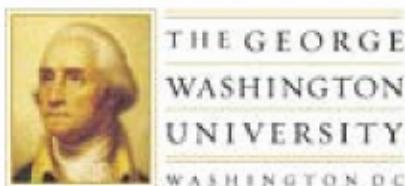


The Burger Court Opinion Writing Database

Usner v. Luckenbach Overseas Corp.
400 U.S. 494 (1971)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

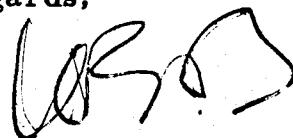
January 7, 1971

Re: No. 47 - Usner v. Luckenbach Overseas Corp.

Dear Potter:

Please join me.

Regards,



Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HUGO L. BLACK

January 6, 1971

Dear Bill:

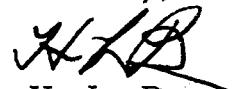
Re: No. 47 - Usner v. Luckenbach

I gladly agree. I would change the last sentence, second paragraph, page three, to read as follows:

"But when private rights not rooted in the Constitution are at issue, it is surprising to find law made by new judges taking the place of law made by prior judges."

My suggestion there may be too cutting but I could not resist jotting it down for myself only.

Sincerely,


H. L. B.

Mr. Justice Douglas

WD

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

SUPREME COURT OF THE UNITED STATES

No. 47.—OCTOBER TERM, 1970

1/6/71

Joseph Charles Usner, Petitioner, v. Luckenbach Overseas Corporation et al.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
---	--

[January —, 1971]

MR. JUSTICE DOUGLAS, dissenting.

While petitioner was working on a barge loading cargo into a hatch of the ship, he was injured as a result of the negligent operation of a winch. The winch was part of the ship and the winch operator was a member of its crew. The injury was caused by a lowering of a sling which carried the cargo too quickly and too far, injuring petitioner.

Prior to the 1970 Term the judgment denying recovery would have been reversed, probably out of hand. We held in *Mahnich v. Southern SS Co.*, 321 U. S. 96, that the obligation of an owner to furnish a seaworthy ship extends to seaworthy appliances. We also held that the owner was not insulated from liability by the "negligent failure" of his officers or members of the crew to furnish seaworthy appliances. *Id.*, at 101. In *Mahnich*, the staging from which the seaman fell was an unseaworthy appliance because of the defective rope with which it was rigged. There was sound rope on board but defective rope was used. The fact that the mate and boatswain were negligent in selecting defective rope was held to be no defense.

In *Crumady v. J. H. Fisser*, 358 U. S. 423, a winch was not inherently defective as was the rope in *Mahnich*. But it was used in a way which made it unsafe and dangerous for the work at hand. While the rigging

13

To: The Chief Justice
 Mr. Justice Black
 Mr. Justice Harlan
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun

4

SUPREME COURT OF THE UNITED STATES

No. 47.—OCTOBER TERM, 1970

1/8/71

Joseph Charles Usner, Petitioner,	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
v.	
Luckenbach Overseas Corporation et al.	

[January —, 1971]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs.

While petitioner was working on a barge loading cargo into a hatch of the ship, he was injured as a result of the negligent operation of a winch. The winch was part of the ship and the winch operator was a member of its crew. The injury was caused by a lowering of a sling which carried the cargo too quickly and too far, injuring petitioner.

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To: The Chief Justice
Mr. Justice Black
Mr. Justice White
Mr. Justice Clark
Mr. Justice Harlan
Mr. Justice Stewart
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Marshall
Mr. Justice Brandeis

SUPREME COURT OF THE UNITED STATES

No. 47.—OCTOBER TERM, 1970

Joseph Charles Usner,
Petitioner,
v.
Luckenbach Overseas
Corporation et al. } On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit.

[January —, 1971]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

While petitioner was working on a barge loading cargo into a hatch of the ship, he was injured as a result of the negligent operation of a winch. The winch was part of the ship and the winch operator was a member of the crew of the stevedores. The injury was caused by a lowering of a sling which carried the cargo too quickly and too far, injuring petitioner.

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To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan *
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

6

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SUPREME COURT OF THE UNITED STATES

No. 47.—OCTOBER TERM, 1970

Joseph Charles Usner,
Petitioner,
v.
Luckenbach Overseas
Corporation et al. } On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit.

[January —, 1971]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE BRENNAN concur, dissenting.

While petitioner was working on a barge loading cargo into a hatch of the ship, he was injured as a result of the negligent operation of a winch. The winch was part of the ship and the winch operator was a member of the crew of the stevedores. The injury was caused by a lowering of a sling which carried the cargo too quickly and too far, injuring petitioner.

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To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 47.—OCTOBER TERM, 1970

From: Harlan, J.

JAN 22 1971

Circulated:

Joseph Charles Usner,
Petitioner,
v.
Luckenbach Overseas
Corporation et al.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit.

Recirculated:

[January —, 1971]

MR. JUSTICE HARLAN, dissenting.

Past decisions of this Court have expanded the doctrine of unseaworthiness almost to the point of absolute liability. I have often protested against this development. See, e. g., the cases cited by the Court, *ante*, p. —, n. 6. But I must in good conscience regard the particular issue in this case as having been decided by *Crumady v. The J. H. Fisser*, 358 U. S. 423 (1959), even if prior decisions did not inexorably point to that result. As my Brother DOUGLAS states, *Crumady* cannot justly be distinguished from the case before us. Much as I would welcome a thoroughgoing reexamination of the past course of developments in the unseaworthiness doctrine, I fear that the Court's action today can only result in compounding the current difficulties of the lower courts with this area of the law.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 12, 1971

RE: No. 47 - USNER v. Luckenbach Overseas
Corporation

Dear Bill:

Would you please join me in your dissent
in the above.

Sincerely,


W. J. B. Jr.

Mr. Justice Douglas

cc: The Conference

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1

From: Stewart, J.

Circulated: JAN 5 1971

SUPREME COURT OF THE UNITED STATES

Recirculated: _____

No. 47.—OCTOBER TERM, 1970

Joseph Charles Usner,
Petitioner,
v.
Luckenbach Overseas
Corporation et al.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit.

[January —, 1971]

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner, a longshoreman employed by an independent stevedoring contractor, was injured while engaged with his fellow employees in loading cargo aboard respondent's ship, the *S. S. Edgar F. Luckenbach*. He brought this action for damages against the respondent in a federal district court, alleging that his injuries had been caused by the ship's unseaworthiness.

In the course of pretrial proceedings the circumstances under which the petitioner had been injured were fully disclosed, and they are not in dispute. On the day in question the ship lay moored to a dock in New Orleans, Louisiana, receiving cargo from a barge positioned alongside. The loading operations were being performed by the petitioner and his fellow longshoremen under the direction of their employer. Some of the men were on the ship, operating the port winch and boom at the No. 2 hatch. The petitioner and others were on the barge, where their job was to "break out" the bundles of cargo by securing them to a sling attached to the fall each time it was lowered from the ship's boom by the winch operator. The loading operations had been proceeding in

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

5,6

2

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

circulated:

No. 47.—OCTOBER TERM, 1970

Recirculated: JAN 6 1971

Joseph Charles Usner,
Petitioner,
v.
Luckenbach Overseas
Corporation et al. } On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit.

[January —, 1971]

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types corrected

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

3rd DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

No. 47.—OCTOBER TERM, 1970

Recirculated: JAN 21 1971

Joseph Charles Usner,
Petitioner,
v.
Luckenbach Overseas
Corporation et al. } On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit.

[January —, 1971]

MR. JUSTICE STEWART delivered the opinion of the Court.

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In the course of pretrial proceedings the circumstances under which the petitioner had been injured were fully disclosed, and they are not in dispute. On the day in question the ship lay moored to a dock in New Orleans, Louisiana, receiving cargo from a barge positioned alongside. The loading operations were being performed by the petitioner and his fellow longshoremen under the direction of their employer. Some of the men were on the ship, operating the port winch and boom at the No. 2 hatch. The petitioner and others were on the barge, where their job was to "break out" the bundles of cargo by securing them to a sling attached to the fall each time it was lowered from the ship's boom by the winch operator. The loading operations had been proceeding in

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

February 16, 1971

MEMORANDUM TO THE CONFERENCE

Re: No. 74 - Zim-Israel Nav. Co. v. Tarabocchia
No. 152 - Patterson v. Humble Oil & Ref. Co.

The above cases, which appear at page 20 of the Conference List for February 19, 1971, had heretofore been held for our decision in No. 47, Usner v. Lukenbach Overseas Corp., decided on January 25, 1971.

In No. 74, the petitioner shipowner was held liable to respondent longshoreman, who was injured when another longshoreman negligently operated a shipboard wire sling in such a way as to dislodge a platform attached to the pier where the ship was unloading. There was no showing that the sling was defective in any way, and the injury occurred instantaneously as a result of the fall of the platform. The Court of Appeals for the Second Circuit affirmed the judgment for the respondent on the basis of its rule that "operational negligence" by a longshoreman unloading a ship renders the ship unseaworthy. The reason for the grant of certiorari in Usner was to resolve the conflict between this doctrine and the "instantaneous negligence" rule of the Fifth Circuit. Since the Fifth Circuit rule was upheld, I suggest that the appropriate disposition of this case would be to grant certiorari and remand to the Second Circuit for reconsideration in light of our decision in Usner.

The petitioner in No. 152 is a ship repairman injured while working under a contract between the respondent shipowner and his employer ship repair firm to fix a main shaft bearing. The ship was in port. At the time of the discovery of the malfunction, the crew of the ship had lifted the upper part of the bearing off the lower part and carefully secured it with a chain

lift. Members of the ship repair crew with whom petitioner was working later released the chain and left the upper part of the bearing resting precariously on the curved surface of the lower part. The petitioner slipped against the bearing and dislodged the upper part, which weighed 500 lbs. It fell and injured his foot.

The District Court granted respondent shipowner's motion for a directed verdict, and the Court of Appeals for the Fifth Circuit affirmed, holding that "the owner's warranty of seaworthiness does not extend to non-crew members regarding transitory conditions created by an outside repair crew during the course of substantial repairs to an existing unseaworthy condition when the transitory condition relates to the subject matter of the repair contract."

Although the particular fact situation is not on all fours with Usner, I would deny certiorari in this case.

PS

P.S.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

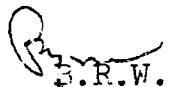
January 6, 1971

Re: No. 47 - Usner v. Luckenbach Overseas Corp.

Dear Potter:

Please join me in your opinion in this
case.

Sincerely,



B.R.W.

Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 21, 1971

Re: No. 47 - Usner v. Luckenbach Overseas Corp.

Dear Potter:

Please join me.

Sincerely,



T.M.

Mr. Justice Stewart

cc: The Conference

January 12, 1971

Re: No. 47 - Usner v. Luckenbach
Overseas Corp.

Dear Potter:

I have not taken the trouble to look at the petition for certiorari in the Mascuilli case, to which reference is made in footnote 19. I wonder, however, whether in the next to the last line of the first paragraph of that footnote the word "and" should not be "as."

Sincerely,

H. A. B.

Mr. Justice Stewart

January 12, 1971

Re: No. 47 - Usner v. Luckenbach Overseas Corp.

Dear Potter:

I think your opinion proposed for this case
is a very good one. Please join me.

Sincerely,

H. A. B.

Mr. Justice Stewart

cc: The Conference