

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: MARJORIE ZICHERMAN, ETC., ET AL.,
Petitioners, v. KOREAN AIR LINES CO., LTD.
and KOREAN AIR LINES CO., LTD., Petitioner
v. MARJORIE ZICHERMAN, ETC., ET AL.

CASE NO: No. 94-1361, 94-1477

PLACE: Washington, D.C.

DATE: Tuesday, November 7, 1995

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MARJORIE ZICHERMAN, ETC., :

4 ET AL., :

5 Petitioners :

6 v. : No. 94-1361

7 KOREAN AIR LINES CO., LTD. :

8 and :

9 KOREAN AIR LINES CO., LTD., :

10 Petitioner :

11 v. : No. 94-1477

12 MARJORIE ZICHERMAN, ETC., :

13 ET AL. :

14 - - - - -X

15 Washington, D.C.

16 Tuesday, November 7, 1995

17 The above-entitled matter came on for oral
18 argument before the Supreme Court of the United States at
19 10:05 a.m.

20 APPEARANCES:

21 W. PAUL NEEDHAM, ESQ., Boston, Massachusetts; on behalf of
22 the Petitioners/Respondents Zicherman, et al.

23 ANDREW J. HARAKAS, ESQ., White Plains, New York; on behalf
24 of the Respondents/Petitioners Korean Air Lines.

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in Number 94-1361, Marjorie Zicherman
5 v. Korean Air Lines, and a companion case.

6 Mr. Needham.

7 ORAL ARGUMENT OF W. PAUL NEEDHAM

8 ON BEHALF OF THE PETITIONERS/RESPONDENTS

9 ZICHERMAN, ET AL.

10 MR. NEEDHAM: Mr. Chief Justice and may it
11 please the Court:

12 On September 1, 1983, Muriel Kole lost her life
13 as a result of the wilful misconduct of Korean Air Lines.
14 Suit was instigated in the Federal District Court pursuant
15 to the Warsaw Convention, and loss of society damages were
16 awarded by a jury.

17 Loss of society damages, it is our position,
18 pursuant to Article 17 of the Warsaw Convention, are
19 damages sustained. That is a treaty entered into force in
20 1934. The phrase is damage sustained, or dommage survenu.
21 It is our position that based on the plain meaning of
22 those words, damage equals loss, and loss equals loss of
23 society.

24 This is consistent with French civil law, and
25 this Court in Saks said that French civil law plays a role

1 in determining the interpretation of the word, dommage
2 survenu, and when the phrase dommage survenu, or damage
3 sustained, is used, there was no pecuniary restriction.

4 QUESTION: The world adopted French civil law
5 when it subscribed to the Warsaw Treaty?

6 MR. NEEDHAM: No, it did not, Your Honor, but
7 French civil law is one indication of the meaning of those
8 words at the time it was drafted. Since the United States
9 did not attend, it was in French, and the French civil law
10 and continental jurists drafted it, and in Saks this Court
11 says that --

12 QUESTION: I don't understand. What do you
13 mean, one indication? Do we look to French civil law for
14 the meaning of dommage, or do we not?

15 MR. NEEDHAM: We do.

16 QUESTION: We do, and French civil law governs.

17 MR. NEEDHAM: It governs --

18 QUESTION: And the Warsaw Treaty adopted French
19 civil law.

20 MR. NEEDHAM: It did --

21 QUESTION: It seems to me very unlikely.

22 MR. NEEDHAM: It did to the extent -- this Court
23 in Saks said that you look to French civil law because
24 that's the law that was used when it was drafted, and
25 dommage survenu in French civil law includes both dommage

1 moral and dommage material, which is both the pecuniary
2 damages and the moral damages.

3 QUESTION: Every element of damages that French
4 civil law includes can be recovered under the Warsaw
5 Treaty, and every element of damages that French civil law
6 does not permit to be recovered must be excluded?

7 MR. NEEDHAM: Yes, Your Honor, and I think --

8 QUESTION: Now, is this French civil law as it
9 is amended from year to year, or is it the French civil
10 law that was in effect at the time the --

11 MR. NEEDHAM: I believe it would be the French
12 civil law that was in effect at the time.

13 QUESTION: In effect at the time --

14 MR. NEEDHAM: But more than anything, Your
15 Honor, it's the plain meaning, because this Court in
16 interpreting treaties, and in the Chan case this Court
17 looked at plain meaning, and in the Chan case, Your
18 Honor --

19 QUESTION: If we are to take seriously your
20 argument that French law, French jurisprudence controls,
21 then what mustn't we take into account all of French law,
22 that is, how it in fact applies in France, and no matter
23 how many elements of damages -- of damage would be
24 included in the word dommage, still, there are no juries
25 in France, and awards on all of the items are more modest

1 than they are in the United States.

2 So can you pick the part of the French law that
3 you like, that is, the list of what's included in damages,
4 but leave out the fact that the recovery is likely to be a
5 lot lower if you have the same case before a French trier?

6 MR. NEEDHAM: We look at French civil law to
7 determining the meaning of the phrase, dommage survenu,
8 and we note that they did not restrict it to pecuniary
9 laws. That's the main thrust of our argument, not that
10 the entire convention is governed by French civil law, but
11 that the definition of --

12 QUESTION: I just -- if -- let's just say pain
13 and suffering would be an element, but in fact pain and
14 suffering damages awarded in French cases do not compare
15 with the size of awards in this country. Isn't that part
16 of the French law that would apply, if, indeed, French law
17 controls?

18 MR. NEEDHAM: If French law controlled
19 everything, that would the case, Your Honor, but in this
20 case we are before you on loss of society, and the narrow
21 question is whether the phrase dommage survenu in French
22 law, the phrase dommage, includes loss of society or
23 dommage moral, and we contend that it does.

24 QUESTION: Well, Mr. Needham, the Warsaw
25 Convention also contains Article 24, and under Article 24,

1 which refers back to Article 17, where you find the phrase
2 dommage survenu, it appears to leave the level and nature
3 of damages under the Warsaw Convention subject to
4 limitations and law of the signatory nations.

5 Article 24, subsection 2, has to have some
6 meaning.

7 MR. NEEDHAM: Well, Your Honor, we would contend
8 that subsection 2 of Article 24 refers to the procedural
9 matters to the State, and it reads that without prejudice
10 to the questions as to who are the persons who have the
11 right to bring suit, and what are their respective rights
12 -- rather than saying what are their rights, what are
13 their respective rights.

14 And our reading of that is, respective meaning
15 what are their rights vis-a-vis one another. What are
16 their rights, who has standing to bring the suit, who may
17 recover, what special questions go to the jury, and that
18 the plain meaning doctrine still applies, the plain
19 meaning of the word.

20 And this Court in the Chan case looked very
21 closely at the Warsaw Convention, in Article 3, where it
22 says ticket delivered, and said it could not substitute
23 the phrase, a conforming ticket delivered, or a regular
24 ticket delivered, and we contend in this case you would
25 have to insert the phrase, dommage material survenu, or

1 pecuniary damages.

2 QUESTION: Well, what about a signatory State
3 that does not permit a cause of action after death to a
4 survivor, only to the estate of the decedent? Would
5 Article 24 refer us back to who should recover under the
6 law of the signatory State?

7 MR. NEEDHAM: I think it would to the extent
8 that that State decides who may bring the lawsuits and who
9 is entitled to have which question submitted to the jury.

10 QUESTION: Isn't that a strange, strange system
11 you're -- I mean, French law governs what damage may be
12 recovered, but local law governs who gets the damages.
13 Why would anyone create a system like that? It seems so
14 bizarre.

15 MR. NEEDHAM: Well, reading through the minutes,
16 Your Honor, the United States was not present. You had
17 civil law countries, common law countries, and the
18 convention has a whole series of very, almost conflicting
19 terms.

20 QUESTION: No, I understand that, but I never
21 look at that stuff anyway, but it seems to me if you have
22 alternate interpretations of the text, you shouldn't
23 impose the one that creates a bizarre result, and it seems
24 bizarre to me that French law should determine whether
25 there can be recovery, but local law shall determine who

1 gets the recovery. That's what you're arguing.

2 MR. NEEDHAM: Well, Your Honor, I would
3 submit --

4 QUESTION: That can be avoided by interpreting
5 Article 25 as Justice O'Connor suggested it could be
6 interpreted.

7 MR. NEEDHAM: Well, when the Warsaw Convention
8 wanted a reference to local law, they were very specific.
9 In Article 21, Article 28, Article 29, they said local
10 law, go to local law. So that's our -- that's our
11 argument, and we think that that is consistent with the
12 damage cap.

13 This is a unique treaty where there is a damage
14 cap, and when this treaty was negotiated, at the time it
15 was negotiated there was great concern about the airline
16 industry not staying in business. There was great concern
17 that any large liability lost and they'd be out of
18 business.

19 QUESTION: Did the French -- did French law
20 determine the meaning of misconduct in this case?

21 MR. NEEDHAM: It did not. There is a specific
22 provision in Article 25 that you can use the phrase,
23 wilful misconduct, or whatever equivalent you have in your
24 local law, and in that case they were very specific about
25 going to local law.

1 But it's interesting to note, even in its
2 infancy when there was great concern about the viability
3 of the airline industry, even then the Warsaw Convention
4 determined that if there is wilful misconduct there is no
5 pact, so even at a time when they were very concerned
6 about being able to attract capital, very concerned about
7 being able to get insurance, even at that time they
8 concluded that if there was wilful misconduct there was no
9 cap, and if there's wilful misconduct and there's no cap,
10 then there are limited damages, and we contend to deter
11 the wrongful misconduct, and because there is a deterrence
12 factor, and because there are not punitive damages
13 available, this Court must allow a broad range of
14 compensatory damages.

15 To have a cap off so there's wilful misconduct
16 that needs to be deterred, and then to graft on some
17 restrictive interpretation of the phrase, dommage survenu,
18 would give the airline a double layer of protection that
19 it did not negotiate --

20 QUESTION: Was there not a report that a
21 company -- at the time that the Warsaw Convention was
22 originally drafted that said there were the two problems,
23 the who and the what damages, that they couldn't
24 successfully resolve and both were referred to local law.
25 The two questions, what persons in the case of death would

1 recover and what are the damages subject to reparation,
2 the report accompanying the treaty said it wasn't possible
3 to find a satisfactory solution, so those questions were
4 not regulated by the convention itself.

5 Now, you're telling us that dommage must mean
6 what it means in the French law. There's no report at the
7 time of the drafting that says that. Are you relying on
8 any practice abroad with respect to the interpretation of
9 this treaty that everyone looks to the French civil law to
10 see how it should be construed?

11 MR. NEEDHAM: I'm relying more on the plain
12 meaning of the words, and the plain meaning of the words
13 as they appear in the treaty. However, if this Court.

14 QUESTION: Am I correct that all of the foreign
15 courts that have grappled with this except one have
16 applied local law rather than French law --

17 MR. NEEDHAM: Well, there's the --

18 QUESTION: -- and that one court was overruled
19 by statute?

20 MR. NEEDHAM: Well, that one court is Preston v.
21 Hunting Air Transport, which is an English case, and then
22 there's the Israeli case which this Court cited with some
23 disfavor in Floyd when it awarded emotional damages,
24 called Air France v. Titner, a case in Israel, when they
25 looked at the plain meaning of Article 17 and said it was

1 good jurisprudential policy to give it a wide meaning.

2 However, if this Court concludes --

3 QUESTION: Why was that? Did they say why it
4 was good jurisprudential policy to give it a wide meaning
5 rather than a narrow meaning?

6 MR. NEEDHAM: I don't know. It concerned the
7 Israelis who were hijacked to Entebbe. They had no
8 physical injuries, but they'd been very traumatized, and
9 the court concluded --

10 QUESTION: Jurisprudence favors plaintiffs
11 rather than defendants, is that the jurisprudential
12 principle?

13 MR. NEEDHAM: Well, I think the principle is
14 that a treaty with a cap such as this, when the cap is
15 off, that the good jurisprudential policy is to give the
16 plain meaning of the words and to give adequate
17 compensation. This Court --

18 QUESTION: That may be perfectly -- the plain
19 meaning of the word sounds fine. Adequate compensation
20 sounds fine, but what you're saying is, in effect, we put
21 a thumb on the scale, that, you know, if you have an
22 interpretation that perhaps is evenly balanced between a
23 narrower and a broader one favoring plaintiffs, you favor
24 the broader one. Why on earth is that?

25 MR. NEEDHAM: I favor the broader one in this

1 case for several reasons. First of all, there is a
2 deterrent element to this convention. The United States
3 signed this convention and carriers agreed that they would
4 be subject to limitations. \$75,000 is a limitation. If
5 the airplane is negligent, and 100 people lose their
6 lives, they write out a check for \$7.5 million.

7 In that very unusual instance, and one of the
8 amicus briefs points out there's only eight reported cases
9 of wilful misconduct since 1934, when that occurs the cap
10 should be off. When that occurs, for deterrence if
11 nothing else, there should be a broad range of
12 compensatory damages to deter the wrongful misconduct and
13 to allow compensation to the plaintiffs, who suffer under
14 this cap.

15 American citizens have a cap out there, a
16 \$75,000 cap.

17 QUESTION: That's what the treaty says. I mean,
18 there's no doubt or alternate constructions of it. That's
19 what the treaty says.

20 MR. NEEDHAM: Yes, Your Honor, and the treaty
21 says that the airlines or the carrier may not invoke that
22 cap when there's a finding of wilful misconduct.

23 QUESTION: So the cap isn't involved here, but I
24 don't see how it follows what else you're saying, that
25 apparently the sky is the limit, regardless of language

1 and that sort of thing, that you just bend every effort to
2 maximize the plaintiff's recovery.

3 MR. NEEDHAM: We do not, Your Honor. We say in
4 this particular case that there is no grief, there are no
5 punitive damages. We're saying in this particular case
6 that loss of society should be awarded without limitation
7 and without any financial dependence, and --

8 QUESTION: Now, if it were a domestic flight
9 that had gone down over the high seas, I assume that there
10 would be no damages such as you are recovering -- seeking
11 to recover here for loss of society.

12 MR. NEEDHAM: If this --

13 QUESTION: Domestic passengers would not be able
14 to recover --

15 MR. NEEDHAM: If this --

16 QUESTION: -- for loss of society.

17 MR. NEEDHAM: If this were governed by the Death
18 on the High Seas Act, there would be --

19 QUESTION: Right.

20 MR. NEEDHAM: -- only a pecuniary loss.

21 QUESTION: Right.

22 MR. NEEDHAM: If this case were governed by
23 varying State laws, there is overwhelming support for the
24 loss of society.

25 QUESTION: Yes, but we've said that when a death

1 occurs on the high seas it's governed by DOHSA, isn't that
2 right?

3 MR. NEEDHAM: Well, the DOHSA has been applied
4 to deaths on the high seas. It has not been applied in a
5 Warsaw Convention case. We would contend that the treaty
6 is the supreme law of the land.

7 QUESTION: And do you say the cause of action is
8 created by the Warsaw Convention?

9 MR. NEEDHAM: We do.

10 QUESTION: Could you file suit under Korean law,
11 do you suppose, in this case?

12 MR. NEEDHAM: Well, there was -- there's one
13 part of the Death on the High Seas Act that allows you
14 under 7 -- section 764 to use the law of the carrier.
15 That may be one possibility, to use Korean law.

16 Here, the exclusive remedy in international air
17 transport is the Warsaw Convention, and if this Court
18 concludes that the damages under the Warsaw Convention are
19 not to be controlled by their plain meaning, or not to be
20 controlled by French civil law but rather by the law of
21 the United States or the local law, we also find support,
22 and we find support in general maritime law, we find
23 support outside of the straitjacket, or the shackle of the
24 Jones Act and the Death on the High Seas Act.

25 QUESTION: Well, I take it it's the law of the

1 case because of the D.C. Circuit's opinion that U.S. law
2 applies, not Korean law, U.S. law of some sort.

3 MR. NEEDHAM: Well, that was not in our
4 particular case, and I believe they were talking about the
5 list of beneficiaries and who are the proper parties to
6 bring the cas, and they looked to the Death on the High
7 Seas Act for that.

8 QUESTION: But is it not the law of the case
9 that Korean law cannot apply, or am I wrong about that?

10 MR. NEEDHAM: I believe that is the law of the
11 case. I believe this is strictly a Warsaw Convention
12 case, and the phrase, damage --

13 QUESTION: Well, under the Warsaw Convention
14 Korean law might have applied in some cases, might it not?

15 MR. NEEDHAM: For Korean citizens it may have
16 applied in some factor. We think in this case that
17 Korean -- the Nation of Korea was not involved in the
18 drafting or the negotiation of the Warsaw Convention, and
19 for certain Korean citizens it might.

20 In our case, we have American citizens who were
21 on the flight, and their claim for loss of damage
22 sustained finds support in civil rights law. There's
23 cases under 1983 where this Court has administered
24 remedies, including death remedies, from the common law
25 going outside of the statutory framework, and the approach

1 by Korean Air Lines to make this a DOHSA case, to make
2 this a Jones Act case, is simply inappropriate.

3 The Jones Act and the Death on the High Seas Act
4 were passed in 1920.

5 QUESTION: But that's not -- that, I take it, is
6 not the argument. The argument is, how do you fill in
7 this term, and if we reject your argument that it has a
8 plain meaning, then there are several sources of law you
9 could consult. You've mentioned some of them. You can
10 look at the laws of other States, you can look at general
11 maritime law, but why isn't the most appropriate reference
12 a statute passed by Congress meant to deal with tragedies
13 of a similar kind?

14 MR. NEEDHAM: Your Honor, the statute passed by
15 Congress, and this Court in Alves said that it was hastily
16 enacted, it was not the product of attentive judicial
17 review, and was merely to fill a gap for death on the high
18 seas.

19 It is a pecuniary law statute. It is an
20 employment-related compensation statute that was designed
21 to compensate the bread-winner who may have been injured
22 on the high seas. It is a very limited, very restrictive
23 statute that was passed to fill a gap.

24 QUESTION: What case did you rely on, Mr.
25 Needham?

1 MR. NEEDHAM: I relied on Alves, Your Honor, and
2 the quote from Alves is that --

3 QUESTION: Do you have a citation?

4 MR. NEEDHAM: I do, Your Honor. The citation on
5 Alves is 446 U.S. 274, and the particular page, on page
6 282 to 283, that states that DOHSA and the Jones Act
7 should not be accorded overwhelming analogical weight in
8 formulating remedies under general maritime law because
9 they were hastily enacted within days of each other, yet
10 are hopelessly inconsistent and not the product of
11 attentive judicial review.

12 QUESTION: What was the date of that case?

13 MR. NEEDHAM: That was 1980, Your Honor.

14 QUESTION: Yes.

15 MR. NEEDHAM: And the Court --

16 QUESTION: But that's --

17 QUESTION: Haven't we later applied the Death on
18 the High Seas Act in determining what general maritime law
19 ought to be, even when the act is not strictly applicable?

20 MR. NEEDHAM: Well, in Miles this Court did
21 apply it, but I think Miles is very distinguishable,
22 because you had a Jones Act seaman, and I think what this
23 Court held is, when you have a Jones Act seaman, and he's
24 wearing his Jones Act seaman hat, then whether he's in the
25 territorial waters or on the high seas, and whether it's

1 under the Jones Act or general maritime law, you're going
2 to treat him the same as a Jones Act seaman, and I don't
3 think that extinguished the general maritime right to
4 recover loss of society that this Court announced in
5 Gaudet, and this Court went on to say in Alves that no
6 intention appears that DOHSA has the effect of foreclosing
7 any nonstatutory Federal remedies that might be found
8 appropriate to effectuate the policies of general
9 maritime --

10 QUESTION: Yes, but shouldn't the complete
11 answer to the Chief Justice's question include a citation
12 to Executive Jet? We applied DOHSA there, a domestic
13 flight crash in -- on the high seas.

14 MR. NEEDHAM: That is -- is correct, there has
15 been an application of DOHSA to air crashes, but not in
16 cases where the Warsaw Convention controls.

17 QUESTION: Well, wait, why should that make any
18 difference? I mean, it seems to me either French law
19 applies or domestic law applies, and we've done arguing on
20 the first one. We're now arguing on whether, if domestic
21 law applies, it ought to be DOHSA or something else, but
22 once you say domestic law applies, haven't we held that by
23 its terms DOHSA applies here, so there's -- we need to
24 argue about what general maritime law might be.

25 Whatever it might be, the very words of DOHSA

1 apply to this case by reason of Executive Jet, isn't that
2 true?

3 MR. NEEDHAM: I don't believe so, Your Honor,
4 because --

5 QUESTION: Why not?

6 MR. NEEDHAM: We have a binding treaty
7 obligation, and the DOHSA, because you have the DOHSA for
8 certain restrictive kinds of deaths, does not mean that
9 that trumps the treaty obligation that comes 14 years
10 later.

11 QUESTION: That's true if the treaty refers to
12 French law, but if the treaty refers to United States law,
13 isn't it clear that the United States law is DOHSA?

14 MR. NEEDHAM: Not in this case, Your Honor.

15 QUESTION: Why?

16 MR. NEEDHAM: Because this is not a Jones Act
17 seaman. This is a civilian. this is a --

18 QUESTION: But neither was it in Executive Jet.
19 I just think you have to confront the consequences of
20 Executive Jet. Say that we were wrong in Executive Jet,
21 if you want to make that argument.

22 MR. NEEDHAM: I think --

23 QUESTION: But first you say it's the treaty,
24 and then we get you back to the -- what should the
25 domestic law be? We've said in Executive Jet that DOHSA

1 is the closest analogue, and we're going to apply it.

2 MR. NEEDHAM: Well, we think that that's in
3 error, Your Honor. We think that --

4 QUESTION: Mr. Needham --

5 MR. NEEDHAM: Yes, Your Honor.

6 QUESTION: -- Alves was not a Court opinion, was
7 it?

8 MR. NEEDHAM: I understood that it was, Your
9 Honor, at 446 U.S. 274.

10 QUESTION: I think if you'll look again you'll
11 see it's only a plurality opinion.

12 MR. NEEDHAM: All right, Your Honor.

13 To get back to the point that the Court's
14 addressing, if we're going to look at domestic law, are we
15 shackled by the Death on the High Seas Act, and I think
16 that you still --

17 QUESTION: What do you mean, shackled by the
18 Death on the High Seas Act? Why don't you use a neutral
19 phrase such as governed? I mean, the Death on the High
20 Seas Act is an act of Congress, just like numerous other
21 statutes are, and to refer to you as being shackled, I
22 don't -- I mean, that's a very pejorative --

23 MR. NEEDHAM: I understand, Your Honor. We feel
24 as if the other side is attempting to do that, Your Honor.
25 Looking at it more fairly --

1 QUESTION: -- the other side use the word.

2 QUESTION: Why, actually -- I want to get your
3 point, but I mean, if I had started back -- it gets a
4 little depressing, frankly. There isn't much damage here.
5 It's 12 years later. There isn't a lot of money in the
6 case, so I guess if I'd gone back to page 1, I would have
7 looked at this Article 17, which strikes me as totally
8 ambiguous, and I would have asked whether or not there are
9 other cases over the last 75 years where somebody decided
10 what law applied, and I take it the answer to that's none,
11 right -- never decided.

12 MR. NEEDHAM: In the United States, Your Honor?

13 QUESTION: No, in the world.

14 MR. NEEDHAM: There's very thin jurisprudence,
15 and I would contend --

16 QUESTION: Yes, okay, so you say the answer's
17 none, all right, except one that you think is on your side
18 here, which I don't, but nonetheless, I'm trying to get --

19 QUESTION: That's not true, though. There are a
20 number of other cases in other jurisdictions, almost all
21 of which, except the English case, come out the other way,
22 don't they? They apply local law.

23 MR. NEEDHAM: We have not found very many cases,
24 simply because -- I think because of the damage cap. What
25 generally happens, it's such a minimal amount of money, if

1 there's a crash, it gets paid, and it's only when there's
2 wilful misconduct and you don't have a damage cap --

3 QUESTION: And then they didn't settle, or you
4 couldn't reach a settlement, or whatever. Okay.

5 Now, my question is really Justice O'Connor's.
6 I then go to Article 24. This would all happen 12 years
7 ago. Twelve years ago we'd look to Article 24. It seems
8 to say that you apply the local law. That's what it seems
9 to say. I grant you it's a little ambiguous, but I would
10 have thought at least there's a chance you'd apply local
11 law.

12 And at that point I'd ask, what does a court in
13 the United States do, and I guess the first question that
14 a court in the United States would have under, were there
15 never any Warsaw Treaty, would be, oh, I have an accident
16 in the Sea of Japan with a Korean airplane shot down by
17 some Russians, and the only American connection is the
18 identity of the victim.

19 So I would have wondered whether American law
20 would be applied by an American court, and my question is,
21 what happened? I.e., when you raised that question, what
22 happened, or is that question in the case, or what is the
23 law that applies under American law?

24 MR. NEEDHAM: The law that we would contend that
25 would apply under American law is Federal common law.

1 QUESTION: In other words, it's a normal rule of
2 conflicts that even if you have an accident that happens
3 somewhere in the world, a Korean plane, the Sea of Japan,
4 a Russian fault, et cetera, that the law of the State of
5 the victim always applies no matter what?

6 MR. NEEDHAM: No. It's clear from the drafting
7 of the treaty that you must have --

8 QUESTION: No, no, I'm talking about without the
9 treaty. I would imagine that the first question would be,
10 if Article 24 applies and you're supposed to use local
11 law, what the treaty tells you to do is pretend there is
12 no treaty, all right.

13 Now, if I'm right about that, the first question
14 would be, what law applies for an American court? I would
15 try -- the one thing I -- I'm asking you because I'm
16 puzzled. I'm not asking as an argument. The one thing I
17 can't find in this case is some kind of answer to that
18 question.

19 It seems to me lawyers have been litigating this
20 for about 14 years over a fairly small amount of damage,
21 and so I would like to know what the status of that is.
22 How am I supposed to answer this?

23 MR. NEEDHAM: I would think without the
24 convention, Your Honor, it would be a very ticklish
25 problem, which is --

1 QUESTION: Well, how are we supposed to treat
2 this case, given that problem in it? Are we supposed to
3 pretend it's stipulated out when it wasn't, or what?

4 MR. NEEDHAM: Well, I think in this case there
5 is a convention, and the convention does apply in this
6 case, precisely to simplify the problem, but were there
7 not a convention it would be --

8 QUESTION: I was making the assumption that
9 Article 17 is ambiguous and doesn't give you the clear
10 answer that you think, that Article 24 says, courts of the
11 world, apply your own law when you decide the meaning and
12 shape out who gets to what kinds of damages.

13 On those assumptions, what am I supposed to do?

14 MR. NEEDHAM: Under those assumptions you are
15 supposed to apply, I would contend, a Federal common law
16 so you'll have a uniformity of results in the country and
17 you wouldn't get caught in this hodge podge of conflicting
18 State death statutes of one kind or another.

19 QUESTION: Well, but counsel, the question is
20 whether U.S. law should apply at all.

21 I had assumed that you were taking the position
22 that U.S. law applies and -- in this case, and the other
23 side is, too, and somehow you expect us to decide the case
24 on that basis, is that right?

25 MR. NEEDHAM: Well, that's our alternative

1 argument, that if Article 24 brings us back to the United
2 States for our law, that in fact it's a Federal common
3 law, and that we should recover under the Federal common
4 law.

5 QUESTION: I thought you said it was the law of
6 the case because of what the D.C. Circuit held, at least
7 as to the definition of misconduct, et cetera.

8 MR. NEEDHAM: I do not believe that that is the
9 law of the case.

10 QUESTION: All right, it's not the law of the
11 case.

12 MR. NEEDHAM: And if there are no further
13 questions I would like to reserve the balance of my time.

14 QUESTION: Very well, Mr. Needham. Mr. Harakas,
15 we'll hear from you.

16 ORAL ARGUMENT OF ANDREW J. HARAKAS
17 ON BEHALF OF THE RESPONDENTS/PETITIONERS
18 KOREAN AIR LINES

19 MR. HARAKAS: Mr. Chief Justice, may it please
20 the Court:

21 The issue in this case is, what is the United
22 States law that is applicable --

23 QUESTION: May I ask right there, because I
24 didn't get a chance to ask your opponent, but the --
25 assuming the treaty doesn't speak for itself, we have to

1 go behind the treaty to look at some other law, it seemed
2 to me as I read the papers in this case that both of you
3 seemed to assume that we do look to American law, to
4 United States law for the answers, and I just wonder why?

5 MR. HARAKAS: In the action that was pled
6 here -- there were actions pled under the Warsaw
7 Convention and under the Death on the High Seas Act.

8 QUESTION: Right.

9 MR. HARAKAS: Now, under the Death on the High
10 Seas Act there is a -- its own conflict of law provision
11 saying, under section 4, that you can avail yourself to
12 any remedies provided by local law.

13 Now, with respect to the choices of law issue,
14 there is the Harris case from the Ninth Circuit where the
15 court did do a choice of law analysis under the Warsaw
16 Convention.

17 QUESTION: So when you say local law applies,
18 you mean local law including the local choice of law
19 rules.

20 MR. HARAKAS: Exactly.

21 QUESTION: So whatever forum you're in will
22 apply its own choice of law rules.

23 MR. HARAKAS: Exactly.

24 QUESTION: So it's the fact that it's American
25 forum that really controls in your view.

1 MR. HARAKAS: Exactly. You could have a Warsaw
2 Convention case, but then there can be -- there's nothing
3 in the convention that would preclude you from applying --
4 doing a choice-of-law analysis, and in fact the drafters,
5 when they were drafting the convention, were unable to
6 agree to that specific issue because of the very different
7 views with respect to which law do you apply, and --

8 QUESTION: You have agreed that the choice of
9 law of this forum, if it is local law, would be American
10 law, and properly would be American law.

11 MR. HARAKAS: That's correct, Your Honor.

12 QUESTION: So that issue is not before us.

13 MR. HARAKAS: Correct, Your Honor.

14 QUESTION: And may I ask, just to get one
15 thought sorted out in my mind, here, under American law,
16 your argument is the death occurred on the high seas, so
17 the statute -- the statute applies.

18 If the death had occurred, say, in flight over
19 California instead of on the high seas, would you then
20 contend -- would it be California law that would apply in
21 your view?

22 MR. HARAKAS: No, Your Honor. I would contend
23 that in that situation, that if you want to have a desire
24 for uniform law, because the convention does -- is a
25 Federal treaty, it should be interpreted under one uniform

1 law, and you could apply by analogy other Federal
2 statutes.

3 QUESTION: If we want a uniform law, we'd have
4 French law.

5 MR. HARAKAS: Well, any --

6 QUESTION: Once you decide you're not going to
7 interpret dommage the way the French do, it seems to me
8 you've abandoned any desire for uniform law.

9 MR. HARAKAS: Well, that's correct with respect
10 to -- at the international level. The drafters never
11 accepted the fact that they cannot come up with one
12 uniform rule at the international level as to damages and
13 who can recover damages. They left that to the domestic
14 States.

15 Now, when you look to the convention --

16 QUESTION: California's a State.

17 QUESTION: Yes, that's what -- I don't quite
18 understand why -- what is your answer, if the action had
19 occurred in flight over California? Would the Death on
20 the High Seas Act provide the rule under your view?

21 MR. HARAKAS: Yes, it would, by analogy, not
22 directly, Your Honor, because when I refer to States I
23 really am referring to nations, because when you look at
24 the convention, the convention is a contract between
25 countries, not --

1 QUESTION: And that's true if it also occurred
2 over territorial waters. You'd say the Death on the High
3 Seas Act governs even though it would not govern if it had
4 been a ship in territorial waters.

5 MR. HARAKAS: No, not by -- not directly, but I
6 think when you look to the progression of the general
7 maritime law cause of action for wrong death, especially
8 under the principles of Moragne and Miles --

9 QUESTION: You know we have a case before us --

10 MR. HARAKAS: Yes.

11 QUESTION: -- involving that.

12 MR. HARAKAS: Yes, the Calhoun case, Your Honor.

13 QUESTION: And you think -- you're suggesting
14 what the answer ought to be to that.

15 MR. HARAKAS: Well, I would say --

16 QUESTION: Or do you think we should have a
17 different rule for boats and airplanes?

18 (Laughter.)

19 MR. HARAKAS: No, I think you should have one
20 uniform rule, but in, let's say the Calhoun situation, I
21 think the Moragne case sent a strong signal what the Court
22 was doing with the application of State statutes in the
23 territorial water. Moragne --

24 QUESTION: Well, if that isn't the answer, if it
25 should turn out that this Court does not think that

1 Moragne extends to territorial water, and certainly not to
2 land, then what should happen in the Warsaw Convention,
3 and where do you read in the Warsaw Convention some notion
4 that the law of the signatory State has to be uniform in
5 giving the answers to those questions?

6 MR. HARAKAS: Well, there's no specific
7 provision in the convention because when they were
8 drafting the convention I don't -- the drafters were not
9 looking to the Federal system that we have in our country,
10 in any specific country.

11 Of course, the United States had only sent
12 observers to the conference. They were more concerned --
13 they were looking at nations as a whole, and what happens
14 domestically, the drafters didn't address that issue, but
15 when you look to the convention, I think in our system it
16 does create -- it is a Federal treaty, and it should be
17 interpreted at the Federal level with one consistent,
18 uniform law.

19 My argument -- my basic argument is that on the
20 high seas --

21 QUESTION: I just don't understand why. I mean,
22 if all it does is refer you to the law of the signatory
23 State, why can't that be whatever the law of the signatory
24 State is, which may not in fact be uniform with regard to
25 the answer, depending on whether it occurred over the high

1 seas or over land?

2 MR. HARAKAS: Well, I think that's where we run
3 into one of the problems here, is that when it does occur
4 over the high seas, that you do have a directly applicable
5 Federal statute.

6 Let's say, the scenario you gave with respect to
7 California, Your Honor, in that situation an argument
8 could be made, if you were just going to look to the
9 various States, that you would apply California law, but I
10 think there are other considerations that --

11 QUESTION: What do you care, Mr. Harakas?

12 MR. HARAKAS: Well, it isn't --

13 QUESTION: You really don't care, do you? All
14 you have to say is, in this case, it's on the high seas,
15 and the Death on the High Seas Act applies? Why -- why --

16 MR. HARAKAS: It would be -- that is a simple
17 issue, the simple answer to my case here, because it is in
18 fact just a Death on the High Seas Act case.

19 QUESTION: You want us to decide other cases,
20 too.

21 (Laughter.)

22 MR. HARAKAS: Well, I don't think it's necessary
23 for you to go beyond the facts of our case.

24 QUESTION: I think you want us to deal with the
25 Second Circuit reasoning, which said our first case under

1 the convention was the Lockerbie case.

2 MR. HARAKAS: That's correct, Your Honor.

3 QUESTION: Where we thought that there ought to
4 be this uniformity, and that wasn't a watery death, so
5 they had some Federal common law, general maritime law,
6 which is a little more giving than DOHSA, right?

7 MR. HARAKAS: That's correct, they did look to
8 general maritime law, and the problem with that case is,
9 they looked to Gaudet as representative of general
10 maritime law.

11 QUESTION: And Lockerbie is not California.
12 It's not within any of the States of the United States.

13 The problem that Justice O'Connor is posing is
14 really quite different. It has to do with domestic
15 Federalism within the United States. Lockerbie doesn't
16 relate to that.

17 MR. HARAKAS: Well, the Lockerbie --

18 QUESTION: You could say that Lockerbie properly
19 came out the way it did without necessarily saying that if
20 the crash -- if Lockerbie occurred in California,
21 California law wouldn't --

22 MR. HARAKAS: You could do that, and in our case
23 that is a necessary determination to be made in our case,
24 because you do have the Federal statute. You don't
25 necessarily have to reach that.

1 The only point I'm making here is that, if the
2 Court wants to address the Lockerbie case in order to come
3 up with unified rule as what the Lockerbie court was
4 concerned with, then the proper rule should be taken from
5 looking to other Federal wrongful death statutes.

6 QUESTION: Can I ask you -- I'm not -- one
7 puzzle that I have in my mind still, which maybe you've
8 just answered to Justice Scalia, is how does this work in
9 your -- in your mind, the treaty refers you to, say, the
10 Eastern District of Iowa, or whatever it is.

11 Now, we're in the Eastern District of Iowa, and
12 the first thing that they have -- say, that judge there is
13 a Federal judge, and the treaty said judge, you apply the
14 law you would apply normally without the treaty. That's
15 right?

16 MR. HARAKAS: That's right.

17 QUESTION: Okay. So why isn't the first thing
18 the judge would do is say, the first thing I have to
19 decide for a case where the accident happens over in
20 Japan, in the international sea, to the Korean Airline
21 with an American passenger, is, what law applies, all
22 right.

23 Now, why isn't that in this case? Because --

24 MR. HARAKAS: Well, because in this case it
25 was -- you look to what is the United States law that

1 would apply in that context. I think all parties have
2 agreed that it would --

3 QUESTION: Well, can you do that? Can you say,
4 we all agree that the law of Tibet applies?

5 MR. HAKAKAS: No, of course -- parties can't
6 agree to tell the court what law that --

7 QUESTION: Yes, all right, so the first thing
8 the judge in Iowa does is, he gets out the Death on the
9 High Seas Act. The Death on the High Seas Act gives
10 anybody in the world a right of action if they're killed
11 on the high seas.

12 MR. HAKAKAS: That's correct.

13 QUESTION: Okay. So there we have in the court
14 of Iowa, we have a person from Italy who was killed in an
15 airline accident in Korea by a Japanese, so the first
16 thing -- or in the Sea of Japan, so the first thing I'd
17 wonder is, what law applies. What law would apply there?

18 MR. HAKAKAS: Well, in that case, then, you
19 could -- if the parties brought it up, you could make a
20 Federal --

21 QUESTION: Suppose they didn't bring it up.

22 MR. HAKAKAS: Well --

23 QUESTION: Suppose that's -- suppose -- so then
24 this Court would decide, okay, it's an Italian, it
25 involves Japan, it involves Korea, so we'll apply our

1 American law just for fun, or what?

2 MR. HAKAKAS: No.

3 QUESTION: What are you supposed to do?

4 MR. HAKAKAS: What you should do in that

5 situation, let's say you didn't have the Federal statute

6 or anything --

7 QUESTION: No, no, what you have --

8 MR. HAKAKAS: I'm sorry. I'm sorry.

9 QUESTION: It's the real situation. The judge

10 in Iowa picks the page up, chapter 21, Death on the High

11 Seas Act, the Italian has the cause of action, now he asks

12 himself, what law do I apply here to find out the rights

13 and wrongs of the party? Do I apply the rest of the Death

14 on the High Seas Act? Do I go to Korean law, Japanese

15 law, Italian law?

16 MR. HAKAKAS: I understand --

17 QUESTION: How do you do it? I'm genuinely

18 puzzled, which is why I'm asking --

19 MR. HAKAKAS: Well --

20 QUESTION: -- and I don't believe the parties

21 would just stipulate that issue out of the case, would

22 they?

23 MR. HAKAKAS: No. Well, in a situation like

24 that, you could do a Federal choice-of-law analysis to

25 see, just like in the Harris case, to see which law you

1 would apply. I think in the Harris case they did apply
2 the law of --

3 QUESTION: All right, then, why don't you have
4 to do that here?

5 MR. HAKAKAS: Because we brought -- the action
6 was in the context of the Death of the High Seas Act, and
7 the decedents in this case, of course, were United States
8 citizens and residents of New York or Massachusetts.

9 QUESTION: So if a victim -- that's enough to
10 get American law to apply, even though the accident's
11 abroad and everything else --

12 MR. HAKAKAS: Well, the Death on the --

13 QUESTION: -- the answer's yes?

14 MR. HAKAKAS: The Death -- yes, Your Honor.

15 QUESTION: Okay.

16 MR. HAKAKAS: But I would like to just add to
17 that is that the Death on the High Seas Act does give the
18 court jurisdiction for any death occurring on the high
19 seas, and it doesn't specify that you have to any other
20 nexus is required other than the application of a death
21 occurring on the high seas.

22 QUESTION: Mr. Harakas, I'd like you to go back
23 to your prior answer, because I'm not confident that it's
24 clear that it would be the whole law of the United States.

25 You know that you can get into a rather messy

1 situation in defining local law to be not only the -- not
2 the conduct-regulating rule, but the choice-of-law rule,
3 which could then get you over into some other system, and
4 then you must ask, is it the whole law, including the
5 choice-of-law rule?

6 So in many legal contexts, local law is
7 understood to mean not the choice of law rule, but you go
8 directly to the conduct-regulating rule, or the damage-
9 setting rule. You do not go to the choice-of-law just so
10 you will avoid this kind of problem that conflicts
11 teachers sometimes call the *rondure*.

12 MR. HARAKAS: Yes.

13 QUESTION: So in the Warsaw Convention, is there
14 nothing that tells us whether local law means whole law of
15 the country, or substantive law of the country?

16 MR. HARAKAS: The -- there's no specific
17 provision saying that in those terms, but with respect to
18 the substantive law, it does tell you, go to the law of
19 the court where the action is pending.

20 I think when you look to, let's say Article 28,
21 or other various provisions, it's always referenced in
22 terms of the law of the court where the action is pending.

23 QUESTION: Why would the treaty make an American
24 court apply American law, even where an American court
25 would normally not apply American law? That's very

1 strange.

2 MR. HARAKAS: Well, I don't -- the treaty
3 doesn't do that. It just leaves the whole issue to the
4 domestic law of the country, and at that level --

5 QUESTION: By which you mean, including the
6 choice of law, which was the question Justice Ginsburg was
7 asking.

8 MR. HARAKAS: I would say it would include the
9 choice of law, because the convention specifically didn't
10 want to deal with that issue, because every time they
11 tried to insert a choice of law provision there was a lot
12 of objection to that, and in fact any choice-of-law
13 provisions other than a couple of places where it
14 specifically says, look to your national law, were deleted
15 from the convention.

16 QUESTION: The concern is, is that if you have
17 just stipulated with the other parties that U.S. law,
18 including U.S. choice-of-law principles apply, and U.S.
19 law applies to determine the substantive issues in the
20 case, then the case may not be as important as you told us
21 in the writ for certiorari, or as the petitioner has told
22 us.

23 MR. HARAKAS: No, Your Honor, because in this
24 case here it's -- you do have a death on the high seas,
25 and that gives the court juris -- a Federal court

1 jurisdiction to hear the action, and when you're talking
2 about looking into foreign laws, the pleader does have the
3 option to bring in elements of foreign law within the
4 Death on the High Seas Act.

5 I think here, when you have an international
6 crash on the high seas, and you do have a Death on the
7 High Seas Act that is applicable, that does give the court
8 jurisdiction, and at that point, the elements of damages
9 are set out, and I don't think you have to engage, in the
10 context of this case, in a choice-of-law analysis.

11 QUESTION: But if other courts in a number of
12 other cases would, and would apply foreign law, then this
13 case has less significance than it would otherwise.

14 MR. HARAKAS: I don't think so, because even
15 with respect to the application of foreign law, if the
16 court finds that it should apply to foreign law, which I
17 don't get into now because I don't think you have to, but
18 if it does, then the issue comes down to, what are those
19 damages recoverable under that foreign law, and that just
20 leads to more disarray in the convention itself, with --
21 each court starts engaging in various choice-of-law
22 analysis. You want to --

23 QUESTION: I would think in most places in the
24 world -- the Death on the High Seas Act was passed at a
25 time when it was more liberal, really, than most State

1 law, but tort law has sort of gone beyond that in most
2 places in the world, and you'd think almost any other law
3 would let a survivor recover. Wouldn't most of them give
4 you damages for pain and suffering -- sorry, for grief and
5 for loss of society?

6 MR. HARAKAS: Well, for -- a lot of the civil
7 law countries do allow brief damages, but a lot of the
8 civil law countries still don't allow loss of society or
9 nonpecuniary damages.

10 For example, at the time the convention was
11 drafted, I think a majority of the States did not allow
12 nonpecuniary damages. You had countries like the Soviet
13 Union that were involved in the drafting of that, and
14 their strict pecuniary loss at that time, and if you had
15 told someone from the Soviet Union that you're going to be
16 allowing nonpecuniary damages under French law, I don't
17 think they would have signed on to this convention.

18 In addition --

19 QUESTION: Do you know, Mr. Harakas, in fact,
20 the -- have there been actions elsewhere arising out of
21 the KAL crash that has occupied our court now for -- our
22 courts for over a decade, but talking about how would it
23 be in other countries, how many cases are pending
24 elsewhere in comparison to the number pending in the
25 United States?

1 MR. HARAKAS: I believe there are four actions
2 pending in Canada, and five actions pending in Japan.

3 QUESTION: And how many in the United States?

4 MR. HARAKAS: Currently pending, approximately
5 40 in the United States. Everything else has been
6 settled.

7 QUESTION: Yes, but in the original carving up
8 of who was going to sue, didn't the United States have the
9 overwhelming number of lawsuits?

10 MR. HARAKAS: That's correct, Your Honor. There
11 were over 101 actions filed in the United States.

12 QUESTION: Even though most of the people who
13 were killed were not from the United States.

14 MR. HARAKAS: A number of people, they worked --
15 I can't remember the exact breakdown of the citizenship,
16 but most of those people were either settled before the
17 case came to trial, or they settled in their own countries
18 with Korean Airlines.

19 But when you look back, just to pick up again on
20 the issue of recoverable damages in France, Mr. Needham
21 says that it allows loss of society damages, and those
22 damages are nonpecuniary, and they were recoverable in
23 1929.

24 But from the references cited in the briefs, and
25 I've done some research on the issue, the only thing I

1 could discern that in 1929, France allowed grief damages,
2 but I couldn't see anything that allowed loss of society
3 damages, per se, even under French law, and even the grief
4 damages, they were in a minority position at that time.

5 I don't think you can adopt the entire body of
6 French law from 1929 and bring it into a treaty and say,
7 this is what you're going to apply in the United States.

8 QUESTION: Hoe did you find that out about
9 French law, from cases or from treatises?

10 MR. HARAKAS: From treatises, Your Honor.

11 QUESTION: That's what they use, isn't it?

12 MR. HARAKAS: Yes.

13 QUESTION: And what do the French treatises say
14 about this issue of whether Article 17 applies French law,
15 French treatises?

16 MR. HARAKAS: There's no French decision I was
17 able to locate --

18 QUESTION: Yes.

19 MR. HARAKAS: -- that discusses this issue,
20 because basically in French law they just allow any
21 damages that are certain and direct. That's the basic
22 principle of French civil law.

23 The only other cases I've been able to locate
24 are some -- a Canadian case, which basically applied the
25 law of Quebec, and there is the Preston case that was

1 brought up here, and the court didn't engage in extensive
2 analysis --

3 QUESTION: And a number of American cases.

4 MR. HARAKAS: And a number of American cases all
5 adopting unanimously the view that you go to your domestic
6 law.

7 QUESTION: And abroad there are a number of
8 treatises, though. There are quite a few cited.

9 MR. HARAKAS: Yes, there are a number of
10 treatises, and they're all unanimous in that view. I was
11 unable to find anyone taking a contrary position.

12 Now, with the Preston case, that case --

13 QUESTION: And they rate professors higher than
14 judges over there, right?

15 (Laughter.)

16 MR. HARAKAS: Um --

17 QUESTION: Oh, you can tell the truth.

18 (laughter.)

19 MR. HARAKAS: Sometimes. I don't think
20 they're -- I'm not going to --

21 (Laughter.)

22 MR. HARAKAS: -- go on with that.

23 QUESTION: Well, their cases don't count, at
24 least formally, as precedent.

25 MR. HARAKAS: No, they don't, not in a civil law

1 country, even though they tend to be persuasive enough to
2 other courts, but formally they don't. But --

3 QUESTION: So nobody would cite the Executive
4 Jet case to any court.

5 MR. HARAKAS: Well --

6 QUESTION: Or their counterpart.

7 MR. HARAKAS: -- they do sometimes cite to --
8 refer to American decisions, because since the United
9 States decisions are one source of law where the
10 convention has been analyzed to --

11 QUESTION: I meant comparable precedent in their
12 own system. You might cite something for persuasive
13 value.

14 MR. HARAKAS: Yes, you might cite that. A court
15 would look at it, but they wouldn't be obliged to follow
16 that.

17 QUESTION: But in your view, would you like this
18 Court to hold -- I'm not saying we would, but I mean,
19 would you like the Court to hold, is that the treaty
20 refers you back to domestic law, then, in a case where the
21 parties have stipulated that American law applies, under
22 those circumstances, the Death on the High Seas Act limits
23 the recovery, but in the cases where they haven't made
24 that stipulation in court, now -- am I right? Now we have
25 a blank to fill in, and -- am I right about what you want

1 us to say?

2 MR. HARAKAS: No. I think what I would like
3 you -- the opinion to say would be, is, the Warsaw
4 Convention refers the Court to domestic law, and then the
5 domestic law in the context -- you have to look to the
6 context where you're in, and the domestic law in the
7 context of that case, you look to the Federal law that
8 applies, and that case is the Death on the High Seas Act.

9 QUESTION: So in a case where the parties said,
10 please, judge, it's Korean law that applies, you would
11 like us to say that isn't true.

12 MR. HARAKAS: No. I -- the -- I think with
13 respect to the Korean law issue, that can come in through
14 the Federal statute, through the Death on the High Seas
15 Act, under section 4. There was specific provision for
16 that under section 4 of the Death on the High Seas Act.

17 And then the issue comes down to, in that
18 situation, whether those remedies are in addition to the
19 remedies provided by the Death on the High Seas Act, or
20 are those just the exclusive remedies which the lower
21 courts have taken conflicting views on.

22 QUESTION: I just don't think it's quite that
23 easy. If a Korean passenger were on the airplane and
24 died, and wanted to sue in the United States, and if the
25 parties wanted to raise the issue, why wouldn't the court

1 in the United States have to make a choice-of-law decision
2 that might well refer them to Korean law?

3 MR. HARAKAS: Well, in -- outside the context of
4 our -- because let's say in the case where DOHSA is not
5 applicable, where you don't have a Federal statute giving
6 you the court jurisdiction, that you do have a -- you
7 can't have Federal jurisdiction under the Warsaw
8 Convention itself, and at that point the court could do a
9 choice-of-law analysis and go to another country, but in
10 the context of our case --

11 QUESTION: Well, don't you think this case arose
12 under law of the Warsaw Convention?

13 MR. HARAKAS: It did arise under the law of the
14 Warsaw Convention, and it occurred -- the deaths and
15 everything arose on the high seas, and that's enough to
16 trigger the applicability of the Death on the High Seas
17 Act.

18 QUESTION: And the plaintiffs here were
19 Americans.

20 MR. HARAKAS: The plaintiffs here were
21 Americans, in this case.

22 QUESTION: So your point -- it's been slow, but
23 I think the light is dawning.

24 You're saying when you sue under the Death on
25 the High Seas Act there's a specific provision, section 4,

1 that tells you whenever a right of action is granted by
2 the law of a foreign State, you can sue on that one, so a
3 person who doesn't mention that is a person who is deemed
4 to have forgotten by that one -- forget it, cut it out --
5 and therefore wants American law to apply.

6 MR. HARAKAS: You have the option --

7 QUESTION: Is that --

8 MR. HARAKAS: -- under the Death on the High
9 Seas Act.

10 QUESTION: You have your option, but you have to
11 state what your option is, and unless they refer to
12 section 4, they must be taking the American option.

13 MR. HARAKAS: That's correct.

14 QUESTION: That's your point. I've got it.
15 Thank you.

16 MR. HARAKAS: Thank you, Your Honors.

17 The only other point that I just want to stress
18 here is that in developing this law in this case, I think
19 this case is very similar to the Higginbotham case, where
20 the Court was faced with the same question that the Second
21 Circuit faced. Do you apply the law chosen by Congress
22 under DOHSA, or the law developed by the Court in Gaudet,
23 and in Higginbotham the Court said, you cannot use Gaudet
24 to allow loss of society damages where the Death on the
25 High Seas Act applies.

1 All those precedents following Higginbotham and
2 Miles show the restrictive nature of the Gaudet remedy,
3 and in fact Gaudet has been limited specifically to its
4 facts with respect to, it only applies in territorial
5 waters, and it only applies to longshoremen.

6 The Second Circuit didn't address that issue in
7 looking to Gaudet, and just adopted Gaudet as a general
8 representation of maritime law today, and I think the
9 Second Circuit was incorrect in approaching the issue in
10 that manner.

11 QUESTION: But you -- but if I understand your
12 argument correctly, you do say there should be one uniform
13 Federal rule that applies not only to high seas but to
14 territorial waters and to accidents over land, and if
15 that's so, I just don't quite understand why that should
16 be -- if there is a uniform law, why we aren't free to
17 choose between the alternatives.

18 MR. HARAKAS: Well, I'm saying in our particular
19 case, I don't think we have to go any further than just
20 looking to the context of our case in DOHSA, but if the
21 Court is concerned with the uniformity issue, I think
22 there is room to develop a uniform rule, but I don't think
23 we -- in the context of our case we have to go any further
24 than DOHSA --

25 QUESTION: But you're saying then --

1 MR. HARAKAS: -- for death on the high seas.

2 QUESTION: -- if it's just sort of an accident,
3 this happens to be a high seas case, so we'll take that
4 standard, and then we later on say, we've got to have
5 uniformity, so we would extend the coverage of that
6 statute.

7 MR. HARAKAS: Well --

8 QUESTION: But if we started out saying we have
9 to have uniformity, then we might have a lot of different
10 alternatives to apply.

11 MR. HARAKAS: Not necessarily, because when
12 you're talking about uniformity, you're not talking about
13 treaty uniformity, you're talking about --

14 QUESTION: American --

15 MR. HARAKAS: American uniformity.

16 QUESTION: Right.

17 MR. HARAKAS: And then when you're looking to
18 the rule of what should be the uniform rule, you should
19 look first to the Federal statute to see is there a
20 directly applicable statute, and even when there isn't a
21 directly applicable statute, is there a policy in similar
22 statutes that Congress has expressed what types of, in
23 this case damages are recoverable, and when you look to
24 each of those Federal statutes, there is one consistency
25 between the Jones Act, DOHSA, and FELA. It's pecuniary

1 losses only.

2 QUESTION: Do I remember the Second Circuit case
3 in this decision, this case correctly in that the Second
4 Circuit, wrong or right, was saying that in these
5 international air disasters, when they come into U.S.
6 courts and you apply the provision of the treaty that
7 says, local law applies, the Second Circuit thought that
8 that ought to be one local law whether the crash occurred
9 in Scotland on land, in the Sea of Japan, or over
10 California? That was the Second Circuit's view, was it
11 not?

12 MR. HARAKAS: Yes, Your Honor, it was, and
13 that's where I think they ran into trouble in trying to
14 find what this uniform law is, and they adopted --

15 QUESTION: Well, they didn't. They thought the
16 general maritime law, as declared in Gaudet, was a very
17 fine reference.

18 MR. HARAKAS: That's what they did look to, but
19 I think you have to -- when you're applying and looking
20 for Federal law, it's just the general maritime law
21 doesn't have a life of its own.

22 I think the Court's decisions in Miles and
23 Moragne showed us that the general maritime law is derived
24 from the maritime statutes. Because today there are so
25 many statutes out there, we have to look at those statutes

1 for guidance, and those statutes direct the court and
2 control the latitude that a court has in fashioning a
3 remedy or recognizing a remedy, and I don't think the
4 Second Circuit took those considerations into account.
5 They viewed general maritime law as something separate and
6 distinct from those maritime statutes.

7 QUESTION: May I -- are you finished with
8 your -- may I ask this question?

9 It just -- we think -- we tend to think of
10 international air crashes like this as almost always
11 occurring over the high seas, because of all the
12 international flights, but at the time the convention was
13 adopted, is it not true that the typical case would be one
14 flying between different countries, and the action would
15 be most apt to occur over land?

16 MR. HARAKAS: Within Europe, that would be true,
17 but beyond that I think the drafters noted the issue --
18 they foresaw, because Lindbergh had just crossed the
19 Atlantic in 1927 --

20 QUESTION: Right --

21 MR. HARAKAS: -- and the end of World War I --

22 QUESTION: -- but there wasn't an awful lot of
23 air carriers flying across the Atlantic at that time.

24 MR. HARAKAS: Not at that time, but they foresaw
25 that coming to be, and in fact within 10 years that's

1 what --

2 QUESTION: But there already was substantial
3 international commerce over land.

4 MR. HAKAKAS: Over land, but a flight between
5 London and the Continent would have been over the high
6 seas --

7 QUESTION: Over the channel, right.

8 MR. HAKAKAS: Over the channel, and in fact
9 transportation even between the United States, there were
10 flights between the United States and Cuba, and those were
11 over the high seas -- over --

12 QUESTION: Yes.

13 MR. HAKAKAS: -- international waters as well.

14 Just in conclusion, I'd like to say that the
15 Court should reverse the decision of the Second Circuit
16 below extending Gaudet to the high seas and allowing loss
17 of society damages and reaffirm the basic principle in
18 this case and in maritime law that damages for loss of
19 society simply are not recoverable for a death on the high
20 seas.

21 If there are no further questions, I will
22 conclude.

23 QUESTION: Thank you, Mr. Harakas.

24 MR. HAKAKAS: Thank you.

25 QUESTION: Mr. Needham, you have 3 minutes

1 remaining.

2 REBUTTAL ARGUMENT OF W. PAUL NEEDHAM
3 ON BEHALF OF THE PETITIONERS/RESPONDENTS
4 ZICHERMAN, ET AL.

5 MR. NEEDHAM: Thank you.

6 Mr. Chief Justice, and may it please the Court:
7 The United States signed the Warsaw Convention.
8 They are treaty-bound to follow that convention.

9 One of the fundamental purposes of that
10 convention was to deter wilful misconduct. In this case,
11 there has been a finding of wilful misconduct.

12 At the time that the Death on the High Seas Act
13 was passed into law, there was no contemplation of a cap.
14 There was no cap of any kind, and in this particular case,
15 when, to effectuate the purpose of this treaty, the Court
16 needs to have a deterrent effect, to then graft on to --

17 QUESTION: But the people who are guilty of the
18 wilful misconduct were the flight crew, weren't they?

19 MR. NEEDHAM: Well, the flight crew, and that
20 gets imputed to Korean Air Lines, which is the defendant.

21 QUESTION: Yes, but the flight crew, I suppose
22 they have a pretty good deterrent whatever the damages
23 are.

24 MR. NEEDHAM: Yes, absolutely.

25 QUESTION: I thought the purpose of the Warsaw

1 Convention was to put a lid on the damages, wasn't that
2 the main purpose of it, so that the then-infant industry
3 would be able to grow up?

4 MR. NEEDHAM: That's absolutely true, but even
5 then, they said no lid when there's wilful misconduct, so
6 as concerned as they were then about judgments --

7 QUESTION: Yes, well, I thought the purpose was
8 rather to put a lid on damages but, when the conduct was
9 so bad, they were going to allow it to be handled the way
10 tort litigation was handled generally.

11 MR. NEEDHAM: And that -- that is this case,
12 Your Honor, and in this case, to award loss of society,
13 and we believe that Federal common law is correct, we
14 believe loss of society is there in Federal common law,
15 and we believe to attach a financial dependency
16 requirement to loss of society is inappropriate.

17 The love and affection and mutual benefit you
18 have in a family does not depend on how much money changes
19 hands, and we disagree with the financial dependency --

20 QUESTION: Counsel, I have one question. I hate
21 to ask at the last minute, but the complaint had Count I,
22 a suit under the Warsaw Convention, Count II, a suit under
23 the Death on the High Seas Act, in which it asserts that
24 Korean law is applicable. What happened to that?

25 MR. NEEDHAM: Your Honor, that was alternative

1 pleading. We had a very detailed complaint, and after the
2 finding of wilful misconduct we trimmed it up and made it
3 very clean. The defendants insisted it was a death on the
4 high sea case. It was merely alternative pleading.

5 You can see, under jurisdiction, we said there
6 was jurisdiction under the Warsaw Convention. We pled the
7 Warsaw Convention, we argued consistently the Warsaw
8 Convention, and we --

9 QUESTION: What happened to that Count II, Death
10 on the High Seas --

11 MR. NEEDHAM: I think that count was either
12 dismissed, or there was no finding. It was submitted to
13 the jury, not on Count I, not on Count II, just on a
14 verdict to the jury, and we argued our first count. We
15 never relied on the second count. It was just alternative
16 defensive pleading, Your Honor.

17 And we would ask that the decision of the Second
18 Circuit be affirmed with the exception that there not be a
19 financial dependency requirement grafted onto the loss of
20 society.

21 Thank you.

22 CHIEF JUSTICE REHNQUIST: Thank you,
23 Mr. Needham. The case is submitted.

24 (Whereupon, at 11:04 a.m., the case in the
25 above-entitled matter was submitted.)

CERTIFICATION

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The United States in the Matter of:

MARJORIE ZICHERMAN, ETC., ET AL.,
Petitioners, v. KOREAN AIR LINES CO., LTD.
and KOREAN AIR LINES CO., LTD.,
Petitioner, v. MARJORIE ZICHERMAN, ETC., ET AL.

CASE NO. : 94-1361, 94-1477

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BY Don Mario Federico

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