

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-202

TITLE OFFSHORE LOGISTICS, INC., ET AL., Petitioners V.  
BETH A. TALLENTIRE, ET AL.

PLACE Washington, D. C.

DATE February 24, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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OFFSHORE LOGISTICS, INC., :

Petitioners, :

V. : No. 85-202

BETH A. TALLENTIRE, ET AL. :

- - - - -x

Washington, D.C.

Monday, February 24, 1986

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 10:02 o'clock a.m.

APPEARANCES:

KEITH A. JONES, ESQ., Washington, D. C.; on behalf of the  
Petitioners.

CHARLES HANEMANN, ESQ., Houma, Louisiana; on behalf of  
the Respondents.

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1 PROCEEDINGS

2 CHIEF JUSTICE BURGER: We will hear arguments  
3 first this morning in Offshore Logistics, Incorporated  
4 v. Tallentire.

5 Mr. Jones, you may proceed whenever you are  
6 ready.

7 ORAL ARGUMENT OF KEITH A. JONES, ESQ.,  
8 ON BEHALF OF THE PETITIONERS

9 MR. JONES: Thank you, Mr. Chief Justice, and  
10 may it please the Court, this case arises from the crash  
11 of a helicopter on the high seas. The crash occurred in  
12 the Gulf of Mexico, approximately 35 miles from land.  
13 All persons on board were killed. The operator of the  
14 helicopter, Offshore Logistics, conceded in the District  
15 Court that it is liable for damages under the Federal  
16 Death on the High Seas Act, which is known by its  
17 acronym DOHSA. That statute provides for the recovery  
18 of pecuniary damages, but it does not allow the award of  
19 nonpecuniary or sentimental damages.

20 The case is here because the Plaintiffs  
21 contend and the Court of Appeals held that Offshore  
22 Logistics additionally is liable for sentimental damages  
23 under state law. The theory of the Plaintiffs and that  
24 of the Court of Appeals is that state law may be invoked  
25 and applied as a means of supplementing DOHSA and



1 enlarging the recoveries for wrongful death on the high  
2 seas.

3           We disagree. Our position is that DOHSA is  
4 exclusive, that the availability of a uniform maritime  
5 rule of recovery makes the parallel of supplemental  
6 enforcement of state law both unnecessary and  
7 inappropriate. The Court of Appeals rejected our  
8 position because, it held, that enforcement of state law  
9 is required by what it called the clear mandate of  
10 Section 7 of DOHSA. That holding defines the core issue  
11 in this case, that is, whether Section 7 actually does  
12 mandate enforcement of state law on the high seas.

13           We submit that Plaintiffs cannot prevail in  
14 this case unless Section 7 affirmatively directs federal  
15 admiralty courts to enforce state wrongful death  
16 statutes on the high seas. We further submit that  
17 Section 7 issues no such directive.

18           Before I turn to the construction of Section  
19 7, let me begin by assuming that for purposes of  
20 argument that Section 7 is merely neutral, that it  
21 neither prohibits nor requires the enforcement of state  
22 law on the high seas. In this event, the proper role of  
23 state law will be left for judicial determination in  
24 accordance with the governing principles of admiralty,  
25 and there can be no serious question about the outcome.

1 Federal courts would not be required to enforce state  
2 law on the high seas, and they would not do so.

3 The courts would not be required to enforce  
4 state law because admiralty is a federal common law  
5 jurisdiction in which state law does not operate of its  
6 own force. This Court has refused to apply state law  
7 even in cases arising on the territorial waters and  
8 involving issues on which Congress has not spoken. It  
9 follows a fortiori that admiralty courts have no  
10 obligation to enforce state law in cases arising not in  
11 the territorial waters but on the high seas and  
12 involving issues on which Congress already has spoken by  
13 providing a uniform maritime rule.

14 QUESTION: Mr. Jones, how far in towards the  
15 shore does the DOHSA come? Is it a what, a marine  
16 league?

17 MR. JONES: One marine league, Your Honor.

18 QUESTION: Well, how far is that?

19 MR. JONES: I understand that's just a little  
20 bit more than three geographic miles. I think it is the  
21 equivalent of three nautical miles. I think the purpose  
22 of DOHSA was to define the territorial boundary of the  
23 United States or to conform with that boundary.

24 Not only would federal admiralty courts not be  
25 required to enforce state law in those circumstances, it

1 is clear that they would not do so. The purpose of the  
2 constitutional framers in conferring admiralty  
3 jurisdiction on the federal courts was to ensure the  
4 preservation and development of a coherent and uniform  
5 body of maritime law. Admiralty law historically has  
6 been shaped and governed by this constitutional policy  
7 of maritime uniformity.

8 From time to time the courts have borrowed  
9 from state law in order to fill a void in maritime law,  
10 but that practice has marked the limit of admiralty's  
11 tolerance for nonuniformity. Admiralty courts do not  
12 offer diversity when there is a national admiralty rule  
13 already at hand. This is especially true on the high  
14 seas where the essential features of an exclusive  
15 federal jurisdiction are at issue.

16 The Plaintiffs appear to suggest that this  
17 constitutional policy of maritime uniformity covers only  
18 duties of care and that there is no federal interest in  
19 uniform remedies. It is by no means clear that the  
20 decision below contemplates only the enforcement of  
21 state remedies and not of state duties of care. But be  
22 that as it may, the Plaintiffs' argument is simply  
23 wrong.

24 One of the earliest cases stressing the need  
25 for maritime uniformity, *Chelentis v. Luckenbach*,

1 specifically involved the question of remedy, and in  
2 that case this Court held that a state remedy of full  
3 indemnification would not and could not be substituted  
4 for the more limited general maritime remedy of  
5 maintenance and cure. The doctrine of maritime  
6 uniformity plainly embraces remedies as well as duties  
7 of care.

8 QUESTION: Well, are you saying that would be  
9 true even if Congress intended that state remedies  
10 apply?

11 MR. JONES: No, Your Honor, I am still  
12 operating under the initial assumption that Section 7 is  
13 neutral. I will get --

14 QUESTION: Though certainly it doesn't look  
15 very neutral on its face, and I think that's the problem  
16 you have along with the legislative history.

17 MR. JONES: Well, our basic submission here is  
18 that Section 7 does not command the enforcement of state  
19 law on the high seas.

20 Let us turn to the language of Section 7. It  
21 provides, and I quote, "the provisions of any state  
22 statute giving or regulating rights of action or  
23 remedies for death shall not be affected."

24 Now, I agree that at first blush this language  
25 may appear to be suggestive, but the closer one looks,



1 the less meaningful it appears. To say that the  
2 provisions of state law are not affected is not to say  
3 that state law can, let alone that it must, be enforced  
4 on the high seas. And this is no mere dramatic  
5 quibble. In Section 4 of DOHSA Congress expressly  
6 directed federal admiralty courts to enforce foreign law  
7 on the high seas. If Congress had intended to issue the  
8 same kind of directive with respect to state law, it  
9 would have used similar language. It would have  
10 specified in the same manner as in Section 4 that rights  
11 of action for wrongful death on the high seas based upon  
12 state law may be maintained in admiralty. But Congress  
13 did not do so.

14 Instead, the language of Section 7 is, as  
15 Representative Goodykoontz observed on the floor of the  
16 House, and I quote, "not unlike Mohammed's coffin,  
17 suspended between heaven and earth, having no  
18 application to anything in particular."

19 QUESTION: Well, why should we take  
20 Representative Goodykoontz's word as opposed to  
21 Congressman Mann's word who apparently drafted the  
22 thing?

23 MR. JONES: Well, I think that there is a lot  
24 to be said about what Representative Mann had in mind,  
25 but let me first point out that for 60 years following

1 the enactment of DOHSA, this language of Section 7 has  
2 been treated by all leading admiralty commentators as  
3 nothing more than a saving clause, as providing nothing  
4 more than that state law may be used where federal law,  
5 where the federal remedy does not apply.

6 QUESTION: Like the saving to suitors clause?

7 MR. JONES: Well, the saving to suitors clause  
8 basically is a provision that permits the use of a state  
9 forum. The saving to suitors clause is somewhat  
10 different from this provision, but I think what people  
11 understood Section 7 as providing is that where the  
12 federal remedy does not apply, the state remedies may  
13 still be enforced in admiralty.

14 Now, it is true that recently the lower court  
15 and a handful of other district courts, out of apparent  
16 dissatisfaction of DOHSA's limitation of recovery to  
17 pecuniary damages, have sought to supplement it with  
18 remedies borrowed from state law, but in doing so, they  
19 have disregarded this Court's instruction in *Mobil Oil*  
20 *v. Higginbotham* that, and I quote, "Congress did not  
21 limit DOHSA beneficiaries to recovery of their pecuniary  
22 losses in order to encourage the creation of  
23 nonpecuniary supplements. And the lower court's  
24 departure from *Higginbotham* is not justified by their  
25 vague and cryptic language of Section 7." And I don't

1 think it's justified by the legislative history either,  
2 either of DOHSA as a whole or Section 7 in particular.

3 The legislative history of DOHSA as a whole,  
4 as set forth in the committee reports, reveals that  
5 Congress intended to establish a uniform and exclusive  
6 remedy for wrongful death on the high seas, and the  
7 bill's sponsor, Representative Montague, explained  
8 during floor debate, Section 7 was merely put in out of  
9 abundant caution to calm the minds of those who think  
10 that rights within the territorial waters will be  
11 usurped by the national law.

12 Now, to be sure, this statement was made  
13 before Section 7 was amended on the floor of the House,  
14 but that amendment, Representative Mann's amendment,  
15 would not have the effect of defeating the original and  
16 expressly stated legislative purposes of uniformity and  
17 exclusivity.

18 QUESTION: Would that be true even if he  
19 intended to alter the text in the way that his  
20 statements indicated?

21 MR. JONES: Well, Justice O'Connor, I think no  
22 parsing of the floor debate can make crystal clear what  
23 either Representative Mann's intention was or the  
24 intention of the House as a whole.

25 Representative Mann offered his amendment out

1 of a confusion of motives. He wanted to ensure that  
2 state law would continue to apply in all territorial  
3 waters, whether or not they were within one marine  
4 league of shore. He also wanted to provide for  
5 concurrent federal and state court jurisdiction over  
6 actions arising under DOHSA.

7 Now, those appear to have been his dominant  
8 motives, and they do not bear upon this case one way or  
9 the other.

10 Now, Representative Mann's third motive, if  
11 indeed he had a third motive, was to preserve existing  
12 state court jurisdiction over actions predicated upon  
13 state law. But what was that existing state court  
14 jurisdiction? Representative Mann himself, during the  
15 debate on an earlier version of this bill, stated  
16 explicitly that state courts have no jurisdiction over  
17 accidents on the high seas.

18 Now, the plaintiffs appear to suggest, and a  
19 theme that runs through the decision below, is that the  
20 purpose of the amendment was to codify the holding of  
21 the Hamilton. But Representative Mann himself never  
22 said so. And what the court below and the Plaintiffs  
23 overlook is that the Hamilton did not approve a  
24 direction action for wrongful death under state law.  
25 The holding of the Hamilton is that a federal admiralty



1 court, in the absence of a national admiralty rule, when  
2 Congress has not spoken, will apply state wrongful death  
3 law, but only in a special set of circumstances, only  
4 when the owner of the vessel has invoked the protection  
5 of admiralty by initiating a special federal statutory  
6 proceeding to limit liability.

7 The congressional reports, the committee  
8 reports on DOHSA noted the narrowness of this holding.  
9 They stated, and I quote, "The right to affirmative  
10 action in the admiralty against ship or owner has never  
11 been sustained by the Supreme Court." And represented  
12 Igoe repeated this point during the floor debate. The  
13 general understanding at the time, as this Court noted in  
14 its decision in *Moragne*, was that state law did not  
15 apply beyond state boundaries.

16 Insofar as deaths on the high seas was  
17 concerned, there simply was no existing state court  
18 jurisdiction, and there was no direct action for  
19 wrongful death under state law to be preserved.

20 Finally, floor debate on Representative Mann's  
21 amendment was repeatedly punctuated by the assertion  
22 made by several members of the House that adoption of  
23 the amendment would have no effect on the exclusivity of  
24 the new federal remedy on the high seas. One may  
25 assume, indeed, one must assume that the amendment was

1 adopted at least in part in reliance upon those  
2 representations.

3 QUESTION: Has it been authoritatively decided  
4 whether or not a DOHSA cause of action can be brought in  
5 state courts as well as federal?

6 MR. JONES: If by that you mean whether this  
7 Court has decided it, I don't think the Court has ever  
8 had occasion to, but I think it is generally understood  
9 that a cause of action can be maintained in state  
10 court.

11 We submit that viewed realistically, the  
12 adoption of Representative Mann's amendment did not  
13 represent a retreat from the expressly stated  
14 legislative purpose of providing a uniform and exclusive  
15 remedy for wrongful death on the high seas.

16 Now, the Plaintiffs argue that --

17 QUESTION: Let me ask about the -- what is the  
18 support for the statement that the remedy was to be  
19 exclusive?

20 MR. JONES: I'm referring to the committee  
21 reports on DOHSA.

22 QUESTION: Is that the part you quote at page  
23 22 of your brief? You have a long quote there that I  
24 thought that was from a letter rather than the report  
25 itself. That's what I thought.

1 MR. JONES: Actually, the committee report  
2 consists of nothing but letters.

3 QUESTION: So it is not really a statement  
4 written by the Court itself; it is something they put in  
5 the report that had been written by somebody who  
6 submitted information to the committee, is that right?

7 MR. JONES: The committee reports really  
8 contain -- really are nothing more than three letters,  
9 three or four letters, as I recall.

10 QUESTION: And this is a quote from one of  
11 those letters?

12 MR. JONES: That's correct.

13 QUESTION: Is there anything that the  
14 committee itself wrote that supports the proposition  
15 that the remedy was to be exclusive there?

16 MR. JONES: The committee really said nothing  
17 other than that these letters were the basis for its  
18 action.

19 QUESTION: That plus whatever the colloquy is  
20 on that that has been quoted in some of the papers, and  
21 that doesn't really go to the exclusivity point, as I  
22 recall it.

23 MR. JONES: Floor debate did not go to the act  
24 at large; it only was focusing on Section 7. Section 7  
25 I think was the only provision that was amended on the

1 floor of the House.

2 QUESTION: Going back to your original  
3 argument, if I may, for a moment, what -- you said that  
4 if Section 7 were neutral and so forth. Is it your  
5 position that if DOHSA had never been passed at all --  
6 let me ask it this way. If DOHSA had never been passed  
7 at all, what is your position as to the result in this  
8 case and Hamilton?

9 MR. JONES: If DOHSA had never been passed at  
10 all, we would be left with the position that we were in  
11 in 1919 where the Supreme Court could either deny a  
12 remedy altogether, as it did in the Harrisburg, or it  
13 could recognize a general maritime remedy for wrongful  
14 death as it subsequently did in Moragne, and extend that  
15 remedy to the high seas as it decided it was precluded  
16 from doing in Higginbotham. Or it could adjudicate on a  
17 case-by-case basis, determining whether in special  
18 circumstances it would give effect to state law in the  
19 absence of the federal remedy.

20 QUESTION: But you would not say that there  
21 could not have been recognition of a state remedy if  
22 there had never been a DOHSA?

23 MR. JONES: Oh, no, oh, no. Our argument is  
24 that the existence of a national uniform admiralty rule  
25 precludes the parallel enforcement of state law unless



1 Congress in fact has required admiralty courts to  
2 enforce state law.

3 QUESTION: And in the absence of DOHSA, what  
4 would that uniform admiralty rule have been? We don't  
5 know, do we?

6 MR. JONES: Well, that would have been up to  
7 the Supreme Court to determine.

8 QUESTION: Well, what about the -- what about  
9 if there weren't a -- if DOHSA wasn't on the books now  
10 after Moragne?

11 MR. JONES: I assume this Court would extend  
12 Moragne to the high seas.

13 QUESTION: And preclude state law?

14 MR. JONES: I think that would preclude state  
15 law.

16 QUESTION: Well, does it preclude state law in  
17 territorial waters now?

18 MR. JONES: Two Courts of Appeals have so  
19 held. This Court has never ruled on that.

20 QUESTION: And Moragne apparently would permit  
21 the kind of recovery that is being sought here in  
22 territorial waters, as I understand it. It would allow  
23 nonpecuniary loss recovery.

24 MR. JONES: Under the subsequent decision in  
25 Godet, the Moragne remedy would allow nonpecuniary --

1 recovery of certain nonpecuniary damages.

2 QUESTION: So whatever result we reach results  
3 in some anomalies. I mean, there is just no way to  
4 reconcile everything whichever way we go, is there?

5 MR. JONES: That is correct. That is what  
6 this Court recognized in its decision in Higginbotham  
7 where it pointed out that the result was one national  
8 rule for the territorial waters, and a slightly narrower  
9 national rule for the high seas. The Court has  
10 explicitly identified that anomaly in Higginbotham.

11 Let me address one more point with respect to  
12 the wording of Section 7.

13 Plaintiffs point out that that wording before  
14 its amendment would have prohibited application of state  
15 law on the high seas by what they call negative  
16 implication. If so, the amendment did nothing more than  
17 remove a negatively implied prohibition from one  
18 provision of the bill without substituting in its place  
19 a positive directive to enforce state law.

20 Consequently, even if the amendment could be portrayed  
21 as a retreat from an original intention of actually  
22 requiring federal exclusivity on the high seas, it was  
23 at most only a partial and tactical retreat to a posture  
24 of congressional neutrality. If adoption of the  
25 amendment means anything at all with respect to the role

1 of state law on the high seas, it means no more than  
2 that Congress, having been advised that the courts would  
3 hold the federal remedy to be exclusive, whether or not  
4 Section 7 was amended, decided simply to leave the  
5 matter to the courts without itself either prohibiting  
6 or requiring enforcement of state law.

7 Now, as I said earlier, if the matter is left  
8 to the courts, it is clear what the courts would  
9 decide.

10 The extension of a hodgepodge of differing and  
11 conflicting state laws under the high seas would make a  
12 mockery of the notion of maritime uniformity. As Judge  
13 Jolly said in his somewhat reluctant concurring opinion  
14 below, application of state law would make a mess in  
15 more than a few cases. It would make a mess.  
16 Application of state law on the high seas would meet  
17 with no apparent limiting principle to constrain or  
18 define its applicability. We would be faced with the  
19 prospect, the rather bizarre prospect, of Kansas law  
20 applying in the Persian Gulf or Arizona law applying on  
21 the North Sea.

22 Such extraterritorial applications of state  
23 law is patently anomalous, and even if, even if state  
24 law, the adoption of state law were limited to remedies,  
25 that would renew tensions and discrepancies that result

1 from the necessity to accommodate state remedial  
2 statutes to exclusively federal maritime subsidy  
3 concepts, precisely the tensions and discrepancies that  
4 this Court tried to bring to an end in its decision in  
5 Moragne.

6 But in fact, the question of engrafting state  
7 remedies, of engrafting supplemental remedies onto DOHSA  
8 already has been decided, assuming that state law is not  
9 mandated by Congress because this Court in its decision  
10 in Higginbotham held that state law -- I'm sorry, that  
11 DOHSA will not be supplemented or displaced even by a  
12 uniform, judge-made remedy. That was the decision in  
13 Higginbotham, and the basis for that decision was that  
14 federal common law power of rulemaking permits federal  
15 courts to devise general maritime rules, would not be  
16 exercised when Congress already has provided a uniform  
17 maritime rule.

18 That reasoning applies here with even greater  
19 force because the borrowing of state law not only would  
20 displace DOHSA but introduce widespread disuniformity as  
21 well.

22 For these reasons, we submit that the  
23 governing principles of admiralty, including in  
24 particular the constitutional policy of maritime  
25 uniformity, preclude supplemental enforcement of state



1 law.

2 CHIEF JUSTICE BURGER: Mr. Hanemann?

3 ORAL ARGUMENT OF CHARLES HANEMANN, ESQ.,

4 ON BEHALF OF THE RESPONDENTS

5 MR. HANEMANN: Mr. Chief Justice, and may it  
6 please the Court:

7 I want to launch right into this language of  
8 Section 7 which, if you see where the legislators were  
9 coming from, is the farthest thing from neutral.

10 When this bill had been introduced before on  
11 numerous occasions, it contained language to the effect  
12 that in all cases of death on the high seas, admiralty  
13 courts shall have exclusive jurisdiction, and this shall  
14 be the exclusive remedy. Those bills never passed.  
15 They were up for years. I have cited them in my brief,  
16 and they never passed. Those who militated then for  
17 exclusive jurisdiction and an exclusive remedy didn't  
18 get away with it.

19 QUESTION: Mr. Hanemann, in Section 1 of  
20 DCHSA, it says the personal representative of the  
21 decedent may maintain a suit for damages in the district  
22 courts of the United States in admiralty, and as I  
23 glance through the statute here -- I would be the first  
24 to admit I am not an admiralty lawyer -- I don't see  
25 anything that seems to authorize a suit in state courts

1 under DOHSA.

2 MR. HANEMANN: Section 1 is permissive,  
3 Justice Rehnquist. It says may maintain, personal  
4 representatives may maintain. The Constitution creates  
5 this federal system tha we have, and the savings to  
6 suitors clause preserves the right to go to state  
7 courts, and this Court recognized in The Hamilton that  
8 state courts, state created remedies for wrongful death  
9 may be sued upon. In the subsequent cases --

10 QUESTION: Did The Hamilton involved the  
11 DOHSA?

12 MR. HANEMANN: Oh, The Hamilton was 1907 --

13 QUESTION: Before the --

14 MR. HANEMANN: Thirteen years before DOHSA.

15 QUESTION: So this Court has never held that a  
16 state court has jurisdiction over a DOHSA claim.

17 MR. HANEMANN: No, it has not, but to the best  
18 of my knowledge and research, neither has that position  
19 ever been advanced to you.

20 But to come back to Section 7 and what  
21 happened to it? The unsuccessful bills sought to be  
22 exclusive just like the Petitioners would have the Court  
23 construe those today.

24 Then in the 1920 bill this language was  
25 offered to the House. The provisions of Section 7, the

1 provisions of any state statute giving or regulating  
2 rights of action or remedies for death shall not be  
3 affected by this act. Now, the act that's before you  
4 stopped right there. The one that was before the House  
5 went on to say "as to causes of action accruing within  
6 the territorial limits within the state," as to causes  
7 of action accruing within the territorial waters of the  
8 state. That woul have resulted, perhaps, in a result  
9 such as the Petitioners argue for because if DOHSA  
10 doesn't affect remedies created by state law as to  
11 causes of action accruing wityin the territorial limits  
12 of any state, then maybe DOHSA does supplant and preempt  
13 state created remedies which, by reason of The Hamilton,  
14 would apply on the high seas.

15 But that's what Mr. Mann's amendment took  
16 out. He took out "as to causes of action accruing  
17 within the territorial limits of any state." So now it  
18 just says DOHSA won't affect state created remedies,  
19 period. No longer is that savings clause limited to the  
20 territorial waters of the state. That savings clause is  
21 all-inclusive.

22 Boiled down to its simplest terms, the  
23 Petitioners' position is that state death acts, which  
24 this Court once held in The Hamilton do afford a remedy  
25 on the high seas, no longer apply there because DOHSA

1 has preempted them, but the very statute on which  
2 they -- on which the Petitioner relies saves whatever  
3 force state statutes have, and you have already held in  
4 The Hamilton that state death acts do apply on the high  
5 seas.

6 Now, we can argue this case for the remainder  
7 of the hour, and we have briefed hundreds of pages, but  
8 that's what it boils down to. The Petitioners say that  
9 the statute preempts state death remedies on the high  
10 seas, and we say the statute saves them.

11 QUESTION: Mr. Hanemann, how do you account  
12 for the fact that other courts have agreed with the  
13 Petitioner and that scholarly writers on the subject  
14 have generally agreed with the Petitioner all these  
15 years?

16 MR. HANEMANN: I don't think they ever took a  
17 good look at the legislative history of Section 7,  
18 Justice O'Connor. In the Nygaard decision out of the  
19 Ninth Circuit, which is the case with which the  
20 Tallentire decision, our case, conflicts, the Ninth  
21 Circuit didn't even cite Section 7. There was a line of  
22 older cases, most exemplary of which is Wilson v.  
23 Transocean Airlines in which the District Court I think  
24 for the Southern District of New York did address the  
25 matter of Section 7 and called it simply an innocuous



1 change in language.

2 I don't think it's an innocuous change in  
3 language. I think that's a little shallow to approach  
4 this, and The Harrisburg was the law from 1874 until you  
5 decided the Moragne case, and everybody thought that The  
6 Harrisburg precluded a federal leath action in  
7 admiralty, and you did not let that erroneous view  
8 preclude you from reaching a just decision in the  
9 Moragne case.

10 And I would not hold to the view that old  
11 error is good error. Nor would I hold to the view that  
12 error is somehow sanctified by the universality of its  
13 acceptance, and I think this is a good opportunity for  
14 the Court to straighten out the error that has persisted  
15 if such it is.

16 However, the error has not been universal  
17 because we cited the Safir case and a number of other  
18 cases from the lower courts which hold the opposite  
19 view, Rairigh v. Erlbeck, etc., which hold the opposite  
20 view, and that is that Section 7 does indeed say the  
21 state created remedies on the high seas.

22 Mr. Jones' argument proceeds from the  
23 assumption, I think, that one federal statute in a field  
24 preempts all state action in the field. Alexander  
25 Hamilton, writing in "The Federalist" certainly would

1 not have shared that view. According to Mr. Hamilton,  
2 federal law is exclusive only in three situations:  
3 first of all, where the Constitution in express terms  
4 grants an exclusive authority to the state. That's not  
5 the -- to the federal government, pardon me. That  
6 certainly is not the case here. The second case where  
7 the federal government -- federal legislation, rather  
8 excludes state legislation, is where the Constitution  
9 expressly grants a power, though perhaps not explicitly  
10 exclusive to the federal government, and also says that  
11 the state shall not do it. That is certainly not the  
12 case here. The third situation is, according to Mr.  
13 Hamilton, where the Constitution granted an authority to  
14 the Union to which a similar authority in the states  
15 would be absolutely and totally contradictory and  
16 repugnant.

17 Let me remind you that Justice Charles Evans  
18 Hughes, writing in the case of *Just v. Chambers* said  
19 uniformity is required only when the legislation -- when  
20 the essential features of an exclusive federal  
21 jurisdiction are involved, but as admiralty takes  
22 cognizance of maritime torts, there is no repugnancy to  
23 its characteristic features, either in permitting  
24 recovery for wrongful death or in allowing compensation  
25 for a wrong to the living to be obtained from a

1 tortfeasor's estate. Chief Justice Hughes echoed the  
2 very words that Mr. Hamilton used in Just v. Chambers  
3 with direct reference to a state death action applied on  
4 navigable waters.

5 Now, that -- those were navigable waters of a  
6 state, I'll grant you, but it's perfectly consistent  
7 with what you did in The Hamilton, and if the  
8 application of state law on the high seas -- rather, on  
9 the navigable waters of a state is not repugnant, then I  
10 see no conceptual reason why the application of state  
11 law on the high seas should be any different.

12 QUESTION: Well, I suppose that state law  
13 applied to accidents on territorial waters has a more  
14 local flavor to it than the extension of the application  
15 of state law to accidents on the high seas, maybe  
16 hundreds or thousands of miles from shore.

17 MR. HANEMANN: Well, Justice O'Connor, that is  
18 not our case, and I don't presume to trace the outer  
19 limits of the effect of your decision in this case.  
20 however, I would point out to you that if ever there was  
21 a case that is maritime but local, this is it because we  
22 have people living in Louisiana, working off Louisiana's  
23 coast on the Louisiana offshore platforms, and it is a  
24 very highly Louisiana case.

25 QUESTION: Well, but if the accident with the

1 same parties had occurred in the Gulf of Aqaba, I assume  
2 you would be making the same argument, wouldn't you?

3 MR. HANEMANN: I might be if the Louisiana  
4 connections were there like they are in this case,  
5 because you held in The Hamilton that a statute -- and  
6 this is a quote from Justice Holmes -- a statute giving  
7 damages, meaning a state statute, giving damages for  
8 death caused by a tort might be enforced in a state  
9 court even though the tort was committed at sea.

10 Now, at sea has a very broad reach, and I am  
11 only -- I don't, I don't have any reservations about the  
12 applicability of state law in the waters overlying the  
13 shelf and perhaps in waters more distant than that. But  
14 I really would not presume to trace just how far,  
15 whether it could go to the Gulf of Aqaba or some other  
16 place. If the connections were there, though, I see no  
17 reason why they should not, nor did Congress, because  
18 Congress said that DOHSA will not affect them wherever  
19 they have effect, and we know from The Hamilton that  
20 they go at least as far as our case.

21 QUESTION: Mr. Hanemann, in fact, in the next  
22 sentence in Justice Holmes' opinion, he says insofar as  
23 the objection is based on the admiralty clause, it would  
24 not seem to matter whether the accident happened near  
25 the shore or in mid ocean. So he agrees with Justice



1 O'Connor's proposition that the place isn't all that  
2 controlling.

3 MR. HANEMANN: And so do I. It's just that I  
4 wouldn't presume to draw the -- to try to trace the  
5 farthest reaches. To me, if you can apply it four  
6 miles, if you can apply the state law four miles off the  
7 coast, there seems little conceptual reason why not to  
8 apply it 100 or 400 or five. I don't retreat from that  
9 at all.

10 Now, Mr. Jones made reference to the  
11 Higginbotham case, and of course, we cannot escape  
12 reference to the Higginbotham case in this discussion.  
13 Let me remind you that no one in the Higginbotham case  
14 contended that state law government that was a straight  
15 conflict between DOHSA and the general maritime death  
16 action announced in Moragne. You held in the  
17 Higginbotham that DOHSA is the national admiralty rule  
18 and supplants Moragne, but you also said in  
19 Higginbotham -- beg your pardon, in Moragne, in Moragne,  
20 "the message is that it," DOHSA, "does not by its own  
21 force abrogate available state remedies."

22 So whatever the -- why the people, why the  
23 plaintiffs in the Higginbotham case did not militate for  
24 the application of state law, I do not know, but the  
25 fact is that state law was not advanced by any party in

1 the Higginbotham case, nor was Section 7 of DOHSA relied  
2 upon as saving state law by any party in the  
3 Higginbotham case.

4 Mr. -- the Petitioner further advances the  
5 proposition that any state -- that any state remedy is  
6 automatically ousted when there is a federal statute on  
7 the point, and relies heavily on Jensen and  
8 Knickerbocker, the decisions in both of which were  
9 written around 1917, 1920 by Justice McReynolds and also  
10 Chelentis v. Luckenbach, which was written by Justice  
11 McReynolds. Well, I don't think I have to remind the  
12 Court that as Justice Frankfurter said in Kossick,  
13 certainly no more decision in the Court's history has  
14 been progenitor of more lasting dissatisfaction and  
15 disharmony with a particular area of law than Southern  
16 Pacific Company v. Jensen. It is easily one of the --  
17 Jensen and Knickerbocker are easily two of the most  
18 widely criticized decisions that this Court has ever  
19 issues. This Court is --

20 QUESTION: But those cases were certainly the  
21 legal environment in which the DOHSA was passed, were  
22 they not?

23 MR. HANEMANN: They were more or less in the  
24 same timeframe. However, efforts to pass DOHSA as an  
25 exclusive bill had been going on since the turn of the

1 century, about 1900, and every time it came up  
2 exclusive, it was voted down.

3 QUESTION: But when DOHSA was finally passed,  
4 Southern Pacific v. Jensen was on the books as good  
5 law.

6 MR. HANEMANN: It was on the books, but if it  
7 was there as good law, it wasn't there for long because  
8 it was --

9 QUESTION: Well, it doesn't matter whether it  
10 was there for long or not because DOHSA was passed at a  
11 particular moment in time.

12 MR. HANEMANN: Yes.

13 DOHSA was passed in 1920, and Jensen was  
14 decided in 1917, but this Court has never applied Jensen  
15 or Knickerbocker to preclude the operation of any state  
16 statute except a state workmen's compensation statute,  
17 and even vis-a-vis state workmen's compensation statute,  
18 really, the very next chance you had to do so, you found  
19 a way for state workmen's compensation statutes even to  
20 apply on navigable waters, and that was Grant  
21 Smith-Porter v. Rohie. So three, four, five years after  
22 Jensen, already you were letting state compensation,  
23 workmen's compensation statutes apply where Jensen, if  
24 you read it strictly, had said they would not. And in  
25 many, many instances you have allowed state laws not

1 dealing with workmen's compensation to apply. Wrongful  
2 death has been applied -- state wrongful death has been  
3 applied many times since the Jensen decision, Just v.  
4 Chambers, Western Fuel v. Garcia, many other cases. You  
5 have let state lien laws apply on navigable waters,  
6 state laws for the partitions of ships, state laws on  
7 arbitration, state laws on maritime insurance, state  
8 unemployment insurance laws, state water pollution laws  
9 just recently here in Askew v. American Waterways  
10 Operators.

11 QUESTION: May I ask this question, please?

12 Were all of the people on this helicopter  
13 citizens of Louisiana?

14 MR. HANEMANN: I cannot remember that. The  
15 citizen -- the pilot was a citizen of Florida, as I  
16 recall, and I know that some of the other people were  
17 citizens of Louisiana.

18 QUESTION: How many people were on it?

19 MR. HANEMANN: As memory serves, it was  
20 either 12 or 13, and all were killed.

21 QUESTION: Suppose each of the 13 had come  
22 from a different state and each state had different  
23 laws? Would not the recovery by each person differ and  
24 perhaps widely, and would that be fair?

25 MR. HANEMANN: It would certainly be as fair



1 as denying them recovery.

2 QUESTION: It would be as fair as what?

3 MR. HANEMANN: It would certainly be as fair  
4 as denying them recovery for what the petitioner I think  
5 somewhat calls sentimental damages. I don't think it is  
6 fair to deny people certain real damages even though  
7 they may have to do with sentiment, but to come back to  
8 your specific question, as Justice Brennan pointed out  
9 right in the Congress, as I recall, there was -- these  
10 state wrongful death laws have been applied on navigable  
11 waters for many, many years, and there has never been  
12 any serious -- there has never been any serious  
13 difficulty with them. And if there were any difficulty,  
14 I think it would be nothing more than an accustomed  
15 exercise in conflicts of laws. Most jurisdictions now  
16 favor a weighing of contexts. Most courts are very  
17 familiar with that process, and the courts can do that,  
18 and the courts can reap substantial justice in all  
19 cases, I think, by a balancing and a weighing of  
20 contacts.

21 So yes, certainly there would be some  
22 differences, but in the Hamilton, too, the Court pointed  
23 out, Justice Holmes pointed out that there would be no  
24 lamentable lack of uniformity in applying state death  
25 actions on the high seas. In Just v. Chambers, you said

1     there would be no repugnancy to federal law in allowing  
2     state death actions to control, and to me, what's more  
3     repugnant to bona fide admiralty concepts is to deny  
4     these real damages, to --

5             QUESTION: Are you suggesting there could be  
6     no difference in the damages recovered in the  
7     hypothetical I suggested for --

8             MR. HANEMANN: Well --

9             QUESTION: Assume one state provided treble  
10    damages and the other state did not. There would  
11    manifestly be a difference if both persons were killed  
12    and the same survivors are entitled to sue.

13            MR. HANEMANN: Yes, there certainly could be a  
14    different measure of damages. However, you surveyed the  
15    law in, as I recall, the Gaudet case, and you relied --  
16    you cited Speiser's work on wrongful death, and  
17    Speiser's work on wrongful death pointed out that across  
18    the country, as a matter of fact, a clear majority of  
19    the states allow for this type of law, and if there is  
20    one --

21            QUESTION: You say the clear majority.

22            MR. HANEMANN: That's what Speiser said, and  
23    that's what you said in writing, in the Gaudet  
24    decision.

25            QUESTION: Yes. Yes. That's far less than

1 all.

2 MR. HANEMANN: Yes, it's less than all. But  
3 that --

4 QUESTION: And some of the -- if some of these  
5 people came from people that didn't provide for these  
6 kinds of damages, they wouldn't get them under your  
7 rule.

8 MR. HANEMANN: They can fall back on DOHSA,  
9 and they might not get them. If their states do not  
10 accord them -- if their states do not accord them those  
11 kinds of damages, they do fall back on DOHSA, and I see  
12 DOHSA as a guaranteed minimum recovery allowable by  
13 federal law which operates even in the event that the  
14 states do not allow some sort of recovery.

15 QUESTION: In your view, is it a question of  
16 the domicile of the individual plaintiff?

17 MR. HANEMANN: I think no, sir, Justice  
18 Rehnquist. I don't think that's the sole determinant.  
19 There's a whole body of laws which points out what the  
20 relevant contacts are for purposes of balancing contacts  
21 in a conflicts of law situation.

22 QUESTION: And so, in a case brought in  
23 Louisiana, the federal court sitting in Louisiana would  
24 apply Louisiana conflicts laws to decide whether a  
25 Florida plaintiff would recover under Florida law or,

1 say, Louisiana law?

2 MR. HANEMANN: I think that's correct. I  
3 think that the forum state is likely to apply its own --  
4 at least in Louisiana we would do that -- the forum  
5 state would apply its conflict laws in order to arrive  
6 at the choice of laws, yes.

7 But I don't -- once again, I don't think  
8 that's going to be as great a practical problem as the  
9 practical problem that results from the Petitioner's  
10 petition. The Petitioner is spouting uniformity, but  
11 listen to how his uniformity works. Picture the map of  
12 Louisiana, shaped like a boot, the bottom of the boot is  
13 the line between the state and the Gulf of Mexico. Houma  
14 is down -- Houma, Louisiana, where these people were  
15 heading, is down at the bottom about 20 miles inland,  
16 and there's an offshore platform way out there. Picture  
17 four helicopters at the airport. The first helicopter  
18 takes off, crashes within minutes after it takes off.  
19 Those people get loss of love and affection or lost  
20 society. The next one makes it out past the coast but  
21 not a marine league past the coast. It crashes. Those  
22 people get loss of society under your Moragne decision.  
23 The third helicopter gets all the way out to the  
24 platform and crashes on the platform. Those people get  
25 loss of love and affection --



1 QUESTION: But under a different statute,  
2 isn't it?

3 MR. HANEMANN: Same statute, Louisiana Article  
4 2315. But extended but a different statute.

5 QUESTION: Precisely.

6 MR. HANEMANN: Precisely.

7 QUESTION: It's -- but the disuniformity is  
8 what I am pointing out. Whereas the fourth helicopter,  
9 if it lands somewhere between the marine league and the  
10 platform in the sea, or crashes, by the Petitioners'  
11 position, those people get nothing for their loss of  
12 love and affection or loss of society.

13 Now --

14 QUESTION: Well, you left out one, if it blew  
15 up at the platform.

16 MR. HANEMANN: If it blew up at the  
17 platform --

18 QUESTION: No, not the platform, in Houma.

19 MR. HANEMANN: They would get loss of love and  
20 affection if it crashed right there.

21 QUESTION: You left that one out.

22 I meant, while you're going to do it, why not  
23 do it all?

24 MR. HANEMANN: I missed the question, Mr.  
25 Justice.

1 QUESTION: I say you were covering all the  
2 situations. I just thought you would have covered that  
3 one, too.

4 MR. HANEMANN: I intended to, thank you.

5 QUESTION: Yes.

6 MR. HANEMANN: But in all of the situations  
7 except the one, that is, between a marine league  
8 offshore and the platform itself, by the Petitioners'  
9 argument, there would be loss of love and affection and  
10 loss of society, and in the middle there, the big gap in  
11 the middle, there would be no recovery for that, whereas  
12 by our position you would get either loss of love and  
13 affection or loss of society in every one of those  
14 locations, whether it crashed at home, whether it  
15 crashed in the band less than one marine league off the  
16 coast, if it crashed on the high seas between that band  
17 and the platform, or if it crashed on the platform.

18 Now, that is uniform --

19 QUESTION: Or 500 miles out.

20 MR. HANEMANN: Pardon me?

21 QUESTION: Or 500 miles out.

22 MR. HANEMANN: Or 500 miles out. Or 500 miles  
23 out, yes, and I -- I am not ashamed to hold that  
24 position because I think it is philosophically  
25 consistent with the notions of federal -- of application

1 of state law that Hamilton espoused in the Federal  
2 Papers, that this Court espoused in the case entitled  
3 The Hamilton, and with notions of fairness. I don't  
4 think -- and Justice Marshall pointed this out I think  
5 very aptly in his dissent in the Higginbotham case. He  
6 pointed out, if you will recall, that there was --

7 QUESTION: The dissent didn't carry then. Do  
8 you think it will carry now?

9 MR. HANEMANN: Well, Section -- we never had  
10 Section 7 on our side in the Higginbotham case. So I  
11 think maybe, maybe with Section 7 on our side, it will,  
12 but the notion is correct. The notion is that -- and I  
13 don't think anybody can argue with this -- that there's  
14 a certain basic unfairness in allowing recovery to be  
15 determined -- the measure of recovery to be determined  
16 by the mere fortuity of the geographical location when  
17 everything else is the same.

18 Now, I want to close with just a brief parable  
19 which I think portrays the unfairness of the  
20 Petitioners' position. Let us picture ourself in a land  
21 of plenty. There's a little boy standing on the road  
22 starving. A kind nobleman comes along and gives him a  
23 loaf of bread. He's happy. But right behind him comes  
24 the king. The king takes half the loaf of bread away  
25 from him. The child cries out. But the king says don't

1 cry, you're still better off than you were before.

2 So the king goes on a little farther and he  
3 sees many children with whole loaves of bread. So the  
4 king has his soldiers go and take the half a loaf of  
5 bread away from each of the children with a whole loaf  
6 of bread, and the people ask the king why. And the king  
7 says, because in my land I want uniformity.

8 So somebody points out to the king that when  
9 all of the children had whole loaves of bread there was  
10 uniformity, and the king answered, that's right, but the  
11 only uniformity that I like in my kingdom is the  
12 uniformity that comes from me.

13 And in a word, that is the Petitioners'  
14 position. And I don't think that history is going to be  
15 any kinder with that position than they have been with  
16 Southern Pacific Company v. Jensen.

17 CHIEF JUSTICE BURGER: Do you have anything  
18 further, Mr. Jones?

19 ARGUMENT OF KEITH A. JONES, ESQ.

20 ON BEHALF OF PETITIONERS -- REBUTTAL

21 MR. JONES: Yes, thank you, Mr. Chief  
22 Justice.

23 It seems to me that the Plaintiffs fail to  
24 recognize that admiralty law is different from  
25 conventional interstate commerce law. State statute do



1 not apply of their own force in admiralty, and  
2 preemption does not require a federal statute. The  
3 decision in Chelentis, for example, illustrates this  
4 point. Uniformity in Chelentis is provided by  
5 judge-made rules, not by a congressional prohibition,  
6 express or implied. Decisions like Chelentis and  
7 Kossick, Pope & Talbot all stand for the proposition  
8 that the availability of a uniform national maritime  
9 rule itself precludes enforcement of state law. There  
10 need be no congressional prohibition, express or  
11 implied.

12 Let me address a moment the question of The  
13 Hamilton again. Mr. Justice Stevens read an extract  
14 from that opinion by Justice Holmes, and that opinion is  
15 divided into two parts, as I recall. In the first part  
16 Justice Holmes establishes that state law is valid, that  
17 the state law in question was valid. But then he went  
18 on to consider the question whether that law would be  
19 applied in admiralty, and one of the crucial  
20 considerations that he discusses in that connection was  
21 that this was a case brought in admiralty to limit  
22 liability. It was a special federal statutory  
23 proceeding to limit liability, and The Hamilton does not  
24 stand generally for the proposition that state wrongful  
25 death statutes could be enforced in admiralty in direct

1 actions. And that is what the congression -- the  
2 committee reports pointed out.

3 Moreover, the first part of The Hamilton may  
4 well not have survived the decisions in Jensen and  
5 Chelentis that followed it by about ten years. After  
6 those decisions, the Supreme Court confronted once again  
7 the question of whether a state wrongful death statute  
8 would be applied, this time in territorial waters. This  
9 is the Garcia case. And in that case, the Court said  
10 that because in territorial waters the event was  
11 maritime and local in character, state law could apply.  
12 If The Hamilton had decided more generally that state  
13 wrongful death statutes applied on the high seas, there  
14 would have been no need for the maritime but local in  
15 character ruling of Garcia.

16 Moreover, DOHSA was enacted in the context of  
17 Jensen and Chelentis, and in that context, the members  
18 of the House recognized that the Supreme Court at that  
19 time would hold the federal rule to be exclusive no  
20 matter how Section 7 was amended. With that in mind,  
21 Congress amended Section 7, leaving it to the courts  
22 under what it assumed to be the governing doctrine of  
23 Jensen and Chelentis, of the day.

24 At bottom, it seems to me that the Plaintiffs  
25 want to do away with admiralty as a special, separate

1 federal jurisdiction. They want to assimilate admiralty  
2 to the law of coastal states and the adjacent  
3 platforms. But regardless of the merits of such a  
4 suggestion, it just wouldn't work. There are enormous  
5 choice of law problems on the high seas. Choice of law  
6 problems are obviously far more difficult there than in  
7 the territorial waters where an event actually occurs  
8 within the boundaries of an individual state. This  
9 Court in *Lauritzen v. Larsen* listed seven factors that  
10 bear upon the choice of law in the high seas, even when  
11 it's only a matter of choosing which nation's law would  
12 apply. If we were to extend the separate laws of 50  
13 states on the high seas as well, the question of choice  
14 of law would be enormously complicated.

15 I have nothing further, Your Honor.

16 CHIEF JUSTICE BURGER: Thank you, gentlemen.

17 The case is submitted, and we will hear  
18 arguments next *Library of Congress v. Shaw*.

19 (Whereupon, at 10:57 a.m., the case in the  
20 above-entitled matter was submitted.)  
21  
22  
23  
24  
25

CERTIFICATION

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#85-202 - OFFSHORE LOGISTICS, INC., ET AL., Petitioners v.

BETH A. TALLENTIRE, ET AL.

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BY

Paul A. Richardson

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