

LIBRARY

SUPREME COURT, U. S.
WASHINGTON, D. C. 20543

In the

Supreme Court of the United States

C-2

MOBIL OIL CORPORATION, ET AL.,

PETITIONER,

V.

MRS. FRANCE NELL HIGGINBOTHAM, ET AL.,

RESPONDENTS.

No. 76-1726

Washington, D. C.
January 10, 1978
January 11, 1978

Pages 1 thru 29

Duplication or copying of this transcript
by photographic, electrostatic or other
facsimile means is prohibited under the
order form agreement.

Hoover Reporting Co., Inc.

*Official Reporters
Washington, D. C.*

546-6666

links

IN THE SUPREME COURT OF THE UNITED STATES

----- :
MOBIL OIL CORPORATION, et al., :
 :
Petitioner, :
 :
v. : No. 76-1726
 :
MRS. FRANCE NELL HIGGINBOTHAM, et al., :
 :
Respondents. :
----- :

Washington, D. C.,

Tuesday, January 10, 1978.

The above-entitled matter came on for argument at
2:35 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

CARL J. SCHUMACHER, JR., ESQ., 1106 Arabella Street,
New Orleans, Louisiana 70115; on behalf of the
Petitioner.

JACK C. BENJAMIN, ESQ., Kierr, Gainsburgh, Benjamin,
Fallon & Lewis, 1718 First National Bank of Commerce
Building, New Orleans, Louisiana 70112; on behalf
of the Respondents.

C O N T E N T S

<u>ORAL ARGUMENT OF:</u>	<u>PAGE</u>
Carl J. Schumacher, Jr., Esq., for the Petitioner.	3
Jack C. Benjamin, Esq., for the Respondents.	10

[Second day - pg. 18]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-1726, Mobil Oil against Higginbotham.

Mr. Schumacher, you may proceed whenever you're ready.

ORAL ARGUMENT OF CARL J. SCHUMACHER, JR., ESQ.,

ON BEHALF OF THE PETITIONER

MR. SCHUMACHER: Thank you, Mr. Chief Justice; and may it please the Court:

I appear for Mobil Oil Corporation, the Petitioner. The acts that bring us to this point in this suit are really simple. Indeed, I don't believe there are any facts that are in dispute at this stage of these proceedings.

On August 15th, 1967, four men were killed when a helicopter in which they were riding crashed into the Gulf of Mexico, after leaving a fixed platform, an artificial island, and returning toward the shoreline. The crash occurred some 100 miles off the Louisiana coast.

The case was tried in the district court on three theories by the plaintiffs, seeking a remedy for death damages based upon Death on the High Seas Act, damages under the Jones Act, and damages under the general maritime law.

The issue before this Court, and the sole issue, is whether or not this Court in Moragne, to use Judge Brown's language, consigned the Death on the High Seas Act to the briny deep.

Did this Court, by Moragne, reduce the Death on the High Seas Act to the scrap heap, or reduce it to the level of a nonstatutory restatement, as Professors Gilmore and Black have said or suggested or questioned?

Our submission is that clearly Justice Harlan, in the opinion in Moragne, did not intend to do so. We submit that it's clear beyond any possibility of doubt that this Court, in Moragne, did not decide more than it had to. And when Justice Harlan wrote, "We conclude that the Death on the High Seas Act was not intended to preclude the availability of a remedy for wrongful death under general maritime law in situations not covered by the Act", he specifically declined, or this Court specifically declined to, by Moragne, appeal or nullify or circumvent DOHSA.

The case comes before Your Honors because of a conflict in the opinions of the First Circuit, in Barbe vs. Drummond, and of the Fifth Circuit in Law vs. Sea Drilling.

The question arises because the Fifth Circuit in the instant case, the panel of the Fifth Circuit that heard Higginbotham et al., decided that it was precluded from deciding for itself whether or not Moragne nullified the Death on the High Seas Act. It said it was precluded by its own rules that required it to follow the decision of an earlier panel in the Law case. In Law, Judge Brown speaking for the Fifth Circuit says: No longer does one need a State remedy,

no longer does one need a State court, with the admiralty as a court, and DOHSA as a remedy. There is a federal maritime cause of action for death on navigable waters, any navigable waters, and it can be enforced in any court.

QUESTION: Well, "by any navigable waters" he was of course including the three-mile limit.

MR. SCHUMACHER: He was including, Your Honor, the three-mile limit, which clearly there was good authority for him to do so. But the facts in Law involve deaths beyond the three-mile limit, as did the facts in Barbe vs. Drummond.

The First Circuit, addressing itself to the identical question, came to just the opposite conclusion. The court, in Barbe, said: Since DOHSA clearly provides a cause of action for wrongful death in this case, we fail to see how Moragne applies. We hold that the measure of damage for wrongful death provided by DOHSA, namely pecuniary loss, controls in the instant case.

Now, both the petitioner and the respondent, in the briefs before the Court, have addressed themselves to the intention of the Congress in passing the Death on the High Seas Act.

I submit to the Court that the statute itself demonstrates that the Congress intended that the Death on the High Seas Act be the exclusive remedy for death actions occurring -- or where death occurs more than three miles out,

out of the territorial waters of the State. It reads, "Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from shore ... the personal representative of the decedent may maintain a suit for damages..."

But the damages provision, which is the provision which bears on directly on the Higginbotham case, provides, "The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained..."

And whether our reading of the Congressional Record of 1920 is correct and we properly understand the intention of the Congress, or whether that suggested by the respondents is, may be debatable; but the language of the statute certainly cannot be debated. And the statute says that the measure of damages shall be the pecuniary loss.

There is no exception to that command.

I suppose, Your Honors, that the petitioner's argument really reduces itself to this: We feel that in Moragne the Court correctly limited itself to consideration of death occurring within the three-mile limit. We feel that it did not signal or suggest, as the Fifth Circuit in Lay guessed, that the Moragne decision applied beyond the three-mile limit; and, on the contrary, we believe that the statute itself mandates that it apply exclusively to the Death on the High Seas Act, for the Moragne-Gaudet remedy to be applied beyond

the three-mile limit would be to totally emasculate the Act of the Congress.

Your Honors, that's what I've come here to say. If any member of the Court has questions, of course I will be glad to try to speak to it.

QUESTION: I have one question, counsel. You haven't talked a great deal about the Gaudet case, if I remember the name of it.

MR. SCHUMACHER: Gaudet.

QUESTION: Understandably.

QUESTION: When one reads that opinion, it seems to read -- it doesn't seem to be limited in its language to the territorial waters, although the whole, I know the facts there arose within the territorial waters. What -- do you have anything to say about Gaudet before you go home?

MR. SCHUMACHER: Your Honor, I believe, in Footnote 22 of Gaudet this Court, speaking through Mr. Justice Brennan, committed error. I believe the construction placed by the majority in Gaudet on the Death on the High Seas Act was in error. I don't think that's really germane to our case, because I think Gaudet was limited, should have been limited by rules of interpretation to the facts of Gaudet.

QUESTION: Assuming it's wrongly decided, it may be, and assuming that it's not in fact in its terms limited, what am I supposed to do with it?

I wasn't here when Gaudet was decided.

MR. SCHUMACHER: I'm aware of that, Your Honor.

QUESTION: Am I to follow it or am I free to disregard it?

QUESTION: Wasn't the footnote just addressed to whether the Death on the High Seas Act foreclosed this extra item of damages within the State's waters?

MR. SCHUMACHER: I think not, Your Honor, I think that particular footnote -- it was, in that the case was only limited to the State's waters.

QUESTION: That's right, those are the facts.

QUESTION: Are you suggesting this was dictum, then?

QUESTION: What you don't like?

MR. SCHUMACHER: Certainly, Your Honor. Your Honors, I should say I come from a State where the very first Article of our Civil Code defines the word "law", and it defines "law" as "the solemn expression of legislative will."

Now, coming with -- it was the very first codal article I read when I went to the law school. So, coming from that background, and reading the Death on the High Seas Act, and knowing that this case involves deaths that indeed occurred on the high seas, as defined by the Legislature, I suppose I would say Q.E.D.

But, in effect, I don't believe the Gaudet footnote or the Gaudet decision itself is necessary for the decision in

this case.

QUESTION: Isn't the difference as to whether there is ratio decidendi of the opinion or dicta, as to whether it's "with you or agin you"?

MR. SCHUMACHER: Your Honor, I --

QUESTION: Is there any other difference?

MR. SCHUMACHER: Mr. Justice Marshall, in my Parish it's said, "whose ox is being gored", but it's the same rule of law, yes.

[Laughter.]

MR. SCHUMACHER: But the facts again in Gaudet do not require the Court to decide anything more than territorial water death.

QUESTION: Well, let me pursue it just a little more, in a serious level, too. Part of Justice Harlan's rationale in the Moragne case was the desire for uniformity throughout the -- on both parts of the high seas. Now are we possibly in the position where, in order to achieve uniformity, we must read Gaudet literally and apply it in the same area that the Death on the High Seas was applied? But how do we end it?

MR. SCHUMACHER: Your Honor, certainly if there were to be complete uniformity in all things, there would be no need for courts or lawyers or any administrative process. As I understand it, that's not what the admiralty and maritime law means when it speaks of uniformity. It means uniformity

in the matters of liability leading to the decision as set out by the Fifth Circuit in -- quoted at page 20 of our brief:

"The 'uniformity' that is fundamental in maritime law has to do with the bases of liability, not with differing elements of damages that may be recoverable in differing circumstances with differing class of beneficiaries."

And that comes from the Dennis case.

QUESTION: I understand.

MR. SCHUMACHER: Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Benjamin.

ORAL ARGUMENT OF JACK C. BENJAMIN, ESQ.L

ON BEHALF OF THE RESPONDENTS

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

I want to point out to the Court in the very beginning that my client, Mrs. Shinn, one of the respondents, was -- her decedent was entitled to the benefits of the Jones Act, the Death on the High Seas Act and the general maritime law, as found by the district court and affirmed by the Fifth Circuit, as distinguished from Mrs. Higginbotham, whose decedent was not found to be a seaman.

So, with regard to the issue presented upon review by this Court, and I read, if I may take the time, "Certiorari was granted on the question whether the maritime cause of

action for death occurring within a State's territorial waters created by this Court in Moragne completely replaces the statutory cause of action for death mandated by Congress with respect to death occurring within the geographical scope of the Death on the High Seas Act" may not dispose of the Shinn matter, but may dispose of the Higginbotham matter.

Now, I think it was the intention of the petitioner to ask the Court to consider both the Death on the High Seas Act and the Jones Act in relation to the Moragne cause of action for wrongful death, and we have so treated that in our brief. But I merely wanted to make reference to that to the Court.

QUESTION: Of course a case can be -- a death -- it says, "a death occurring within the geographical scope of the Death on the High Seas Act" might or might not be also covered by the Jones Act, depending upon whether the decedent was a seaman or not. Correct?

MR. BENJAMIN: That is correct, Your Honor.

QUESTION: Both would be within the geographical scope of the Death on the High Seas Act.

MR. BENJAMIN: They could be. But petitioner, if you read the question presented literally, --

QUESTION: Yes.

MR. BENJAMIN: -- it says "the statutory cause of action", it doesn't say "statutory causes of action".

QUESTION: Yes.

MR. BENJAMIN: And the petitioner, no doubt about it, is addressing itself to the Death on the High Seas Act.

QUESTION: Right.

MR. BENJAMIN: Be that as it may, we are not urging this Court not to consider the Jones Act in relation to the Moragne cause of action.

Counsel for the petitioner pointed out, and this Court has accepted the question of review as to whether or not the Moragne cause of action replaces completely the Death on the High Seas Act, or whether or not it's necessary to relegate it to the briny deep. And we believe that the real issue is not whether the Moragne cause of action replaces a statutory Act of Congress, but whether or not it can recognize, as the Court, we think, did in the Moragne case, the existence of a cause of action for wrongful death under the general maritime law, which can augment, complement and supplement the existing federal statute.

And we ask the Court to consider that its decision in Moragne is just that. In overruling The Harrisburg, the Court must reflect back, The Harrisburg case in the late 1880's was cited for the proposition that there was no cause of action for wrongful death under the general maritime law wherever the wrongful death occurred, so long as the death occurred within waters under federal jurisdiction, both within and without the three-mile limit.

QUESTION: But The Harrisburg wasn't based on an Act of Congress.

MR. BENJAMIN: No, sir, it was not, Mr. Justice Rehnquist. The Harrisburg involved, as I recall it, a collision which occurred off the coast of Massachusetts, somewhere between the coast of Massachusetts and Martha's Vineyard. A question as to whether or not it really was territorial waters or the high seas. But, in any event, over the years, the courts, and this Court has held that The Harrisburg has prohibited, or had prohibited a cause of action for wrongful death.

QUESTION: Aren't we freer to overrule a judicially created doctrine like The Harrisburg which, you say, was held to prohibit a cause of action for wrongful death, than we are to overrule a damage limitation in an Act of Congress?

MR. BENJAMIN: Precisely. I think petitioner has overstated the problem. When petitioner suggests in its brief that this Court has not the right to relegate an Act of Congress to the scrap heap, petitioner overlooks the fact that this honorable Court has the right, if not the duty, to reverse prior decisions of this honorable Court, which it feels are wrong or inappropriate or for whatever reason. And that's all we're asking the Court to do.

QUESTION: Well, what do you think, though, would be -- what if it never had been necessary to overrule Harrisburg?

Suppose there had always been a wrongful death action on the high seas, and then Congress passed the Death on the High Seas Act, saying that death on the high seas, an action for death on the high seas shall lie and that the following damages shall be recoverable?

MR. BENJAMIN: I think, Mr. Justice White, that there would have been a jurisprudential disaster.

QUESTION: Well, it may be, but could the Court go on and say, then say, well, nevertheless we're going to allow recovery of more than pecuniary damages?

MR. BENJAMIN: Well, Congress certainly has the right to do that by statute, but I would like to address myself to one of the provisions of the Death on the High Seas Act itself, because we differ very greatly from petitioner's interpretation of what Congress intended to do.

Now, this Court combed the legislative history of the Death on the High Seas Act in the Mozagne case, and I don't think it would be appropriate for me to go through all of the ramifications, but I merely point to what was known as Section 7 of the Act, when petitioner read to you the provisions of the Act, petitioner omitted this portion of the statute which says that "The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter." And this language resulted after great debate on the Floor of the House, where there was some

language in this amendment which restricted the State statutes to territorial limits, and that language was excluded.

So we believe this Act was passed by Congress, it was really to confer jurisdiction in federal court, which had not existed before, before 1920. It was not a grant of exclusive jurisdiction, because those statutes which had been passed by the State, which could have applied to the high seas, were still permitted to by the very language in the statute that I just read to the Court.

Now, if Your Honors inquired of me which States had such statutes, I'm afraid I could not answer the question; obviously there must have been some which did, because there wouldn't have been the necessity for the discussion in the House when the legislation was debated.

QUESTION: But no State would have had power, would it, to enact laws creating liability for injury or death that occurred outside that State's territory, including its territorial waters?

MR. BENJAMIN: Well, I don't know that that issue had ever been presented to this Court, Your Honor, but I'm under the impression that some States did have statutes which permitted --

QUESTION: Which purported to. But I'm asking as a matter of constitutional power.

MR. BENJAMIN: Yes.

QUESTION: A sovereignty only can enact laws applicable within its territorial jurisdiction, and the high seas are not within the jurisdiction of any one of our domestic States.

MR. BENJAMIN: Well, Mr. Justice Stewart, we know that now. I'm not so sure the Congress over the years has recognized that.

QUESTION: Well, we know it, though, don't we?

MR. BENJAMIN: Yes, sir.

QUESTION: Right.

QUESTION: But the Death on the High Seas Act does expressly limit recovery to pecuniary loss?

MR. BENJAMIN: The Death on the High Seas Act does limit recovery to pecuniary loss.

QUESTION: So that just isn't a judicial limitation on damage recovery?

MR. BENJAMIN: No, that's a statutory limitation of the Act itself. And the Jones Act, a limitation on damages, is limited to pecuniary loss. But the two statutes have never been held to be exclusive. They have been implementing one another, and the courts have used them to implement one another over the years. A Jones Act seaman had called upon the provisions of the Death on the High Seas Act when appropriate for a remedy for unseaworthiness.

QUESTION: Well, two congressional statutes are

usually given as much play as each of them can, but we're talking here about a judicial rule, vis-a-vis a congressional statute.

MR. BENJAMIN: Well, Mr. Justice White, as we attempted to point up to the Court in our brief, fortunately the maritime law has evolved with an interrelationship between a statutory law and decisional law, and it has been implemented over the years and delicately -- sometimes not so delicately -- woven into a flexible fabric to cover.

MR. CHIEF JUSTICE BURGER: We will resume there at ten o'clock in the morning.

MR. BENJAMIN: Thank you, sir.

[Whereupon, at 3:00 p.m., the Court was recessed, to reconvene at 10:00 a.m., the following day, Wednesday, January 11, 1978.]