition, no.
21 Although factually there might be certain types of cargo
22 stows where that might in fact be done. My argument is
23 only that the shipowner should be held responsible for
24 that which the shipowners already do in the manner in
25 which they observe the way cargo is being stowed, the

1 conditions that would be disclosed by such inspections --

2 QUESTION: Well, are you arguing that the
3 shipowner only has a duty of care as to conditions that
4 are open and obvious in the stow?

5 MR. SOVEL: To the extent that that phrase might
6 be tantamount to something that is discoverable by a
7 reasonable inspection, I would plead the answer is yes.
8 It's a question -- is it something that can be seen and be
9 determined by the crew of the ship conducting the normal
10 type of inspection that they would be?

11 QUESTION: So, your theory is, if it's an open
12 and obvious problem in the cargo stow area, then the
13 shipowner is liable if in the unloading process someone is
14 injured by virtue of that condition?

15 MR. SOVEL: If it was open and obvious -- and
16 they have become somewhat words of art and I want to use
17 them carefully if I may -- if it was open and obvious
18 sufficiently to be observed at the time of loading, even
19 though it may subsequently, in the course of loading, be
20 concealed, it is a condition that the shipowner should be
21 responsible, because it is the type of condition which
22 would -- he would have knowledge of if he made the
23 observation.

24 QUESTION: Well, what if it's open and obvious
25 before, during and after the original loading, and it is

1 open and obvious at the time of the unloading?

2 MR. SOVEL: If it's open and obvious at the time
3 of the unloading, insofar as there might be any duty to
4 warn of that condition, the fact that it is open and
5 obvious constitutes the warning. However, the question
6 would still remain as to whether, assuming we have an open
7 and obvious condition that is unsafe -- which is what you
8 had in the Woods decision from the Fifth Circuit and in
9 the Riggs decision from the Ninth Circuit -- there -- the
10 -- the -- the condition of that stow may still be such
11 that it cannot be discharged with reasonable safety, and
12 then the shipowner's negligence would survive the fact
13 that it is open and obvious and would still be --

14 QUESTION: Was -- was there a finding by the
15 District Court here that the plastic that was laid under
16 the cargo was an open and obvious condition?

17 MR. SOVEL: Not in -- not in that sense. What
18 the trial judge here stated, that based on the argument
19 that the presence of the plastic would have been open and
20 obvious to the loading longshoremen, that therefore, since
21 it was open and obvious, the -- under Scindia, the
22 shipowner wasn't liable. But that ignores the fact that
23 it wasn't open and obvious to the discharging
24 longshoremen. It was concealed by that. And it was a
25 total non sequitur.

1 QUESTION: Well, I just thought -- I just
2 thought that the District Court had made a finding that it
3 was open and obvious.

4 MR. SOVEL: No. The District Court, in essence,
5 made an argument that if we were arguing that it could
6 have been observed by the loading stevedore and was open
7 and obvious to them, then, by definition, it had to be
8 open and obvious to the discharging longshoremen or to the
9 discharging stevedore.

10 QUESTION: The District --

11 MR. SOVEL: He did not find that.

12 QUESTION: The District Court granted summary
13 judgment for the respondent, didn't it? There was no
14 trial?

15 MR. SOVEL: That is correct. And there
16 shouldn't have been no findings. I mean, it's a question
17 of sufficiency.

18 QUESTION: If there's no finding in the sense of
19 it being in a bench trial?

20 MR. SOVEL: That is correct.

21 QUESTION: Now, are you saying that the
22 shipowner had a duty to inspect here?

23 MR. SOVEL: I -- I'm saying that the shipowner
24 has a duty to conduct reasonable inspections of the manner
25 in which the cargo is stowed, yes.

1 QUESTION: Well, what's your authority for that
2 proposition?

3 MR. SOVEL: My -- my authority for that
4 proposition is the general negligence duty created by
5 Scindia, which it would be no different than inspecting
6 for other conditions which exist on a ship when the ship
7 comes in and is presented to the discharging longshoremen.

8 QUESTION: But, Mr. Sovel, as I understand
9 Scindia -- correct me if I'm wrong -- in Scindia, there
10 was no negligence by a person engaging in providing steve
11 -- stevedoring services to the vessel, was there? Wasn't
12 it just negligence by the --

13 MR. SOVEL: Well, the -- the problem in that --

14 QUESTION: By the vessel?

15 MR. SOVEL: In the Scindia case -- the Scindia
16 did not involve an unsafe condition existing at the start
17 of cargo operations.

18 QUESTION: Well, regardless, start, finish.

19 MR. SOVEL: Okay.

20 QUESTION: There was no negligence by a -- by
21 persons engaged in providing stevedoring services.

22 MR. SOVEL: That's correct.

23 QUESTION: But that is what we have here. Now,
24 there may -- here, there may also be negligence, as you
25 say, by the shipowner, but there is undoubtedly negligence

1 by the person providing stevedoring services.

2 MR. SOVEL: Yes, by the -- but --

3 QUESTION: And the statute reads, it seems to
4 me, very clearly, that if the injured person was employed
5 by the vessel to provide stevedoring services, no such
6 action shall be permitted if -- if the injury was caused
7 by the negligence of persons engaged in providing steve --
8 stevedoring services to the vessel. That clause is
9 absolutely flatly applicable here. It was not applicable
10 in Scindia.

11 MR. SOVEL: No -- that cause, which also was
12 interpreted in Edmonds, has to refer to negligence by the
13 employer stevedore.

14 QUESTION: Well, that's not what it says.

15 MR. SOVEL: And it's not what it says.

16 QUESTION: It's -- it's flat -- it's a flat
17 statement. It doesn't limit it the way you say it.

18 MR. SOVEL: Okay. But the decision of this
19 Court in Kopke v. Cooper Steve -- Cooper Stevedoring v.
20 Kopke made the decision between the employer stevedore and
21 the nonemployer stevedore for purposes of section 5, in
22 which it held that just because you had an employer
23 stevedore who was -- because that employer -- that
24 stevedore, who was not the employer, was subject to suit
25 by the -- an injured longshoreman and by the shipowner as

1 well, who stood in the shoes -- in the shoes of the
2 longshoreman in that situation.

3 The consistent decision has always been that the
4 employer term refers to the employers of the injured
5 longshoreman -- even though you could have -- the Act
6 itself defines employer as any employer of longshoremen or
7 any stevedore -- the language has always been that the
8 exclusive remedy provisions of section 5, which limit the
9 remedy of the longshoreman against his employer, against
10 the stevedore, only apply to the employer stevedore.

11 QUESTION: What is the citation to Kopke? It
12 isn't in your brief, I don't believe.

13 MR. SOVEL: It's in the reply brief.

14 QUESTION: In the reply brief?

15 MR. SOVEL: Yes.

16 And it's cited at Cooper Stevedoring v. Kopke,
17 417 U.S. 106.

18 QUESTION: Thank you.

19 MR. SOVEL: Referred to at page 10 of the reply
20 brief.

21 QUESTION: Mr. Sovel, have you pursued a claim
22 against anyone else other than the shipowners?

23 MR. SOVEL: Well, we have a claim also -- a
24 pending claim against the -- the -- the -- the answer to
25 that essentially is no. There is a question as to whether

1 this shipowner was the charterer or the actual owner. And
2 that issue is -- is really held in abeyance. I have a
3 suit pending against them, depending upon what happens
4 here. But there is not a suit against any other party.

5 So, the -- but coming back to Kopke, Kopke is a
6 situation in which -- it essentially is a situation where
7 an American longshoreman is suing an American stevedore,
8 who is not his employer. And the issue was raised as to
9 the division of damages between that stevedore and the
10 shipowner in that case.

11 And they -- this Court, in Kopke, specifically
12 held that there was a right to sue, because that -- that
13 stevedore, because he was not the employer.

14 QUESTION: But the word "employer" is not used
15 in -- in the provision that -- that seems to flatly cover
16 this case. What -- what word "employer" to which Kopke
17 could be relevant appears there? It says that if the
18 injured person was employed by the vessel to provide
19 stevedoring services -- that was the case here --

20 MR. SOVEL: Okay.

21 QUESTION: No such action shall be permitted if
22 the injury was caused by the negligence of persons -- it
23 doesn't say employers.

24 MR. SOVEL: Okay.

25 QUESTION: By the negligence of persons engaged

1 in providing stevedoring services to the vessel. So, what
2 --

3 MR. SOVEL: Yes, that's correct. But, Your
4 Honor, that's not the only negligence that is involved
5 here. Because if the shipowner is neglig --

6 QUESTION: It doesn't say if -- if it isn't
7 caused solely by the negligence, it said, if it was caused
8 by the negligence of persons engaged in providing
9 stevedoring services -- not employers engaged in -- just
10 persons providing stevedoring services.

11 MR. SOVEL: Well, but that would then say that
12 anybody, including a nonemployer stevedore --

13 QUESTION: Yes.

14 MR. SOVEL: Is to be exempted.

15 QUESTION: That's -- that's what it says.

16 MR. SOVEL: No, I don't -- I -- I don't think
17 that -- it would be inconsistent to hold. That would be
18 inconsistent with Kopke and with --

19 QUESTION: Why? Kopke deals with who is an
20 employer. The word "employer" is not used here.

21 MR. SOVEL: Well, the term "stevedore" -- the
22 stevedore is the employer, and it's the exclusive remedy
23 provision of the Act that -- that you're dealing with
24 here, Your Honor. In other words, you say that -- he --
25 the -- when they amended the Act, they said that the --

1 they were saying that the shipowner would not be liable
2 for a negligence of the stevedore in the context that
3 they're referring to the employer stevedore.

4 Essentially, that's the same argument that --

5 QUESTION: They could have said that. They
6 could have said, if the employer stevedore is guilty of
7 negligence, the employer won't. But it didn't say, if the
8 employer stevedore. It said, if the stevedore -- if -- if
9 -- if the person providing stevedoring services was
10 negligent, the vessel is not.

11 MR. SOVEL: Well, then, in that case, Your
12 Honor, you're -- the -- essentially, the same type of
13 argument was considered by this Court and rejected by this
14 Court in the Edmonds case. Because there, the argument
15 was that we should --

16 QUESTION: In -- in what case?

17 MR. SOVEL: In Edmonds.

18 QUESTION: Edmonds?

19 MR. SOVEL: Edmonds, where the argument was made
20 by the stevedores -- by the shipowner that they should
21 apportion the damages between the employer and the
22 stevedore. And that specific phraseology of the statute
23 was considered. And they said that it didn't preclude the
24 action against the vessel under those circumstances, even
25 though you have a situation where a stevedore was

1 negligent.

2 If you were to take that language totally,
3 Justice Scalia, then you would be eliminating liability
4 based on joint negligence.

5 And suppose you have a situation where you had
6 both negligence by the shipowner and by the stevedore.
7 Under the interpretation of that language --

8 QUESTION: Which is what we have here.

9 MR. SOVEL: Yes -- well -- and therefore -- but
10 that was specifically rejected in the Edmonds case. That
11 was the specific argument that was made and the specific
12 -- it was rejected -- that the shipowner cannot excuse its
13 own negligence by saying that the stevedore was also
14 negligent.

15 QUESTION: Well, but there -- there, the
16 negligence was -- was independent, separate negligence,
17 not what you have here -- the negligence of the shipowner
18 in failing to catch the negligence of the stevedore. I
19 mean, it's all in the same line of causality.

20 MR. SOVEL: Your Honor, if I might posit a
21 situation to the Court. Suppose we have a cargo, say,
22 electronic -- electronic parts, loaded on a ship in Japan
23 or Korea. And the ship loads that cargo. It's -- the
24 stevedore loads it there. It's loaded improperly. It
25 comes to the United States. Cargo -- when the

1 longshoreman goes into the hold, the cargo falls and
2 crushes the longshoreman, kills him, and the box of cargo
3 gets broken all over the place.

4 The cargo owner could then sue the ship, but the
5 injured longshoreman could not.

6 I don't think Congress ever had any idea that
7 that's what this statute would intent to result in.

8 QUESTION: Maybe it should have written
9 something else then if it didn't have such an idea.

10 MR. SOVEL: Well, I think it did when it said
11 that they have negligence based on State law. And it was
12 addressing the issue of the fact that we're not -- we
13 wanted to make sure that the exclusive remedy provisions
14 of the statute would not be interpreted in such a way as
15 to make the employer longshoreman liable for any more than
16 its compensation liability.

17 QUESTION: Maybe you know that, Mr. Sovel, but I
18 only know what I read in the statute. And it doesn't have
19 any of that in it.

20 MR. SOVEL: Well, that -- if you were to accept
21 that same interpretation, Your Honor, your -- the decision
22 in this Court in Edmonds would have been different. It's
23 already --

24 QUESTION: Well, the decision in Kopke wouldn't
25 have been. It seems to me that that -- that involves

1 quite different.

2 MR. SOVEL: Well, Kopke involves the
3 interpretation that when you -- viewing the term
4 "employer" --

5 QUESTION: Which isn't what we're talking about
6 here.

7 MR. SOVEL: No. That you -- that the -- or --
8 or in the term "stevedore subject to the Act," which is
9 the phrase used in the legislative history, that that is
10 referring only to the employer.

11 Now, that's one face of Kopke. Edmonds handles
12 the other aspect of that -- that, if you would interpret
13 --

14 QUESTION: Well, but surely -- surely we're not
15 going to say the legislative history prevails over the
16 language of the statute?

17 MR. SOVEL: No. But the -- the language of the
18 statute, as pointed out in Edmonds, is somewhat
19 inconsistent between the phrase that the shipowner shall
20 be liable for its negligence and that the stevedore shall
21 be liable for its negligence. And then this Court
22 rejected that type of separation and said that the -- this
23 does not preclude liability based on joint negligence.
24 And, therefore, under Edmonds --

25 QUESTION: Yes, but what we have here surely is

1 not joint negligence in the sense that we're talking about
2 it in Edmonds?

3 MR. SOVEL: No. We -- well, we have a situation
4 where, under principles of negligence law, a shipowner
5 would have a duty of inspection.

6 Suppose if we had a situation where the
7 shipowner says, I saw that no plastic was placed under
8 this stow. And the -- a factfinder -- remember, this was
9 a motion for summary judgment -- could conclude that the
10 shipowner did have knowledge of it. Then the shipowner
11 would be liable based on that knowledge, even though the
12 stevedore may have been the party that created the
13 condition. So --

14 QUESTION: And so you jump from that to there's
15 a duty to inspect.

16 MR. SOVEL: Well, I -- I think that there is a
17 duty of reasonable inspection with respect to the manner
18 in which cargo is stowed -- which is the traditional duty
19 -- not duty so much as what the practice is. They do
20 inspect. It's never been denied that they inspect. And
21 now what they're saying here is that, even though we
22 inspect and even though we see, we're not going to be held
23 responsible.

24 QUESTION: But if you're right and they did in
25 fact inspect, then they would know.

1 MR. SOVEL: Right.

2 QUESTION: And you wouldn't have to rely on any
3 duty to inspect.

4 MR. SOVEL: That's right.

5 QUESTION: But I gather from what you say that
6 that's contested. And so you have to rely on a duty to
7 inspect.

8 MR. SOVEL: No, it's not contested in the facts
9 of this case that they did in fact inspect. But --

10 QUESTION: So, you don't rely on any duty to
11 inspect; is that correct?

12 MR. SOVEL: Not in this case. I think that the
13 -- there should be a duty of reasonable inspection with
14 anything that is turned over to the long -- to the
15 discharging longshoremen. However --

16 QUESTION: I'm really getting confused now. I
17 thought it was essential to your case that there be a duty
18 to inspect the loading operation. You -- you say that's
19 not true?

20 MR. SOVEL: I say that it is not true that you
21 have a -- an actual duty to inspect. I think that there
22 is a -- I think there should be a duty to inspect. But in
23 the facts of this case and in the facts of most cases,
24 where you offer testimony showing what the inspection is
25 and that they do do it, that the shipowner should be held

1 knowledgeable for what that would disclose.

2 QUESTION: Well, but if they do it, you're
3 saying they're doing it negligently. But it --

4 MR. SOVEL: Yes.

5 QUESTION: It doesn't matter if it's -- if they
6 do it negligibly unless they have a duty to do it.

7 MR. SOVEL: Right. Well --

8 QUESTION: But I'm trying to -- I really want to
9 be sure I understand.

10 MR. SOVEL: Okay.

11 QUESTION: Do you -- can you prevail in this
12 case and still assume that the shipowner had no duty to
13 inspect the loading operation?

14 MR. SOVEL: Yes. If in fact -- and the evidence
15 shows -- that they did in fact do it. And in fact --

16 QUESTION: Well, doesn't the evidence have to
17 show that they did in fact know the plastic was there, as
18 opposed to simply standing there while plastic was put
19 down?

20 MR. SOVEL: No. The -- the evidence in the case
21 -- in the specific testimony -- the captain was that if
22 the plastic had been placed on the deck, the crew members
23 would have seen it and would have reported it to him.

24 QUESTION: So, you're saying the evidence, in
25 effect, was that they did see it?

1 MR. SOVEL: They did see it.

2 QUESTION: Because they were standing there and
3 they must have?

4 MR. SOVEL: Right. That they could see it. And
5 --

6 QUESTION: But if a finder of fact concluded
7 that they did not in fact see it, then you'd have no case
8 -- unless we hold that --

9 MR. SOVEL: Well --

10 QUESTION: Unless we hold that there is in fact
11 a duty to inspect, as Justice Stevens suggested?

12 MR. SOVEL: If the factfinder found that they
13 did not -- the factfinder would have to find that there is
14 -- that they -- it was not a condition which they could
15 see based on the inspections which they admittedly made.
16 And, in fact, after the Derr case was decided, we offered
17 evidence in Derr that these inspections were created --
18 the Third Circuit has even rejected that -- so that,
19 basically, I say there's a duty to inspect, but that this
20 duty is no more broad -- no broader than what they are in
21 fact doing.

22 I mean, it's not an onus to them, but they have
23 a duty, for instance, to inspect how a winch is repaired.
24 Do they have other types of duties to inspect other
25 equipment? Does it matter whether --

1 QUESTION: No. But if they -- if they have a
2 duty to inspect, presumably, by definition, they have a
3 duty to exercise a certain degree of care in the
4 inspection. So, the things which ought to have been seen
5 are things that are going to be charged to their
6 knowledge.

7 MR. SOVEL: Right.

8 QUESTION: If they don't have a duty to inspect,
9 then the most you can rely upon would be proof that they
10 actually did know that the plastic was here.

11 MR. SOVEL: Yes.

12 QUESTION: Okay.

13 MR. SOVEL: That would be correct that -- I
14 think -- while under the facts of this particular case,
15 having established the inspection, and that it was a kind
16 of condition that is -- was capable of being observed on
17 inspection, that should have been sufficient to --

18 QUESTION: No. But that's -- that's --

19 MR. SOVEL: That's different.

20 QUESTION: It seems to me that is simply another
21 way of saying, well, they actually did have a duty,
22 because we're going to charge them with knowledge of what
23 they would have learned making a reasonable inspection,
24 whether we have direct proof that they knew it or not.

25 MR. SOVEL: Okay. And then they --

1 QUESTION: Isn't that fair to say?

2 MR. SOVEL: Yes. And I think that they have a
3 duty, under Scindia, to provide a ship which is in such
4 condition that it can be discharged with reasonable
5 safety. And that would include the cargo stow. And with
6 how that cargo stow then becomes unsafe is really
7 irrelevant.

8 QUESTION: How does one discharge that duty? To
9 what extent is there an obligation to supervise the
10 stowing of the cargo to make sure that the ship is in safe
11 condition to be unloaded when it gets to the unloading
12 port?

13 MR. SOVEL: To the extent that the term
14 "supervising" implies anything more than the observations
15 that they would make of the normal stowage, I'm not
16 claiming that there's a duty to supervise. I am claiming
17 that --

18 QUESTION: But you said there's a duty to make
19 sure that the cargo is in safe condition to be unloaded.

20 MR. SOVEL: Right.

21 QUESTION: So, can you be as precise as you can
22 in telling me how one discharges that duty?

23 MR. SOVEL: Okay. It would, in various cases,
24 depend upon the type of cargo that is being handled. But,
25 for instance, in this case, observing that the plastic or

1 whatever it is that they're supplying, when they admit
2 that they have to make sure that something is under the
3 stow of cocoa beans, that they would be observing to see
4 that is present -- they've admitted that.

5 In the case where you have improperly stowed
6 steel, such as Woods or Riggs or those cases, just looking
7 at the cargo is all they have to do. In fact, you can
8 bring in testimony that they looked and observed the cargo
9 and saw it.

10 QUESTION: Well, what is it that -- what is the
11 relevant thing that they've admitted here?

12 MR. SOVEL: Here they admitted, first of all,
13 that they -- they inspected; that they would have seen the
14 plastic if it was placed under it; that they required that
15 something be placed under the cocoa beans so that, to that
16 extent -- by the way, they're supervising what the
17 stevedore does, they are giving them the material -- the
18 only source of the plastic or paper or whatever it is has
19 to come from the ship. The ship pulled into Guayaquil,
20 Ecuador, and anything that they needed to load the cargo
21 was supplied by the ship.

22 The duty -- there -- someone at the ship
23 required that something be placed under it. And the fact
24 that the crew members were there and would have observed
25 it.

1 Basically, that case -- and I always maintained
2 -- this case should have been, even under Derr, presented
3 a prima facie case of vessel liability because you have
4 proof of -- from which a factfinder could find actual
5 knowledge of the condition. It was certainly not a matter
6 of summary judgment, and summary judgment should not have
7 been granted.

8 But all you're saying is that they have the same
9 duty of observation that they would, depending on the
10 circumstances of each case. I'm not asking that they be
11 required to make a separate duty based on safety for
12 longshoremen. Because that really isn't necessary. But
13 the same duty that they perform or same task that they
14 perform -- making sure that the cargo is stowed safe for
15 purposes of delivery -- is going to reveal the same thing.

16 The problem here is that you have a situation
17 where, even though under the customary practices and in
18 each case if you took the testimony of the chief mate or
19 the captain, as we did in this case, you would find out
20 what they did. That if they have a condition that they
21 could have observed by the reason of what they did, that
22 they could -- should not be permitted to say, well, we
23 weren't inspecting for safety; we were only inspecting for
24 the safety of the cargo. And, therefore, even though we
25 have information that would normally trigger a duty to use

1 reasonable care to correct this condition, we don't have
2 to do it because we don't have any responsibility for
3 safety.

4 QUESTION: Mr. Sovel, what was the theory of the
5 District Court when it granted summary judgment? Did the
6 District Court rely on the notion that the shipowner had
7 no duty to inspect, or no duty of care here? Or did it
8 rely on the theory that you would have to show actual
9 knowledge?

10 MR. SOVEL: The ship -- the District Court here,
11 relying on Derr, said that there was no duty to inspect
12 and no duty to do anything with respect to cargo, period
13 -- nothing. And it didn't matter on the other things,
14 because --

15 QUESTION: Well, when I -- when I read the
16 District Court's opinion, I interpret them -- it as saying
17 there -- the condition of the plastic was open and
18 obvious. So, it wasn't going to make any difference.

19 MR. SOVEL: No.

20 QUESTION: Because the unloading people would
21 see it, too.

22 MR. SOVEL: Well, the -- the -- it has to go
23 back, Your Honor, to the Derr holding. The Derr holding
24 was that a vessel would be liable for unsafe conditions in
25 the cargo stow only if you could show actual knowledge on

1 the part of the shipowner of the condition and that the
2 condition was not open and obvious.

3 Based on Derr, in preparing this case and
4 arguing it in the District Court, I offered the testimony
5 of the -- the -- the captain as to the condition to prove
6 actual knowledge of the condition. And the testimony of
7 the plaintiff that the condition was not open and obvious
8 to him and was not one that he could expect.

9 The District Court stated in the opinion, in a
10 part of the opinion -- which I have to say very
11 respectfully to the District judge -- makes no sense.
12 Because he said was, well, if this condition was capable
13 of being discovered by the loading longshoremen in
14 Guayaquil, Ecuador, then, by definition, it was an open
15 and obvious condition. And under Scindia, the shipowner
16 isn't liable for open and obvious condition -- which, by
17 the way, is contrary to the holding in Scindia -- and from
18 that he says, therefore, it had to be open and obvious to
19 the plaintiff in this case, when there clearly was
20 evidence it was not open and obvious to him.

21 I mean, the decision -- the statement that if it
22 was open and obvious to the loading longshoremen at the
23 time it was created, by definition, it has to be open and
24 obvious to the discharging longshoremen makes no sense.
25 It's a non sequitur. The condition was concealed. And

1 that, therein, is the problem with respect to the
2 situation as far as a -- from the standpoint of the
3 discharging longshoremen. Because the condition, if they
4 observe it during the creation of cargo operations,
5 subsequently it becomes concealed, and then both he --

6 QUESTION: By stacking cargo on top of the --

7 MR. SOVEL: By stacking it on top of it, yes.

8 If the Court pleases, if there are no further
9 questions, I would like to reserve the rest of my time for
10 rebuttal.

11 QUESTION: Very well, Mr. Sovel.

12 Mr. Buchholz.

13 ORAL ARGUMENT OF CARL D. BUCHHOLZ, III

14 ON BEHALF OF THE RESPONDENT

15 MR. BUCHHOLZ: Mr. Chief Justice, and may it
16 please the Court:

17 Despite the Petitioner's denial to the contrary,
18 as Justice Scalia has pointed out, the duty that he seeks
19 to impose in this particular case -- and we really do have
20 a conflict with the Third, the Ninth and the Fifth
21 Circuits that underlies, I think, the whole case.

22 QUESTION: Just as a preliminary before you get
23 into that conflict, who -- who was Howlett employed by?
24 Who was his employer?

25 MR. BUCHHOLZ: Northern Shipping Company.

1 QUESTION: Is that --

2 MR. BUCHHOLZ: Which is a stevedoring company.

3 QUESTION: That's different from the vessel, I
4 take it?

5 MR. BUCHHOLZ: Yes. It's called Northern
6 Shipping Company, but it -- it is a stevedoring company.
7 It has nothing to do with the vessel or --

8 QUESTION: Well, how -- how does the statutory
9 exclusion on which you rely then apply? Because the
10 statute says, if such person was employed by the vessel to
11 provide stevedoring services. And here the vessel was not
12 the employer.

13 MR. BUCHHOLZ: We're -- we're -- they're seeking
14 to impose liability on us, not for the negligence of
15 Mr. Howlett or his employer -- they're looking to impose
16 liability on us for the negligence of the loading
17 stevedore in Guayaquil, Ecuador.

18 QUESTION: But you rely, I take it, on the
19 second sentence of the provision in section 5(b)?

20 MR. BUCHHOLZ: That and the numerous references
21 in the legislative history that says a shipowner should
22 not be liable for the negligence of another party,
23 including the stevedore. You have loading --

24 QUESTION: Well, but the statute says, if such
25 person was employed by the vessel to provide stevedoring

1 services. And he wasn't employed by the vessel. So, he
2 is not within the -- the exclusion. Or am I just missing
3 something?

4 MR. BUCHHOLZ: I think -- I think you're missing
5 the Act. He -- he is employed by the vessel to -- you're
6 looking at it -- that it's Northern Shipping that's hired
7 by the vessel. I think that's just loose language.

8 QUESTION: Well, you said -- you said that he
9 was employed by someone other than the vessel. So, I
10 don't see how the statute works.

11 MR. BUCHHOLZ: I think the reference is there.
12 Mr. Howlett is employed by Northern Shipping Company,
13 which is hired by the vessel. I think the language used
14 in that Act, as well as other acts, is that those
15 longshoremen employed by Northern are, quote, hired by the
16 vessel.

17 QUESTION: So that we don't have to follow the
18 precise language of the Act?

19 MR. BUCHHOLZ: I'm not -- I'm not sure that I
20 understand.

21 QUESTION: Well, I -- I take it that your --
22 your case requires a very close interpretation of the Act
23 in order to allow the -- the vessel the exemption which it
24 gives. But I just don't understand how the Act works. I
25 don't want to spend too much time on this, because the

1 conflict between the Third and the Ninth Circuit is a very
2 real one.

3 MR. BUCHHOLZ: Right.

4 QUESTION: But I'm -- I'm just somewhat --

5 MR. BUCHHOLZ: My argument, Your Honor --

6 QUESTION: I'm uncertain as to how -- as to how
7 the language of the Act applies here.

8 MR. BUCHHOLZ: Okay. My -- my argument is not
9 based on that -- is not limited to that particular section
10 and that particular language in that Act. Because that
11 particular language leaves out a number of references that
12 are in the legislative history as to what was intended.
13 And I don't think the Act includes them all. But it's
14 implicit.

15 QUESTION: Well, maybe -- maybe your argument
16 shouldn't be relying on that sentence at all, because what
17 -- what Justice Kennedy is just suggesting is also -- was
18 -- we also explicitly said that in Edmonds, didn't we?
19 Edmonds says that the second sentence of the paragraph,
20 the sentence at issue here, is expressly addressed to the
21 different and less-familiar arrangement, where the injured
22 longshoreman loading or unloading the ship is employed by
23 the vessel itself, not by a separate stevedoring company
24 -- in short, to the situation where the ship is its own
25 stevedore. Which is not the situation here, is it?

1 MR. BUCHHOLZ: Absolutely.

2 QUESTION: So, according to Edmonds, that
3 sentence doesn't apply at all -- zero.

4 MR. BUCHHOLZ: Although it was read during your
5 direct questioning -- it could be read --

6 QUESTION: Well, I'm trying to find the weak
7 parts in his case and the weak parts in your case.

8 MR. BUCHHOLZ: Right.

9 QUESTION: And it seems to me that the weak part
10 in your case is Edmonds.

11 MR. BUCHHOLZ: I will address that in a minute.
12 I think Edmonds is actually a strong point for our case,
13 because it shows what will happen in the event --

14 QUESTION: Well, what do you do about that
15 sentence in Edmonds which -- which simply says that this
16 sentence has no provision here -- it has no application
17 here?

18 MR. BUCHHOLZ: The -- the Edmonds situation does
19 not impose a duty on the shipowner -- the legislative
20 history behind the entire 1972 amendments was to relieve
21 the shipowner of any liability for the negligence of
22 another party. And despite there -- there has been some
23 changes to what that duty might be from the Petitioner
24 today, that's the duty they seek to impose -- that we --
25 they seek to hold the shipowner liable for the negligence

1 of the stevedore -- in this particular case, the
2 negligence of the loading stevedore.

3 Now, in the Edmonds situation --

4 QUESTION: Mr. Buchholz, I can see what you're
5 saying if we were dealing with the typical triad -- that
6 is, this certainly meant to exonerate the shipowner from
7 liability to the employer of the longshore worker. So,
8 the things that stem from Ryan and the -- the usual dance
9 of suing the shipowner, the shipowner turning and making a
10 claim over against the stevedoring company. That's not
11 what's involved here.

12 Why does it follow that because Congress
13 certainly meant to do that and did that, that there would
14 be no liability where the injured worker is not employed
15 by the -- where we have an unloading longshore worker, and
16 he is injured because of the -- of negligence attributed
17 to the loading stevedore?

18 MR. BUCHHOLZ: There are two answers to that,
19 Your Honor. One is there is no basis to, as a matter of
20 law or a matter of fact -- essentially, you get into a
21 distinction between perhaps a foreign-loading stevedore
22 and a domestic stevedore, who is covered under this Act.
23 And there is no distinction to create separate duties on
24 what the shipowner's duty is vis-a-vis the cargo, as to
25 whether it's a foreign stevedore that's loading it or a

1 domestic stevedore.

2 The other situation -- and it's where Scindia
3 comes into play -- is --

4 QUESTION: But even a domestic loading stevedore
5 is not going to be the one that compensates the longshore
6 worker. As I understand it, the longshore worker is going
7 to be -- the worker's compensation scheme would enable him
8 to make a claim against his employer's carrier.

9 MR. BUCHHOLZ: Right. But if you get a domestic
10 stevedore who loads this cargo, and then the longshoreman
11 is injured down in Houston. Under -- under plaintiff's
12 theory of liability, we can be liable down in Houston for
13 the accident to the longshoreman in Houston because of
14 what the stevedore up in Philadelphia did.

15 Under the Scindia holding, we had no duty to
16 supervise the loading operation of the Philadelphia
17 stevedore up in Philadelphia. But suddenly, now that
18 we're down in Houston, we're subject to liability. So, if
19 --

20 QUESTION: With respect to anybody -- let's take
21 -- make it a seaman instead of a longshore worker. This
22 -- let's suppose that this plastic had been slipped on by
23 a crew member. There would be no liability on the
24 vessel's part?

25 MR. BUCHHOLZ: No; there would -- there would

1 probably be liability on the vessel's part. The vessel
2 owes a duty of -- it's the doctrine of seaworthiness -- to
3 seamen and crew members. That was the doctrine that was
4 taken away by the 1972 amendments -- the Supreme Court, in
5 a case called Sieracki, extended that --

6 QUESTION: Are you saying it would only be on
7 seaworthiness, not negligence, to allow the plastic to be
8 used in places where sea -- crew members might be walking
9 or jumping on?

10 MR. BUCHHOLZ: I -- I would -- there could be a
11 case in which, if the shipowner knew about it or had
12 constructive knowledge of it, you might be able to make
13 out a case of negligence. In most -- in most cases, a
14 seaman would just use the doctrine of seaworthiness
15 because it's an unseaworthy condition.

16 QUESTION: So, your basic claim here is that
17 there is -- there is simply no negligence on your part; is
18 that it? Because there was no duty to -- to supervise the
19 -- the unloading and -- but you would acknowledge
20 liability if you knew of the defective condition and
21 failed to warn? Or you -- you'd at least acknowledge
22 possible liability?

23 MR. BUCHHOLZ: You -- you -- because of the
24 Scindia case and the lack of any obligation to supervise
25 the work of the loading or discharging stevedore, you --

1 QUESTION: You're not charged with knowledge of
2 the defect?

3 MR. BUCHHOLZ: Right, right.

4 QUESTION: However, if you happen to have
5 knowledge of the defect, you would acknowledge that --
6 that you might be negligent in failing to pass that on?

7 MR. BUCHHOLZ: My proposed duty would -- would
8 be, if you had actual knowledge of a hidden defect that
9 you knew or had to reason to know would present an
10 unreasonable risk of harm to experienced longshoremen.

11 QUESTION: Right.

12 MR. BUCHHOLZ: In that limited situation, you
13 would have a duty vis-a-vis the longshoremen in the next
14 port.

15 QUESTION: So --

16 QUESTION: Well, isn't that the allegation here
17 exactly?

18 MR. BUCHHOLZ: No. The -- the allegation here
19 is that there was no actual knowledge; there was no -- no
20 duty to --

21 QUESTION: Well, I -- I thought I heard the
22 argument and I thought I read in the brief that the
23 shipowner's employees actually provided the plastic and
24 required that something be put under the cocoa beans, gave
25 them the plastic to put under it, knew that the plastic

1 was under it, and subsequently, when it was loaded, it was
2 not obvious.

3 I mean, I -- I understood that to be their
4 theory.

5 MR. BUCHHOLZ: That may be their theory, Justice
6 O'Connor -- if that was the record, there would be
7 liability in this case. But that was not the record. The
8 record was that the ship supplied all material -- the
9 wood, the paper, plastic that's used for a number of
10 purposes.

11 The ship would -- the testimony was the ship
12 would not have permitted the plastic to be laid down
13 because of possible condensation damage to the beans. And
14 the captain said, if I saw it, I would have had it
15 removed. The crew members were under instructions to
16 notify me if it was down there.

17 So, that was the -- the shortcoming of the case
18 that there was no actual knowledge. If there had been
19 actual knowledge, the plastic wouldn't have been down
20 there.

21 QUESTION: Well, but this -- this was a case
22 that was decided on summary judgment, was it not?

23 MR. BUCHHOLZ: Yes, Your Honor.

24 QUESTION: Before any trial?

25 MR. BUCHHOLZ: Before any trial.

1 QUESTION: Well, in -- so, the District Court
2 had to say that there -- this -- this point was absolutely
3 undisputed that no reasonable person could conclude there
4 was actual knowledge on the part of the vessel?

5 MR. BUCHHOLZ: Yes -- which he did.

6 QUESTION: And -- and you support that here.
7 You say that that's -- that's not arguable even?

8 MR. BUCHHOLZ: Right. There was no evidence to
9 suggest to the contrary, and all the evidence -- the
10 evidence all suggested to the contrary -- that the ship
11 would not have permitted it to have sailed with plastic
12 under it if it had known about it.

13 QUESTION: Well, it's down to a very narrow
14 case.

15 MR. BUCHHOLZ: Plastic is used for a number of
16 purposes on the ship. And it -- it was potentially
17 damaging to the ship's cargo to have allowed it there.

18 The other shortcoming in the standard that we --
19 that I was discussing with Justice Scalia is that the ship
20 had absolutely -- there was no evidence that the ship knew
21 or should have known a piece of plastic on that floor of
22 the hatch was going to present an unreasonable risk of
23 harm to an experienced longshoremen.

24 The potential danger -- the only potential
25 danger that was established in the record was that it

1 might cause some condensation damage to the beans. But
2 you wouldn't --

3 QUESTION: Do you know why it was a summary
4 judgment situation? I mean, if the allegation was that --
5 as Justice O'Connor said -- the ship in fact had supplied
6 the plastic, and there were people on the deck who were
7 watching something going on, why isn't this a question of
8 testimony and credibility to find out exactly what was
9 supplied, exactly what was observed?

10 MR. BUCHHOLZ: That was, Your Honor. And the
11 only evidence that was -- was available was -- was that no
12 one saw it. The Petitioner in this case presented no
13 evidence that anyone actually saw it, took no depositions
14 to establish that, and the record was closed at the time
15 the summary judgment was granted. There was nothing more
16 than the fact that there were some crew members up on deck
17 who had a general duty of watching for smugglers, for
18 stowaways, whatever.

19 And the Third Circuit, in Derr, quite correctly
20 said you cannot catapult that type of presence to putting
21 a duty on them to have --

22 QUESTION: May I ask this question,
23 Mr. Buchholz?

24 Am I correct in understanding that he has really
25 two alternate theories of recovery? One is that as a

1 matter of fact -- and that's what you've been debating now
2 -- there was actual knowledge and therefore you were
3 negligent. But that's not really much of a legal issue;
4 that's purely factual. And the other alternative theory,
5 as I understand it, is regardless of what they did or did
6 not know or anything else, they had a duty to supervise or
7 inspect the loading operation.

8 And they -- you -- you can admit that you failed
9 to see things there, but if you didn't have any duty you
10 wouldn't have been doing it negligently.

11 So, the legal issue is -- am I not correct -- I
12 mean, is it just whether you had that duty at that time?

13 MR. BUCHHOLZ: Well, again, the legal duty, as
14 Justice Kennedy referred to throughout, the difference
15 between the Ninth and the Fifth in the Circuit is whether
16 there is a legal duty to do inspections or supervisions of
17 the cargo stow during the loading by the stevedore.

18 QUESTION: And if there is such a duty, the fact
19 that you don't know about it, you would lose under this?
20 But --

21 MR. BUCHHOLZ: That's correct.

22 QUESTION: So -- so, there is no factual issue
23 on that -- on that legal question?

24 MR. BUCHHOLZ: The question and what the Circuit
25 Court --

1 QUESTION: And what this boils down to also is
2 that your real defense is, you're not negligent, period?
3 You don't rely on the fact that the loading stevedore was
4 negligent? I mean --

5 MR. BUCHHOLZ: Well, somebody -- if there was
6 negligence --

7 QUESTION: What I'm saying is that, going back
8 to that argument -- the debate between -- or your
9 opponent's colloquy with Justice Scalia earlier -- the
10 fact that the -- the loading stevedore was negligent would
11 not exonerate you if you were also negligent?

12 MR. BUCHHOLZ: That's correct.

13 QUESTION: Yes. But you say you were not
14 negligent because (a) you had no duty to inspect or
15 supervise the loading operation and (b) as a matter of
16 fact, your people didn't realize that this plastic stuff
17 was there?

18 MR. BUCHHOLZ: Exactly.

19 QUESTION: Okay. And why do you assert you had
20 no duty to supervise -- or -- the unloading -- the loading
21 and unloading, I guess?

22 MR. BUCHHOLZ: That is a duty that has -- that
23 the genesis is the Ninth Circuit's case in Turner. Turner
24 felt -- was faced with a situation in which an injured
25 longshoreman was hurt. The Ninth Circuit took a look at

1 the situation and realized that the negligence had been
2 that of a foreign stevedore, and decided that the
3 longshoreman didn't have anyone to sue. So, they turned
4 around and said, well, we're going to create a -- a
5 liability on the shipowner to have had supervised the
6 loading of the foreign stevedore to prevent any defects in
7 the stow.

8 And, again, that doesn't reconcile with your
9 holding Scindia that you don't have a duty to supervise
10 the minute details of the loading operation.

11 And the fact of the matter is, if you put any
12 duty other than the duty I discussed with Justice Scalia,
13 where you have actual knowledge of a dangerous hazard
14 which you knew or should have known would create an
15 unreasonable risk of harm, if you put any duty of
16 reasonable inspection it will essentially open up every
17 one of these cases to a third-party lawsuit.

18 Any stevedoring expert can come in after an
19 accident and say, a reasonable inspection would have
20 disclosed this.

21 So, essentially, you're -- you're getting -- the
22 two purposes of Congress in passing the '72 amendments was
23 to eliminate the personal injury litigation that was
24 flooding the Federal courts, arising out of these kind of
25 accidents, put them into a very improved compensation

1 system, and also to encourage the safety of the
2 longshoremen.

3 I would just like to touch on the Edmonds case
4 for a second, because that -- that --

5 QUESTION: Well, could -- could I ask you about
6 this? You refer to the notion that you accept that the
7 shipowner has a duty to warn of hazards that the shipowner
8 knows of or should have known of?

9 MR. BUCHHOLZ: No, no.

10 QUESTION: That was what I thought you said.

11 MR. BUCHHOLZ: If -- if I said that, I misstated
12 it. With regard to the cargo -- and if I can just back --

13 QUESTION: That -- that's kind of a general
14 principle anyway --

15 MR. BUCHHOLZ: Right.

16 QUESTION: Of property ownership, I suppose?

17 MR. BUCHHOLZ: That's the duty the vessel owes
18 --

19 QUESTION: A duty to warn of known hazards or
20 things you should have known of?

21 MR. BUCHHOLZ: That's the vessel that -- that
22 this Court imposed in Scindia and the -- of knowledge or
23 should have known relates to the vessel and its -- its
24 equipment, its appurtenances, its gears, things that are
25 permanently attach -- attached to it and affixed to it.

1 The ship does have that duty.

2 With regard to cargo, which is a completely
3 transitory condition, employees of an independent
4 contractor put it on, employees of another independent
5 contractor take it off. The --

6 QUESTION: You're just saying they shouldn't
7 have known, that's all.

8 MR. BUCHHOLZ: It requires actual knowledge.

9 QUESTION: I think you're agreeing with Justice
10 O'Connor. I think you're just saying they -- they did not
11 know and should not have known with respect to the cargo.
12 Because they had no obligation to supervise the loading of
13 the cargo.

14 MR. BUCHHOLZ: Right. And I'm sorry, Justice
15 O'Connor. They -- it would -- under my interpretation, it
16 would require actual knowledge, just because, as Justice
17 Scalia said, you don't have a duty to inspect.

18 QUESTION: Well, is -- well, is that really --
19 isn't there an intermediate position that if they should
20 have known for reasons other than supervising the -- the
21 loading -- in other words, supposing they turned the
22 loading operation entirely over -- the ship entirely over
23 to the loading stevedore at the time of the loading --
24 they had no personnel on the boat. They didn't know a
25 darn thing about what went on during the loading.

1 But while they're at sea, they should have
2 noticed something that was rather apparent from the way
3 the cargo was shifting or something. They would then have
4 had a duty to warn, wouldn't they?

5 They find out about the danger after the loading
6 operation is completed and for nothing to do with it, they
7 don't have any duty to supervise, but they do -- they --
8 there -- there is a condition they reasonably should have
9 realized was dangerous.

10 Wouldn't it be negligent not warning then?

11 MR. BUCHHOLZ: Again, if you have the elements
12 of actual knowledge of a --

13 QUESTION: No, it's not -- it's -- it's -- it
14 should have -- they should have known about it. That's
15 the point.

16 MR. BUCHHOLZ: Okay. That --

17 QUESTION: It's quite apparent that you can't
18 prove anybody actually saw it, but do you find that 19
19 people walked by this place every day and you can't
20 believe they didn't look at it -- but you can't prove they
21 actually saw it.

22 MR. BUCHHOLZ: My answer to that, Your Honor, is
23 no. There's no duty because the stevedore that's going to
24 discharge that cargo upon arrival is in as good, if not
25 better a position, to take a look and see what the

1 condition of that cargo is as some nonexpert shipowner.

2 So, the condition that the shipowner -- that's
3 observable to the shipowner at that point in time is
4 equally observable to the discharging stevedore.

5 And creating any -- creating any type of general
6 duty is going to throw -- throw the courts back into the
7 pre-1972 amendments, where every --

8 QUESTION: Well, it wasn't in this case.
9 Because there's no way in the world -- if you ignore the
10 -- the loading itself, there's no way in the world that
11 the shipowner -- the vessel owner could have known that
12 the plastic was -- was at the bottom of the load.

13 I mean, you'd win this case on my hypothesis,
14 assuming the others.

15 MR. BUCHHOLZ: That -- on your hypothesis. But
16 -- but ships in transit, throughout transit, are going to
17 encounter cargo that shifts. And in every one of those
18 cases -- and that's -- that's where you -- the Fifth
19 Circuit runs into problems, the Ninth Circuit, in Riggs --
20 they have shifting -- it's open and obvious when they come
21 into port. The longshoremen are all aware of it. And
22 that's why they're hired to take it out.

23 And yet, the Ninth Circuit and the Fifth
24 Circuits are imposing liability on the -- on the
25 shipowners.

1 QUESTION: Well, it seems to me there could be
2 cases in which the shipowner would be aware of -- of
3 dangerous conditions that wouldn't -- that they would
4 notice while the -- the ship was at sea that the unloading
5 steve -- stevedore might not know about unless he were
6 warned. You don't think that ever could happen?

7 MR. BUCHHOLZ: I -- I -- I think you're getting
8 very -- very close to the actual knowledge situation in
9 that scenario.

10 QUESTION: Yes. Well, that's what I'm -- but
11 why shouldn't the -- why shouldn't it be negligence if --
12 if it was sufficiently obvious that any competent vessel
13 captain would have spotted it? I --

14 MR. BUCHHOLZ: The reason for that is any
15 so-called expert is going to be able to come in after the
16 accident and say, a reasonably competent shipowner or
17 master should have -- and that's enough to get to the
18 jury.

19 And we get back to the Edmonds case in which a 1
20 percent negligent shipowner -- if you impose any duty on
21 the shipowner for the condition of the cargo loaded by
22 someone else, the 1 percent negligent shipowner gets stuck
23 for 99 percent -- gets stuck for the entire verdict, where
24 the discharging stevedore, who sees the same condition,
25 gets off scot free -- not only gets off scot free, but

1 gets back his entire compensation lien that he's paid to
2 the injured longshoreman.

3 And that was a concern of Chief Justice
4 Rehnquist --

5 QUESTION: Well, of course, that's still true in
6 an actual knowledge case.

7 MR. BUCHHOLZ: Excuse me?

8 QUESTION: That's still true in an actual
9 knowledge case.

10 MR. BUCHHOLZ: In an actual case, there's a
11 basis to impose liability on the shipowner for that
12 situation, though.

13 QUESTION: Is it possible that a condition could
14 be open and obvious at the time that the owner starts the
15 voyage, after the cargo has been loaded, but during the
16 course of the -- the trip, the cargo shifts around so that
17 on arrival it is not open and obvious and, yet, the owner
18 would have been aware because it was open and obvious?

19 MR. BUCHHOLZ: In that situation, again, you --
20 you have actual knowledge of a -- of a -- a -- if you have
21 actual knowledge, which --

22 QUESTION: No, I didn't say that there was, but
23 just that it was an open and obvious condition initially,
24 and it changed later.

25 MR. BUCHHOLZ: Well, if -- if it's an open and

1 obvious condition -- if the shipowner does not have actual
2 knowledge of it, no, there is -- there is no such duty.
3 Because, again, then you'll get into a factual question in
4 every one of these cases as to what the shipowner should
5 have seen at the time of loading.

6 QUESTION: Mr. Buchholz, I'm -- you know, I'm
7 really not sure that your -- your -- your alarmist
8 prediction of what's going to happen is -- is true to
9 life. If -- if, indeed, the shipowner should have known,
10 there will always be available the argument that he did
11 know. And so, you'll have the same parade of -- of these
12 suspect expert witnesses that you're worried about.

13 The -- the only question we're arguing about is
14 whether these suspect expert witnesses are going to say,
15 yes, he must have known, and therefore he knew, or whether
16 they're just going to say, well, he should have known. Is
17 that -- is that that big a deal? I mean --

18 MR. BUCHHOLZ: Yes, Your Honor. I -- I think
19 you don't get to court as you see in this case unless you
20 prove actual knowledge -- unless you can prove there were
21 long -- crew members --

22 QUESTION: As we've established in Justice
23 Stevens' question, you're going to win this case under
24 either approach.

25 MR. BUCHHOLZ: Right.

1 QUESTION: Whether you're liable for should have
2 known or not. But you're worried about other cases. And
3 you say, well, gee, if -- if you make "should have known"
4 enough for liability, we're going to have this parade of
5 suspect expert witnesses. But you're going to have them
6 with -- with -- with new as well.

7 MR. BUCHHOLZ: I don't think there's -- there
8 has been a very limited number of cases in the Third
9 Circuit where this duty has been imposed for -- for
10 exactly that reason -- that the standard under the Derr
11 case is admittedly extremely limited.

12 QUESTION: If you should have known, it's
13 probable that you knew. And so it becomes a jury
14 question, doesn't it?

15 MR. BUCHHOLZ: As to -- on which duty is --
16 should have known is Your Honor referring to?

17 QUESTION: Well, the typical case is -- is the
18 one that Justice Stevens gave -- gave of the cargo
19 shiftings. You know, any idiot would have -- should have
20 known that the cargo had shifted, and therefore he should
21 have warned.

22 So, you say, oh, no, well, should have known is
23 no good; you have to show that he knew. So, these experts
24 would say, okay, I'll show that he knew. He must have
25 known, because any idiot would -- would have noticed it.

1 QUESTION: That's not a subject of expert
2 testimony, whether someone knew or not.

3 QUESTION: No, but -- but the point he's making
4 is if you have this theory, you -- you would -- you would
5 open the case so that experts could be -- could be brought
6 in.

7 I don't see the difference between should have
8 known and -- and actually knew. I don't see that making a
9 difference in the volume of litigation.

10 MR. BUCHHOLZ: Having tried cases since 1970 and
11 seen what changes the Derr situation made in the Third
12 Circuit, I -- I have to respectfully differ with you. It
13 made a considerable difference. 'Because, as Chief Justice
14 Rehnquist pointed out, actual knowledge is far different
15 than should have, or would have, or could have, that an
16 expert may be able to testify.

17 The courts just don't permit -- they take a very
18 close scrutiny as to what actual testimony -- what actual
19 knowledge is in the record, if there is any. And if it's
20 not there, there -- there is no cause of action.

21 QUESTION: Is there -- are there occasions when
22 unloading and offloading proceeds at the same time?
23 You're taking something out of the hold and -- and putting
24 it in at the same -- and putting another cargo in at the
25 same time.

1 MR. BUCHHOLZ: Yes. It's not necessarily the
2 same -- the same ship at the same port -- you may be
3 loading one hatch, taking it out at another hatch.
4 Usually, it's not in the -- vis-a-vis the same hatch, it's
5 not going on at the same time. They'll usually wait till
6 you finish taking out the cargo, then they'll put new
7 cargo in.

8 QUESTION: Using the same stevedore?

9 MR. BUCHHOLZ: Yes. Yes, Your Honor.

10 Unless there is any additional questions, I have
11 nothing further, but would request this Court to affirm
12 the decision of the Third Circuit and the lower court in
13 the Howlett case.

14 QUESTION: Thank you, Mr. Buchholz.

15 Mr. Sovel, you have three minutes remaining.

16 REBUTTAL ARGUMENT OF CHARLES SOVEL

17 ON BEHALF OF PETITIONERS

18 MR. SOVEL: If the Court please:

19 First of all, one of the problems in the record
20 in this case is that the District Court judge did resolve
21 issues of -- where there really are factual issues.
22 Because there is a factual issue here as to knowledge of
23 the shipowner and the captain of this condition. Because
24 we presented the testimony that the ship supplied it; that
25 the -- required something to be placed under it.

1 That alone is sufficient to at least raise a
2 factual issue to be determined by a factfinder as to
3 whether they would have actual knowledge of its presence.
4 It's an inference to be drawn from those facts alone.

5 QUESTION: Well, I thought there was also
6 testimony that plastic is used for a lot of things?

7 MR. SOVEL: Well, first of all, there was no
8 testimony of that. There was none. And that's a very
9 important point. That was an argument by Mr. Buchholz
10 that, well, it could have been used for other things.

11 The only other evidence in this record as to
12 another use of the plastic was to the -- in connection
13 with the loading of corrosive drums -- drums containing
14 corrosive materials. And there was testimony that the
15 only cargo -- other cargo loaded in this port was bananas,
16 which are not corrosive.

17 Now, this argument that it could have been used
18 for some other purposes -- let them bring in the
19 witnesses; let them be cross-examined as to whether any of
20 these purposes are reasonable purposes. There was never
21 an iota of evidence in this record, other than counsel's
22 argument, as to that being a permissible purpose.

23 Now, under Mr. Buchholz's argument, and the real
24 problem that you're having -- I think Your Honor has
25 touched on it -- as Mr. Buchholz says, if I -- even though

1 you question my captain and my chief mate, and he says, we
2 did this, we observed the cargo, and if he says, I didn't
3 see it, then I can't establish a case. Because unless he
4 admits to seeing it, then there's no evidence of that --

5 QUESTION: Well, no, but no one could seriously
6 contend that. A jury would be entitled to say, even
7 though he doesn't admit to seeing it, we infer from other
8 evidence that he did see it.

9 MR. SOVEL: If there is other evidence to
10 support it, and --

11 QUESTION: And if there isn't, then the jury
12 shouldn't infer it.

13 MR. SOVEL: That's right. But in -- in this
14 case, there was evidence on which they could find that.
15 But under Mr. Buchholz's test, if he brings in somebody to
16 say, on a motion for summary judgment -- that he produces
17 a deposition of a captain who says, I didn't see it, the
18 plaintiff is out of court. And I don't think that's
19 anywhere in the law of negligence that you can't have a
20 reason to know.

21 Now, I would want to address one issue because
22 when Justice Scalia questioned me on the language of the
23 statute, it sort of caught me short and I want to go back
24 to that. The statutory language which you quoted reads:
25 If such person -- now, person there refers to injured

1 longshoremen, because it's in the second sentence of the
2 Act -- and by the way, this appears on page three of my
3 initial brief, the blue brief -- it says: If such person
4 was employed by the vessel.

5 The injured person is not employed by the
6 vessel. The injured person is employed by the stevedore.

7 QUESTION: I'm satisfied on that, counsel. I
8 think you're right.

9 MR. SOVEL: Okay. To provide stevedoring
10 services. What this language was directed to was for a
11 situation where the shipowner also acts as the stevedore.
12 And it has no relevance in this situation.

13 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Sovel.
14 The case is submitted.

15 (Whereupon, at 12:04 p.m., the case in the
16 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:

ALBERT HOWLETT, Petitioners v. BIRKDALE SHIPPING CO., S.A.
Respondent.

CASE No. 93-670

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

BY Ann Marie Federico

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