

IN THE SUPREME COURT OF THE UNITED STATES

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 MOBIL OIL CORPORATION, et al., :
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 Petitioner, :
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 v. : No. 76-1726
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 MRS. FRANCES NELL HIGGINBOTHAM, et al., :
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 Respondents. :
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Washington, D. C.,

Wednesday, January 11, 1978.

The above-entitled matter was resumed for argument
at 10:05 o'clock, a.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:

[Same as heretofore noted.]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll resume arguments now in Mobil Oil against Higginbotham and others.

Mr. Benjamin, you may continue.

ORAL ARGUMENT OF JACK C. BENJAMIN, ESQ.,

ON BEHALF OF THE RESPONDENTS -- Resumed

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

At the recess yesterday I believe I was attempting to answer a question from Mr. Justice White, and I was seeking to remind the Court of how the maritime law has evolved over the decades by an interrelationship of both nonstatutory and statutory law, decisional law augmenting statutory law. The Jones Act and the Death on the High Seas Act, the State statutes have all been complementing one another over a period of years.

Further, I believe this Court has answered that question in the Gaudet case, and I read just briefly from Footnote 22, and I'm taking it out of context: "Nothing in the legislative history of the Act suggests that Congress intended the Act's statutory measure of damages to preempt any additional elements of damage for a maritime wrongful death remedy which this Court might deem appropriate to effectuate the policies of general maritime law."

QUESTION: What Act is referred to there, the Jones

Act or the Death on the High Seas Act?

MR. BENJAMIN: The Death on the High Seas Act, sir.

QUESTION: Death on the High Seas?

MR. BENJAMIN: Death on the High Seas, yes.

QUESTION: Thank you, sir.

MR. BENJAMIN: One further point about the exclusivity of the Death on the High Seas Act, and I refer the Court --

QUESTION: Would the Death on the High Seas Act have been applicable on the fact situation of Gaudet?

MR. BENJAMIN: No, Your Honor, it would not.

QUESTION: Then that was dicta that you were just reading, wasn't it?

MR. BENJAMIN: Yes, it is dicta, and it's not really part of the ratio decidendi of the case; yes, sir.

But it is illustrative of what the Court's feeling was concerning the applicability of the general maritime law beyond territorial limits, I believe.

QUESTION: And you did take it out of context, anyway.

MR. BENJAMIN: I did take it out of context, I said I did, to save time.

QUESTION: The thing is, though, just to think it through again with Mr. Benjamin: how could Congress then have been trying to preempt the cause of action that had been decided didn't exist in 1920? I mean --

MR. BENJAMIN: The --

QUESTION: That footnote, as you read it, says that the Congress wasn't trying to preclude some additional damage remedy on the high seas; is that right?

MR. BENJAMIN: It was not intended by Congress.

QUESTION: It couldn't have been intended by Congress, it says there's no cause of action at all in the area covered by the statute, was there?

MR. BENJAMIN: There was not. There was, Your Honor, before The Harrisburg. Prior to The Harrisburg --

QUESTION: Yes, but at the time the statute was enacted, if Harrisburg had been decided.

MR. BENJAMIN: Yes, sir.

QUESTION: So there's no cause of action, so how can the Congress have been deciding anything about damages, except what it puts in the statute it's then enacting? I just don't -- I don't quite understand how this footnote even helps you, even reading it the way you do.

Maybe I missed something, I don't know. But I think it's a very confusing area.

MR. BENJAMIN: Well, I believe the opinion of the Court was dealing with whether or not there was anything inimical in the interest of the maritime law to complementing the Death on the High Seas Act by nonstatutory damages. And that is the context in which I believe this footnote is written.

Further, in the language of the Act itself it may indicate that the Act is not intended to be exclusive, because Section 764 reveals that with respect to elements of damage recoverable under the Death on the High Seas Act, by express provision, the incorporation of foreign law is permitted to supplement the damages recoverable under the Act. So that if an accident occurred involving a Japanese shipping company, for instance, and the law of Japan permitted the recovery of non-pecuniary losses, a seaman in those circumstances, his survivors could then augment the pecuniary losses provided for under the Jones Act and Death on the High Seas Act by the law of Japan.

QUESTION: Mr. Benjamin, let me ask another question. Supposing you're right, we rule with you, and then supposing the day after the Court decides you're right, Congress repeals the Death on the High Seas Act, would that effect any change in the law?

Would there be anything left at all of that statute if we agree with you? Any need for it at all?

MR. BENJAMIN: To answer Your Honor's question, Mr. Justice Stevens, I believe that the general maritime law concepts would be broad enough to cover most of the provisions under the Act, except for those which have not been defined by a jurisprudential development, such as statutes of limitation, beneficiaries, and the like.

QUESTION: But even on statute of limitation, if you're right, a statute of limitation in the Death on the High Seas Act wouldn't necessarily bar a marine type action, would it?

MR. BENJAMIN: No, it would not. In my opinion, the doctrine of laches would apply to a marine type --

QUESTION: Congress is subservient, then, to this Court. Congress can enact a statute providing for a specific limitation in admiralty or providing for a specific limitation on damages, and this Court can come along and say, We don't care what Congress said, we like it this way.

MR. BENJAMIN: Your Honor's question addresses itself to the separation of powers called for in the Constitution, and I respectfully attempted to answer that, Mr. Justice Rehnquist, by saying that in the maritime field the courts have filled the void.

QUESTION: But there isn't any void here. Congress has acted.

MR. BENJAMIN: But Congress's action doesn't provide an adequate remedy.

QUESTION: Well, but isn't that for Congress rather than this Court to say?

MR. BENJAMIN: Well, as I thought the Court answered in the Gaudet case, there was nothing in the Act which prevented the Act from being augmented by decisions permitting

additional elements of damage.

QUESTION: Is that ordinarily the rule with respect to legislatively created cause of action of this kind?

MR. BENJAMIN: Well, the legislative-created cause of action, may it please Mr. Chief Justice, was intended to create a jurisdiction and a jurisdiction only in the federal court.

Now, the measure of damages was held to be adequate, was thought to be adequate by the Congress in both the Death on the High Seas Act and the Jones Act. But the maritime law was a constantly moving body of law, it was a constantly advancing body of law; and today every State in the union has wrongful death statutes, and every State in the union -- I withdraw that -- and the majority of those wrongful death statutes permit the recovery of nonpecuniary losses.

And so it doesn't offend my sense of justice for the Court to augment statutory elements of damage by nonstatutory elements of damage.

QUESTION: You say this law was both moving and advancing, I take it you mean something more than change by that. What do you mean by advancing?

MR. BENJAMIN: Well, Mr. Justice Rehnquist, the maritime law has always held a special solicitude for seamen and for those who brave the hazards of the sea, and has always sought to give rather than to withhold a remedy.

QUESTION: Well, then, why is it necessary for it to

advance at all, if it has always been this way?

MR. BENJAMIN: Because times change, and social concepts change. And the maritime law --

QUESTION: You say change, what particular change would you rely on to support your position?

MR. BENJAMIN: Well, the fact that most of the States, the majority of the States have provisions in their wrongful death acts which allow the recovery of nonpecuniary losses.

QUESTION: Then Congress surely must be aware of that.

MR. BENJAMIN: Well, of course the Congress has not acted since 1920, and I'm not sure there's been any movement for legislation concerning the Death on the High Seas Act in recent years. There has been with regard to the Jones Act, I'm aware of.

I'd like to touch upon another point the petitioner raises. If this Court restricts the applicability of the maritime law to territorial waters, the three-mile limit, it would then return to what is known as a locality test, which was denounced by the Court as a test alone, at least for jurisdictional purposes, in the Executive Jet case.

By way of illustration, a widow of a seaman who is fatally injured as a result of a breach of a maritime duty within the three-mile limit could recover nonpecuniary losses, and the widow of a seaman who is fatally injured on the high

seas as a result of a breach of the same maritime duty could not. And this is basically unfair.

To illustrate further, Your Honors are aware of the amount of oil field activity off the coast of Louisiana, boats and ships are constantly moving from the shoreline to the high seas. It would impose a most onerous burden upon a litigant if he were entitled, or if his survivors were entitled to recover nonpecuniary losses within a three-mile limit and the litigants were not positive of where the injury or death occurred.

Louisiana's coast line, as Your Honors know from arguments in other cases involving boundaries, meander, islands appear, disappear and re-appear, and it is quite difficult to ascertain for a litigant where the boundaries are.

In addition, the locality test is just, in basis, an unfair and unrealistic test.

Then I'd like to touch just briefly upon the Court's decision in the Barbe case, which petitioner brought out. The Barbe case concerned itself with the survival provision of the general maritime law. The Barbe Court recognized the existence -- and I use that language because I believe what this Court did in Moragne was recognize the existence, it restored what was once known as a cause of action for wrongful death under the general maritime law. It didn't create a cause of action.

The Barbe Court recognized the cause of action under the survival provisions of the general maritime law, using the same reasoning, the same methodology as this Court did in Moragne and Gaudet. And it allowed recovery for conscious pain and suffering of the decedent, but denied recovery for funeral expenses, for some reason which has been categorized as absurd by some, on the basis that funeral expenses would have been incurred at some future date anyway. And of course if that logic were carried out, there would be no reason for wrongful death acts, because people are bound to reach the terminal stage of life.

We think the decision of the Barbe Court was completely illogical, and would create additional anomalies than those which existed pre-Moragne.

Finally, I'd like to touch upon the Gaudet decision. The principal reasons for dissent by some members of the panel of this Court in Gaudet were present in the Gaudet case and do not exist in this case, or in these cases.

In the first place, no suit was brought by the decedent prior to death. Presumably decedents were killed instantaneously and there's no problem of res judicata or collateral estoppel.

Secondly, there was no possibility of a double recovery, as the Court was concerned with.

QUESTION: Mr. Benjamin, even though these facts

aren't here, if we applied your reasoning wouldn't the whole concept of Gaudet apply in the high seas?

MR. BENJAMIN: It would apply, Your Honor, yes.

QUESTION: Yes.

MR. BENJAMIN: And, as I said, the recovery for loss of society, although not permitted under the provisions of the Jones Act and Death on the High Seas Act, are permitted by the statutes of most States, and are consistent with the advance of the maritime law and its special sollicitudes.

QUESTION: Have there been any suggestions to Congress that Congress get the Death on the High Seas Act up to the modern trend?

MR. BENJAMIN: I didn't hear the last part of your question, sir.

QUESTION: Well, have there been any suggestions to Congress that Congress amend the Death on the High Seas Act, to keep pace with the times, as you would think?

MR. BENJAMIN: I don't believe they have been, Your Honor. In recent --

QUESTION: At least Congress hasn't amended it?

MR. BENJAMIN: In recent years, it has not amended it, no.

I would like to conclude by reminding the Court that both the Death on the High Seas Act and the Jones Act need not be relegated, as the Fifth Circuit said, and as some of

the commentators have said, to the briny deep, nor to the scrap heap, or to the level of nonstatutory restatements.

They may remain as a basis for recovery for pecuniary losses, and may be augmented by the remedy enunciated by this Court in Moragne and Gaudet for the recovery of nonpecuniary losses, with substantial uniformity to the law and substantial justice to the litigant.

Thank you, sirs.

QUESTION: I suppose you would say that the statute keeps this Court from reversing itself and utterly doing away with a cause of action for death on the high seas?

That's at least the function of the statute.

MR. BENJAMIN: No, I wouldn't -- I wouldn't claim that, Your Honor.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Benjamin.

Mr. Schumacher, do you have anything further?

MR. SCHUMACHER: Thank you, Your Honor, no. I choose not to.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen, the case is submitted.

[Whereupon, at 10:24 o'clock, a.m., the case in the above-entitled matter was submitted.]

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