

In the  
**Supreme Court of the United States**

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**SUPREME COURT, U. S.**

SEA-LAND SERVICES, INC., )  
                                  ) Petitioner, )  
                                  ) )  
                                  ) vs. )  
                                  ) )  
HELEN STEIN GAUDET, )  
ADMINISTRATRIX OF THE ESTATE )  
OF AWTRY C. GAUDET, SR., )  
                                  ) Respondent. )

Docket No. 72-1019

Washington, D.C.  
November 7, 1973

Pages 1 thru 32

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IN THE SUPREME COURT OF THE UNITED STATES

-----: :  
SEA-LAND SERVICES, INC., : :

Petitioner, : :

v. : :

No. 72-1019 : :

HELEN STEIN GAUDET, :  
ADMINISTRATRIX OF THE ESTATE :  
OF AWTREY C. GAUDET, SR., : :

Respondent. : :  
-----: :

Washington, D. C.  
Wednesday, November 7, 1973

The above-entitled matter came on for argument at  
11:13 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States  
WILLIAM O. DOUGLAS, Associate Justice  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HARRY A. BLACKMUN, Associate Justice  
LEWIS F. POWELL, JR., Associate Justice  
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

STUART A. MCCLENDON, ESQ., 3301 North Causeway Blvd.,  
Metairie, Louisiana; for the Petitioner.

GEORGE W. REESE, ESQ., 627 First National Bank of  
Commerce Building, New Orleans, Louisiana; for the  
Respondent.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-1019, Sea-Land Services, Inc., v. Helen Stein Gaudet.

Mr. McClendon?

ORAL ARGUMENT OF STUART A. MCCLENDON, ESQ.,  
ON BEHALF OF THE PETITIONER

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

We're here today for a discussion and a -- and hopefully, a clarification of the rights of litigants under the General Maritime Law, and under the wrongful death recovery allowed by the Court in the Moragne case in 1970. At that time, when the Court overruled the Harrisburg, and allowed recovery under General Maritime Law for wrongful death, the Court did not set any stringent or specific guidelines for future cases, but stated that the sifting through the courts would bring about, hopefully, a consistent law in this area.

In the case before us today, Mr. Gaudet was injured in 1966. He was a foreman -- longshoreman -- he was injured aboard a vessel in the Mississippi River in the port of New Orleans. He instituted suit in U.S. District Court, and brought it to judgement for the amount of \$175,000.00. Ten days after the jury award, which was rendered in the court of proper jurisdiction, Mr. Gaudet died.

His widow did not come into those proceedings requesting any damages for his death, or any modification of the award. Post trial motions were filed, and these were rejected by the trial court. The matter was appealed to the Fifth Circuit, and the appeal failed, and the judgement was paid.

Mrs. Gaudet proceeded with a separate suit, alleging that she had sustained severe financial loss as a result of the death of her husband. And, after reversing the trial court's rejection of her claim, the Fifth Circuit has rendered a decision stating that the previously received judgement was not a bar to her actions for wrongful death. We would like to briefly point out that the Courts have recognized, although at times have been confused over the difference between a survival action and a wrongful death action; survival being purely the right of the survivors of a decedent to recover for the damages which he sustained during his lifetime. The survival action -- the damages there -- terminate at the time of death.

The wrongful death action, on the other hand, is a right of recovery for the decedents for their damages sustained after the death of the individual.

This Court has dealt with these matters in the Flynn case, in the Mellon v. Goodyear, and the Michigan v. Freeland cases; and all of these were F.E.L.A. cases, which took Lord Campbell's Act, which had -- which was referred to in the



Moragne decision, and said that the right of recovery for wrongful death is a right which only exists if in the decedent there existed a right at the time of his death. And we are here today because the Fifth Circuit has said that even though Mr. Gaudet had received a judgement -- had obtained a judgement -- that, in some manner, the widow had a right to re -- to go forward with the claim for wrongful death.

We submit that the claim for wrongful death is a derivative action; and is derived from the initial tort -- the initial injury -- we're not dealing with an instantaneous death, which was not dealt with in these cases. We're dealing with an injury which results in certain injuries to the individual and then, at some time later, there is death -- weeks, or months, or, in several of these cases, many years later. And the Courts have held, especially in the Mellon case, that the right is a derivative right, and it derives from the original injury which the injured man sustained at the time he was involved in the accident. And if there is no viable cause of action, or right on his part, immediately prior to his death, that his heirs cannot renew their right to claim their damages.

This is the question which one of the -- questions before the Court today. We also submit it on our petition for writs that if the Court should find that the recovery is proper, then the uniformity which is desired in Federal law in

Admiralty and Maritime matters, and which has been consistently followed in the Jones Act in the Death on the High Seas, and in the cases since Moragne, in 1972, that the Fifth Circuit is departing from this by allowing damages for nonpecuniary loss. All of the cases under the Jones Act, Death on the High Seas, and General Maritime Law, have stated that the claim of the defendant -- the damages of the -- defendant must pay are pecuniary, and loss of love and affection, society, companionship, consortium, are not recoverable.

Since Mrs. Gaudet inherited the judgement of her husband in the amount of \$175,000.00, and eventually collected it, we submit that this is full pecuniary recovery for the damages that were sustained, and that the only recovery which, we submit, there should not be any, but if the Court should say that in some manner a cause of action exists, even though there wasn't one at the time of death, then, we submit, that in order to maintain uniformity that only non- -- pecuniary losses should be allowed, and that these have already been paid in this case.

This is the matter before the Court today. If the Court has any questions, we would be happy to --

Q Mr. McClendon, you indicated that Mrs. Gaudet inherited the estate of her husband.

MR. MCCLENDON: Yes, sir.

Q Suppose this were not the case; and, I take it,

this could be possible in Louisiana -- I do not know. But if this were a child -- if there were no widow, or something, would it make any difference in your statement of the case?

MR. MCCLENDON: I don't feel so, your Honor, that it -- there was no question that she was the proper representative, and as surviving spouse she did, in fact, inherit --

Q But I wondered whether there was any legal significance in the fact that she had inherited it?

MR. MCCLENDON: No, your Honor, except for the fact that we had let -- we submit that it became a property right which was then inherited by the heirs at the time of death. That when the jury award was rendered that a cause of action ceased to exist, and it was merged into a property right, which was then inherited by her; that the cause of action was not pending. If it had been pending -- if there was a pending claim at the time of death, we feel the law is clear, that there can be an amendment, or a merger, of the claim of the decedent for his damages into a wrongful death action.

But if the claim of the decedent for his damages has been terminated by settlement, by prescription, by statute of limitations, or by judgement, then there -- this precludes any right of the heirs of the --

Q Well, I understand your theory, but it seems to me it does not depend on the fact of inheritance, and that's -- this is what I wish to be assured about. Suppose there were



no widow. Suppose Mr. Gaudet had -- was a widower. I take it, in Louisiana you have wrongful death a possibility as, at least, for surviving minor children?

MR. MCCLENDON: Yes, sir. There are minor children's rights and ascendants --

Q And suppose they were not -- did not inherit in any way his estate.

MR. MCCLENDON: If there was --

Q We'd still have the problem, would we not?

MR. MCCLENDON: Yes, sir.

Q All right, all right.

MR. MCCLENDON: I think so.

Q Mr. McClendon, I haven't thought about this for a good many years, but, as I remember, there are two different basic kinds of wrongful death actions. One is a Lord Campbell's type -- The Lord Campbell's Act type, in which the survivors inherit the cause of action that the decedent would have had. And then there is a quite a different kind of a statutory action in which the survivors are given an independent cause of action for the death of the decedent.

MR. MCCLENDON: Yes, your Honor.

Q Am I right about that? I --

MR. MCCLENDON: Not wanting to --

Q And then there may be some merged classification somewhere in between those two theoretical causes of action.

And, wouldn't it depend here on which -- wouldn't the answer to the problem in this case depend upon which kind of wrongful death action we -- the Court was talking about in Moragne?

MR. MCCLENDON: Your Honor, not --

Q Or Moragne, as it's sometimes called.

MR. MCCLENDON: -- not wishing to argue with coun- -- with the Court, but it's submitted that the Lord Campbell's Act actually was a wrongful death statute which gave to the dependents a right to --

Q An independent action?

MR. MCCLENDON: -- an independent right of action which did, however, depend upon the existence --

Q Of a right of action of the decedent --

MR. MCCLENDON: -- of the right at the time of death. At the time of death.

And in the Carroll case, which is a case from the Supreme Court, on -- the Court said they -- the two can be merged, if the first has not been extinguished, then it can be merged into the claim of the dependents. But they are two separate causes of action. We prefer, for clarity, to try to distinguish between a survival action, which perhaps half of the states have, which enables the representative of the decedent to carry on the claim that he had sustained during his lifetime.

Q And that's a survival -- that's an inheritance

of the cause of action that the decedent had.

MR. MCCLENDON: Exactly.

Q But then there is another theory --

MR. MCCLENDON: Well, there's the wrongf- -- the true wrongful death act, which is the Lord Campbell's Act --

Q That is the only test I have ever --

MR. MCCLENDON: -- in which every state, is the right of the dependents to sue for their damages which have occurred, of course, after --

Q For the loss of the decedent by death.

MR. MCCLENDON: For the loss. Yes, sir. But the Lord Campbell's Act, which was, you might say, the original true wrongful death act, said that since this is a derivative action which goes back to the initial -- the original tort -- that, in order for the dependents to exercise their cause of action after the death of the decedent, there had to be in existence at the time of death, a right on the part of the decedent himself to sue for his damages. And if he extinguished that right in some manner, this extinguishes the separate right of the dependents.

Q Well, how about the matter of damages? Now, in the original action here by the decedent was it shown indisputably that there was total and permanent disability?

MR. MCCLENDON: Yes, sir, I believe there was, and I'm sure counsel will bring this out in his arguments. The

award was \$175,000.00. The injury was a back injury; he'd had surgery; the psychiatrist had said that it had created emotional problems; that he had become addicted to his own medication -- he was having a drug addiction problem; and he was severely emotionally disturbed; and he was about 45-year-old man at the time, with approximately 20-year work life expectancy. Evidence was submitted as to his total inability to work for life.

Q Total and permanent disability.

MR. MCLENDON: Yes, sir. This was the contention. Of course, being a jury award, there was no break-down in the award as to what portions --

Q But I suppose the defendant disputed that, didn't they?

MR. MCLENDON: Yes, sir. Yes, sir, we did.

Q I'm thinking of a case -- let's take a case -- the facts in this case really aren't all that -- they aren't spelled out. But let's take a case of a tortious injury -- personal injury -- that appears, at the time of the award by a jury to the injured party, to be partial, permanent disability, let's say; and then the award is made, and then the man, a month after the award, gets complications which are concededly and directly attributable to these personal injuries; and he then dies in a year. And now it's very clear that he's a total loss to his dependents as far as his earning

power goes. Would there be a cause of action then for his wrongful death, under your theory?

MR. MCCLENDON: No, sir, because of the desire of all of Courts to bring them into litigation, and when the matter was -- the evidence was produced at the initial trial, it anticipated everything that would happen to him. Now --

Q To him. Now, I know that it's very clear that he couldn't bring another lawsuit to say, "Well, look, I was -- the jury was wrong -- and the evidence was wrong," and I fully understand that. That's a commonplace -- he can't bring another lawsuit; his lawsuit is settled, rightly or wrongly.

MR. MCCLENDON: We submit that the claim of the --

Q But now he dies, and the question is, do his -- what, if any, additional cause of action do his dependents have for his wrongful death, attributable to that same tortious -- ?

MR. MCCLENDON: We submit --

Q -- injury?

MR. MCCLENDON: We submit, your Honor, that since it is a derivative right which goes back to the original tort, and must continue in a viable state until the death, that the judgement, even though it may have been inadequate, extinguishes it. And the dependents -- small children, perhaps, with many years of dependency -- are precluded from making any claim.

Q And how about elements of damage? In his own



lawsuit, of course, he can recover, I assume, for things like his own pain and suffering.

MR. MCCLENDON: Yes, sir.

Q Can his dependents, in a wrongful death action, recover for his pain and suffering?

MR. MCCLENDON: Well, under the General Maritime Law -- under the Law, no; under the statutes, no. Now, the Courts, of course, have gone into the state statutes, and gone into the state wrongful death, and to the state survivor statutes.

Q But they can recover, on the other hand, for their loss of -- the widow can recover, perhaps -- you say, not in Maritime Law, but that's the question -- that there might be other elements of damage --

MR. MCCLENDON: Yes, sir --

Q -- as contrasted to his pain and suffering, for which they, perhaps could not recover. They could, on the other hand, as con- -- recover for their loss of companionship and consortium.

MR. MCCLENDON: Yes, sir. And, of course, loss of support is a very large item of -- in a wrongful death claim, in the event that the death has occurred almost immediately with the accident. Then the dependents have a very large claim for the loss of support --

Q Loss of support, but which would be less, maybe,

than his own cause of action if he were, indeed, totally and permanently disabled, his loss of earnings would be greater because they would -- that loss would have had to have supported him during the balance of his life, and now he's dead.

MR. MCCLENDON: Yes, sir; yes, sir, this is true.

This is true.

Q May I put a question on the same line and another direction: What if he died on the first day of the trial of this case, or at some time before the verdict. How many causes of action would have existed, and what would be the elements of damage?

MR. MCCLENDON: There would be two causes of action: His own cause of action would survive, and would be --

Q In the widow?

MR. MCCLENDON: Into the widow or representative of the estate --

Q -- of the estate if there were no widow.

MR. MCCLENDON: And then there would come into existence, at the time of death, a wrongful death action for the dependents for their loss of the loved one. There would be two causes of action; but there was only one wrong -- the initial accident. The Courts have not looked at the death as a wrong. They have looked at it more as an item of damages that flowed from the initial wrong. And so, when the claim of the decedent has been extinguished, insofar as it relates to

the wrong, the Courts have said that the death does not bring into existence a cause of action -- a -- it's not a new tort, it's just an element of damage.

Q You say two causes of action. Two trials, also?

MR. MCCLENDON: No, sir. They may be merged, and were merged in the Carroll case, which is a Supreme Court case, and which are commonly merged -- commonly merged when death occurs shortly after the accident, or simultaneously with it. The -- of course, if it's a simultaneous death -- an instantaneous death -- there would be no survival action.

Yes, sir.

Q If, say a seaman sues for injuries under the Jones Act, and that occurred on the high seas --

MR. MCCLENDON: Yes, sir, it could.

Q And then he dies. And then -- is there an action under the Death on the High Seas Act there?

MR. MCCLENDON: Yes, sir.

Q On behalf of whom?

MR. MCCLENDON: There is a survival -- well, in the question --

Q Well, the Act says who may recover, right?

MR. MCCLENDON: Yes, sir.

Q Does it also -- what if the seaman had already recovered? Under the Death on the High Seas Act?

MR. MCCLENDON: Then we submit that he would have --

Q Well, you submit, but are there holdings --

MR. MCCLENDON: We don't have holdings on Jones Act, your Honor. We don't -- all of the holdings under F.E.L.A. --

Q Well, what about Death on the High Seas Act?

MR. MCCLENDON: Let's see. Under the Death on the High Seas Act, if he had recovered during his lifetime? There are no cases under Death on the High Seas, as I -- as we see the -- They're all under F.E.L.A.

Q Well, Congress -- under Death on the High Seas Act, Congress has not made it a precondition that a cause of action exist at the time of death?

MR. MCCLENDON: Actually, in Death on the High Seas Act, the rule is rather harsh. It says that if the injured man had a suit underway, so to speak, and he dies --

Q Yes --

MR. MCCLENDON: -- then all of his claims for pain and suffering are extinguished and --

Q Yes --

MR. MCCLENDON: -- cannot be passed on to his heirs, but they do get the wrongful death claim for their loss. But his funeral expenses, and pain and suffering claim --

Q But, what if he -- what if he is already recovered?

Q You've got a judgement --

MR. MCCLENDON: We don't have any cases on the Death

on the High Seas Act. But if it is a result of the F.E.L.A., which is what Death on the High Seas is, it came from the F.E. --

Q The Jones Act is what incorporates F.E.L.A. Death on the High Seas Act is something else.

MR. MCCLENDON: You are correct, sir.

Q It doesn't involve seamen.

MR. MCCLENDON: Then we do not have cases, and we do not know of cases, which have dealt with this problem.

Q But, under the Death on the High Seas Act, in the event there is an action, the elements of recovery are pecuniary only?

MR. MCCLENDON: Yes, sir. Pecuniary only.

Q The survivor -- assuming he does have a good Death on the High Seas Act action?

MR. MCCLENDON: Yes.

Q The elements of his damage do not include pain and suffering -- ?

MR. MCCLENDON: Do not include -- well, no, sir. The pain and suffering would be the decedent's right claim --

Q So, well, again I ask you: It does not include the damage to the heirs -- do not include pain and suffering, and --

MR. MCCLENDON: No, sir, they do not. They are --

Q Just pecuniary damages --

MR. MCCLENDON: Just pecuniary loss in the Death on



the High Seas.

Q And the same is true under the --

MR. MCCLENDON: Under the Jones Act.

Q -- under the Jones Act.

MR. MCCLENDON: And in the cases since Moragne, except for a Louisiana case, there has been only recovery for pecuniary loss.

We prefer to reserve the rest of our time --

MR. CHIEF JUSTICE BURGER: Mr. Reese?

ORAL ARGUMENT OF GEORGE W. REESE, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I think the questions that were asked about (let me get my notes) -- about the inheritance and the damages are particularly interesting in Louisiana, because what happened to this judgement is, the lady had a son who was a major, and in Louisiana, with one child the surviving widow inherits the community property, which this happens to be -- a judgement of a husband is a community property -- she inherits half of the judgement directly and her child, who is a major, not dependent and wouldn't have a claim under Moragne, by the way --

Q You mean, he's a major, not a minor --

MR. REESE: Yes.

Q Or is he a major in the Army?

MR. REESE: He is a major, not a minor. Yes, and he therefore would not have a pecuniary loss involved in his father's death, and therefore would not have been a claimant under the Moragne decision. And he did inherit the -- what we call the -- well, his mother inherited a usufruct of his half. It gets a little complicated, depending on the number of children -- if there are more children, the mother's half -- portion goes down -- the children's portion goes up; she inherits her share, her portion, in -- I guess they call it fee simple and common law -- and she gets a usufruct -- and I don't know what the word is in common law for it, but she get the use of it during her lifetime, or until she remarries --

Q Life estate, I guess, there --

MR. REESE: Sir?

Q Life estate, or something like that.

MR. REESE: Yes, I think it is life estate. I've never taken that --

Q What's that called in Louisiana -- cessation or something, when you decide where the money goes? What's that lovely phrase they have down there for it? When you probate in the state?

MR. REESE: Succession?

Q Cessionation?

MR. REESE: No, I thought that was used pretty generally, too. I'm fairly parochial with the amounts of succes-

sion, yes --

So, the answer is that -- you know, this is not merely a matter of this lady inheriting this entire judgement. Louisiana doesn't provide for that, and I'm assuming there are differences in states all over the Union which make the inheritance entirely different, in most states, as I understand it, from the right of a dependent to collect money damages for loss.

Q It's just money in the bank, then, is it?

MR. REESE: Yes.

Q -- under Louisiana law? And it might have come from an inheritance --

MR. REESE: A house --

Q -- from an uncle in England or some place.

MR. REESE: Right. Yes. And it has to be distributed under a different set of rules than your decisions in Moragne are going to be. I mean, in the outgrowths of your decisions in Moragne.

Q But, may I ask, Mr. Reese? Did this judgement which he recovered include an award for impaired earnings for the rest of his life?

MR. REESE: Well, I don't know about --

Q Well, was it more or less that way? Actuarially, or -- ?

MR. REESE: I produced evidence that the man did not recover from his condition. Counsel defending it vociferously

defended --

Q Well, I know, but what I'm trying to get at is, whether there went to the jury, as an element of his damages, an item of impaired earnings -- that hereafter, instead of earning \$200, he can hope to earn not more than \$50 a week for the rest of his life, and actuarially his life span is now going to be "X" years --

MR. REESE: We produced no actuary at the time. We did produce medical evidence of the fact that they didn't think he would recover to be able to perform the same occupation he had performed before.

Q So then, that, in terms of his impaired earning ability?

MR. REESE: Yes, sir.

Q And so there is, in this damage award, an element of a compensation for impaired earning ability, isn't there?

MR. REESE: Very practically speaking, I'll say there's no doubt it.

Q Well, now, if that's true, why doesn't that take care of the -- any dependents' claim?

MR. REESE: Well, let me say that there is a principle involved -- you know, a principle of law involved. I don't know, and I don't think any of us here know, looking at the jury's verdict, whether or not that jury took into con-

sideration --

Q Well, it went to them as considered, didn't it?

MR. REESE: It went to them five years after the man died --

Q I know, but they were told to consider that element, were they not?

MR. REESE: Right.

Q All right. Now, what claim of dependency would his wife and children have?

MR. REESE: It's based on -- the child now, in this particular case, doesn't have any. There could be a situation, for instance, in Louisiana --

Q Why -- what doesn't happen? You mean, under Louisiana it doesn't have any -- ?

MR. REESE: Well, no. I'm saying, under the Moragne decision, because you all said that it was the loss of those --

Q Right --

MR. REESE: -- loved ones, and their particular loss involved. So he's a major, would have no pecuniary loss arising out of a decrease in income. There is a possibility in Louisiana law that a person could have five children, or four children, and the widow, who is the big loser, financially, might end up only getting one-fourth of this recovery, and the children would get the other -- at least, the fee simple or the other -- the rest of the three-fourths, and it definitely, then,



wouldn't cover, no matter what the jury gave him for his future loss -- they would be giving money to four children who don't need the money, whereas the wife, who took the pecuniary loss, would end up with a lot -- an awful lot less after paying a lawyer -- you know, it's a continued fee proposition -- there are a lot of factors involved in it --

Q Well, your theory is that, then, all members of the family together can recover more than just what a jury would award for loss of earnings -- that they can, in effect, duplicate that ro- -- that award in some way.

MR. REESE: Well, I agree with the first half of your statement and disagree with the second half. And that's already being done. When counsel suggests that if a man dies before the thing -- well, not really, no, I wouldn't be fair saying that. But what I am saying is, is that the second jury would have -- or the second fact finder -- would have the opportunity to decide which part of the \$175,000, for instance, to credit against what they're going to give her in a trial for her own pecuniary loss. I mean, I'm making --

Q Well, this case hasn't gone to trial yet, of course --

MR. REESE: No, sir, it was dismissed in the District Court --

Q Yes --

MR. REESE: -- reversed in the Circuit, and then

faced this Court in --

Q Are you suggesting, now, that there might become an issue of how much of the \$175,000 --

MR. REESE: I am su-- --

Q -- is to be credited against any case that she establishes of damages as dependent, is that -- ?

MR. REESE: I'm suggesting there is absolutely no way to avoid it. Yes, sir. Definitely would be --

Q How are you going to break down the \$175,000?

MR. REESE: I think it's a complicated problem, which is what we suggested in the brief in the Fifth Circuit; but, because it's a complicated problem, or because it creates some difficulty in the ascertainment of damages, you know, I think the principle still stands that -- and let me say -- I admit I got a fairly big verdict in this thing, but the verdict could have been \$35,000. You know, the jury could have decided that counsel was right, and possibly he hadn't really been permanently disabled, and then died ten days later; and you'd be presented with an entirely different set of facts, with a thirty-five year old widow, and, you know, eight minor children-- It could work out that way, too.

You know, sir, what we're talking about, I believe, is the principle out of Moragne. You know, we talk about it sifting down, but it's sifted right back up to you all, I'm afraid.

Q Under your theory, I take it the defendant can be required to pay more by way of loss of earnings than the first jury determined the plaintiff there were entitled to recover, taking both suits together?

MR. REESE: Yes, sir. And I'm saying that had this man died before the date of judgement, that same situation could have existed. I'm saying that -- what I am suggesting, if the rule is worked out that the second jury who decides the wife case -- wife's case -- is given instructions on crediting the money that she received, that she received, now, not that the whole family received -- but that she received as a result of this thing -- yes, they could end up paying more money. There isn't any question about it.

Q Well, how do you get over the analysis in Mellon and Goodyear? I realize that was a F.E.L.A. case, but there there was a settlement --

MR. REESE: Yes.

Q -- and it was held that that barred any claim of the dependents.

MR. REESE: Well --

Q Because the settlement had to be taken to have included any dependency claims. Now, how is this different?

MR. REESE: Excuse me, I didn't mean to interrupt --

Q That's all right.

MR. REESE: When we -- counsel was discussing the

matter of the various statutes -- there aren't just two or three. You know, there is the Lord Campbell's Act, which, by the way, is what the F.E.L.A. and the Death on the High Seas deal is. That's exactly what the language is -- comes right out of it, and those cases are based -- the Mellon and those cases are based strictly on an interpretation of those words which say that the claim must be pending at the time of the decedent's death. And it's an interpretation of legislative intent -- you can't get around it.

The pure death claims that have been discussed in *Wilson v. Massengill* -- there are cases that say exactly what I'm suggesting this Court adopt from *Moragne*. I'm not coming up, you know, with a brand new approach. I admit I'm coming here with a minority approach. But there are part death, part survival actions -- which is the usual thing, by the way. I think that there are very few pure survival statutes. Death on the High Seas happens to be one --

Q So, you're suggesting that, for purposes of *Moragne*, and for the people who would get the benefit of the *Moragne* decision, that we not be guided by what the Congress has said the rule should be with respect to seamen, or with respect to the people having the benefit of the Death on the High Seas Act?

MR. REESE: Yes, I'm suggesting exactly that. In other words, if you are going --

Q And that we should not adopt what Congress has thought should be available to seamen's survivors?

MR. REESE: Right. And the reason I'm suggesting it is that Congress has adopted some ancient language in connection with the F.E.L.A. and --

Q Well, I must say, though, ordinarily in framing admiralty rules that we have consulted what Congress has done in congnate situations, haven't we?

MR. REESE: No, I do agree with that, and I do agree that what I am suggesting is a minority position, and I am agreeing that Congress has in the F.E.L.A. and the Death on the High Seas Act adopted the Lord Campbell language --

Q Yes, sir, and there were indications in Moragne, also, that perhaps the Court should look to those Congressional--

MR. REESE: And other things, yes --

Q -- guidance --

MR. REESE: Yes, sir --

Q -- in the -- on this very subject --

MR. REESE: No doubt about it. And what I'm saying here this afternoo- -- well, it's afternoon, yeah -- this morning is that there's a certain amount of legislation and arbitrariness, you know, in the matter of admiralty law that you create, in effect, and I think we could look that squarely in the eye, and I think that the conflict probably is between a very harsh rule which you could adopt by using the Congres-

sional language, and other language that you all have adopted in previous cases in discussing admiralty and the, you know, type of feeling you ought to have toward the wards of this Court in the admiralty matters.

Q Wouldn't it help your case considerably if the elements of damage under -- for those who can have advantage of Moragne, who are not limited to pecuniary loss --

MR. REESE: Yeah, it would help my case in --

Q Because there would be --

MR. REESE: -- because that has not been determined.

Q If Mellon, in that line of cases, if they hadn't assumed or held, or been limited to pecuniary loss, it may be that that precondition of a cause of action wouldn't have obtained.

MR. REESE: Aren't you, also, assuming that the cases you're talking about still come under the F.E.L.A. You still have the opportunity, and it has not been decided yet, by this Court or any Circuits, as far as I know, whether Moragne is limited to pecuniary loss.

Q Well, I understand that, I understand that.

MR. REESE: And, you know, that's another day and another hour, and possibly it might have an effect on your decision in this case.

I think that's basically all I had to answer in connection with the counsel's statement. I don't read the Moragne



case to indicate anything but that you can't recover. If you all read it differently and I'm reading it wrong -- But I don't know whether there is a pure survival action in Moragne. It seems to me it's a -- it reads like a pure death claim -- it reads like the type of thing Wilson v. Massengill says the South Carolina statutes like -- So -- Any other questions?

Thank you, sir. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. McClendon?

REBUTTAL ARGUMENT OF STUART A. MCCLENDON, ESQ.,

ON BEHALF OF THE PETITIONER

MR. MCCLENDON: Yes. The Moragne case was decided to provide a remedy where there was none, and where the harshness of the Harrisburg had been -- in effect, made a mockery of over the years by various by-pass procedures. And so, in Moragne, where there was virtually an instantaneous death, the widow -- and no remedy -- the remedy was supplied -- that the case before the Court today is not one in which there is no remedy. The remedy was received, and the Fifth Circuit points out the problem which will be created by apportionment of damages to go back into the jury award and try to determine which of these damages were anticipatory of the death or the loss of income of Mr. Gaudet, in the footnote on page 4 of the Fifth Circuit's decision.

Again, we would simply point out that the fact that the right is derivative, rather than representative, is, in our

opinion, the crux of the question before the Court. If the original tort gives rise to two courses of action, potentially, then occurrence of the death is not that which creates the right of the dependents to bring their action. It is the original tort, and if this is extinguished by the injured man during his life, the Courts have said that this -- he has received his pecuniary loss, and you are opening a Pandora's box to go and try to carry that --

Q That makes some -- it might make some sense if, as long as you assume that the -- or as long as you hold that the damages recoverable by the survivors are limited to pecuniary loss. Now, where did that rule come from? That the survivors are under the -- for e- -- the Jones Act, and Death on the High Seas, and F.E.L.A. -- that the damages of survivors are limited to pecuniary damages?

MR. MCCLENDON: It has been in all of the cases, your Honor --

Q Well, I know, but is that a construction of the statute, or just --

MR. MCCLENDON: It was not in the sta- --

Q Yes?

MR. MCCLENDON: It was not in the statute, no. It was just -- the statute just set down --

Q That was the rule of Lord Campbell's Act, wasn't it?

MR. MCCLENDON: Yes, sir. It came through F.E.L.A. and it -- the statute said --

Q Yes. But let's assume, for the moment, that a widow could recover for consortium -- the loss of consortium. Now, it wouldn't make much sense, would it, to way that the recovery by the decedent extinguished the widow's cause of action? It really wouldn't make much sense, would it?

MR. MCCLENDON: This is the hiatus -- this is the error --

Q It makes it -- it would make more sense -- it makes some sense if you're talking about pecuniary loss.

MR. MCCLENDON: Yes, sir, and the -- of course, there are several points --

Q But it doesn't if it's consortium --

MR. MCCLENDON: These were several of the points in our brief.

Q And Moragne said we had -- so, I suppose, part of our problem is, what are the elements of damages available under Moragne?

MR. MCCLENDON: Yes, sir; yes, sir. And whether, to maintain uniformity, we are to follow what has been done in the other Acts.

Q And I gather the widow was not a party to his lawsuit, alleging a loss of consortium, was she?

MR. MCCLENDON: No, sir. That's pretty hard to do.

Q So that's still uncompensated, isn't it?

MR. MCCLENDON: Yes, sir. It isn't a question of compensation, it's a question of extinguishing the action before the death occurs. It's an area where -- I don't know if there's a true counterpart, or a comparable situation --

Q Well, what's the derivation of the claim for loss consortium?

MR. MCCLENDON: It's the love, the affectionate relationship of the husband and wife.

Q It's common law, isn't it?

MR. MCCLENDON: Yes, sir. We are a civil law State, but you are right, sir, this is true.

Q Well, of course, the area we are dealing with today --

MR. MCCLENDON: It's the same today --

Q -- we're framing a --

MR. MCCLENDON: Yes, sir.

Q -- Federal Admiralty rule, aren't we?

MR. MCCLENDON: Uhhum.

Thank you, your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:56 o'clock a.m., the case was submitted.]