

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: YAMAHA MOTOR CORPORATION,
U.S.A., ET AL., Petitioner v.
LUCIEN B. CALHOUN, ETC., ET AL.
CASE NO: No. 94-1387
PLACE: Washington, D.C.
DATE: Tuesday, October 31, 1995
PAGES: 1-56

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SUPREME COURT U.S.
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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 YAMAHA MOTOR CORPORATION, :
4 U.S.A., ET AL., :
5 Petitioners :
6 v. : No. 94-1387
7 LUCIEN B. CALHOUN, ETC., :
8 ET AL. :
9 - - - - -X

10 Washington, D.C.

11 Tuesday, October 31, 1995

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 11:08 a.m.

15 APPEARANCES:

16 JAMES W. BARTLETT, III, ESQ., Baltimore, Maryland; on
17 behalf of the Petitioners.

18 PAUL. A. ENGELMAYER, ESQ., Assistant to the Solicitor
19 General, Department of Justice, Washington, D.C.; on
20 behalf of the United States, as amicus curiae,
21 supporting the Petitioners.

22 ALAN B. MORRISON, ESQ., Washington, D.C.; on behalf of the
23 Respondents.

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1 PROCEEDINGS

2 (11:08 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 94-1387, Yamaha Motor Corporation v. Lucien
5 Calhoun.

6 Mr. Bartlett, you may proceed whenever you're
7 ready.

8 MR. BARTLETT: Thank you.

9 ORAL ARGUMENT OF JAMES W. BARTLETT, III

10 ON BEHALF OF THE PETITIONERS

11 MR. BARTLETT: Mr. Chief Justice and may it
12 please the Court:

13 This is a maritime collision case. That means,
14 as the Third Circuit acknowledged, that substantive
15 admiralty and maritime law applies.

16 Where the Third Circuit went astray, however,
17 was in holding that maritime law does not supply the rule
18 of decision. It does.

19 That rule is the general maritime law death
20 remedy announced by this Court in *Moragne*, and because
21 this is a maritime case, the choice of law analysis is
22 that of *American Dredging*.

23 First, *Moragne*.

24 QUESTION: Do we actually know what difference
25 it makes as to what this particular plaintiff recovers

1 which view prevails?

2 MR. BARTLETT: Well, of course, the damages
3 issues, the exact elements of damages issue was not
4 accepted by this Court, although it was one of those that
5 was -- we asked the Court to address.

6 QUESTION: So at this stage, we're deciding a
7 fairly abstract question, and conceivably it might not
8 make any difference, is that correct, that Puerto Rico
9 might have the same rule as the general maritime law?

10 MR. BARTLETT: I believe you are addressing, in
11 that sense, an abstract question, yes, and, indeed, the
12 damages issues can go either way, depending upon what
13 State law you're applying, not just Puerto Rico or
14 Pennsylvania, but my own State of Maryland, would have
15 differences between those.

16 QUESTION: Do the definitions of the primary
17 duty possibly differ, depending on the rule we adopt?

18 MR. BARTLETT: I do not believe so. The primary
19 duty would be, of course, set out in the various liability
20 theories. In this particular case, maritime law addresses
21 or accepts and recognizes all of the various theories for
22 product liability -- strict product liability, negligence,
23 and warranty -- but that would not be the case, say, for
24 example, were the plaintiff or the victim to have died in
25 the territorial waters of Delaware. Delaware does not

1 recognize strict liability in tort product defects, so
2 negligence would be there.

3 QUESTION: So when we're deciding this case, I
4 assume we should consider that the consequences of our
5 decision may have some bearing on how the primary duty
6 will be defined in other cases that come before us.

7 MR. BARTLETT: Certainly --

8 QUESTION: Or are you just confining your
9 argument to questions of damages and remedy?

10 MR. BARTLETT: No. I think -- Yamaha is a boat
11 manufacturer, but it stands in the shoes of any potential
12 maritime defendant who could be sued for the death of a
13 "civilian." It could be a shipowner. It could be
14 shipbuilder.

15 QUESTION: Yes, but isn't there this difference:
16 you really wouldn't have a seaworthiness claim with this
17 particular article, would you?

18 MR. BARTLETT: No. Seaworthiness is a --

19 QUESTION: Which is what we had in Moragne.

20 MR. BARTLETT: -- has a theory of liability that
21 is only available to a Jones Act seaman.

22 QUESTION: Well, theoretically you could have a
23 seaworthiness theory of absolute liability for passengers,
24 couldn't you?

25 MR. BARTLETT: Well, the strict liability theory

1 is certainly an absolute liability theory, so if it was a
2 claim that the ship or a passenger on a ship was injured
3 by some defect or defective design of the ship or the
4 boat, then you would have an absolute liability theory
5 under which the plaintiff could recover, but it would not
6 be the unseaworthiness theory.

7 QUESTION: In this case we have a negligence
8 theory, don't we?

9 MR. BARTLETT: We have a -- we have negligence
10 but there's also a claim in strict liability, which this
11 Court recognized as being viable under maritime law in the
12 East River case.

13 QUESTION: You contend that marine preempts the
14 negligence theory, don't you?

15 MR. BARTLETT: No, I don't.

16 QUESTION: Oh.

17 MR. BARTLETT: First of all, I think Moragne
18 precludes the remedy of State wrongful death, but it
19 doesn't preempt any theory along those lines, so --

20 QUESTION: Because, as Federal common law, we
21 can adopt that theory.

22 MR. BARTLETT: What theory is that, Your Honor?

23 QUESTION: Any theory that is not -- you say it
24 doesn't preempt a particular theory of liability.

25 MR. BARTLETT: Correct.

1 QUESTION: And the answer to that is because we
2 can make up common law, Federal common law, and adopt a
3 different theory.

4 MR. BARTLETT: And you have. Certainly in the
5 East River case you adopted a common law rule that was
6 based upon looking at what the States did, what the
7 Restatement says, and you adopted in essence the 402(a)
8 section absolute strict liability for product defect, and
9 you said --

10 QUESTION: I just wanted to understand your
11 reasoning. Your reasoning is that because State law is
12 preempted, their given Federal theory of recovery is not
13 precluded.

14 MR. BARTLETT: Correct.

15 QUESTION: Yes.

16 QUESTION: But you do contend that a State law
17 theory, negligence theory of recovery is preempted.

18 Let me put it this way. In Moragne there were
19 two theories. 1) There was the Florida negligence
20 theory, and the unseaworthiness theory.

21 MR. BARTLETT: Yes.

22 QUESTION: And Moragne held that the
23 unseaworthiness claim was available, and it left
24 standing -- as you remember, it was a 1292(b) appeal --
25 left standing the negligence theory. That was not

1 preempted in that case.

2 MR. BARTLETT: Correct.

3 QUESTION: Do you contend that if the same two-
4 count complaint were filed today, that the negligence,
5 State law negligence theory would be preempted?

6 MR. BARTLETT: Yes, because I believe the
7 Moragne theory of recovery adapts itself, or allows itself
8 to go forward under any theory of liability, be it strict
9 product liability, be it negligence --

10 QUESTION: Even though it was not preempted in
11 Moragne itself?

12 MR. BARTLETT: Yes.

13 QUESTION: And even though Moragne, even going
14 back to The Harrisburg, said the way we got into this mess
15 in the first place was that they sued too late on the
16 State claim.

17 MR. BARTLETT: Yes, well, The Harrisburg, of
18 course, held that there was no wrongful death remedy.

19 QUESTION: Yes, but let me just understand this
20 background of the case. You have no quarrel with the law
21 that was in place pre-Moragne -- that is, for these inland
22 water deaths. The remedy was State survival and wrongful
23 death acts, pre-Moragne.

24 MR. BARTLETT: Yes, because this Court allowed
25 State wrongful death statutes to provide a remedy where

1 The Harrisburg said there was none under the general
2 maritime law.

3 QUESTION: So when the Death on the High Seas
4 Act was passed, everyone understood that for inland
5 waters, as distinguished from overseas, that their State
6 law remedies would apply.

7 MR. BARTLETT: That was because, I believe, that
8 the Congress, when it passed the Death on the High Seas
9 Act, was providing the remedy where there was none. It
10 was solving the problem --

11 QUESTION: Right.

12 MR. BARTLETT: -- that was presented to it.

13 QUESTION: Right, and then we get Moragne, which
14 involves an unseaworthiness claim, and this Court is
15 adding something that didn't exist before, a Federal
16 maritime law claim for the unseaworthiness for the benefit
17 of a longshore worker, and that's what Moragne itself
18 does. It adds something.

19 Now, you are saying, but without saying so,
20 implicit in Moragne is also a subtraction, and how do you
21 get to the subtraction? I see what Moragne added, but I
22 don't see in the decision itself anything that says and,
23 not only are we creating this seaworthiness that the
24 States don't know about because they don't know about
25 seaworthiness doctrine, but we are also taking away what

1 everyone understood was in place up until now.

2 MR. BARTLETT: I think the logic of Moragne is
3 such that you can only read it as providing a uniform
4 death remedy that is to apply to the exclusion of State
5 wrongful death statutes.

6 QUESTION: Well, Mr. Bartlett, to put it another
7 way, it seems to me for you to prevail we would have to
8 extend Moragne, because it didn't really cover this.

9 MR. BARTLETT: It only went to the
10 unseaworthiness theory of liability, that's correct,
11 but --

12 QUESTION: I mean, it seems to me you'd have to
13 extend it.

14 Do you see any room in State territorial -- in
15 territorial waters for both admiralty law and State law,
16 depending on the circumstances?

17 MR. BARTLETT: No, I don't. I believe the
18 Moragne remedy provides both a wrongful death remedy and
19 several of the lower courts have also held that it can
20 provide a survival --

21 QUESTION: Well, there's a division of opinion
22 on whether Moragne should be extended to this, but it --
23 what is the Federal interest in uniformity in connection
24 with a jet ski accident in territorial waters?

25 Why do we need to apply admiralty law and seek

1 uniformity? Why isn't that much closer to traditional
2 State negligence actions, where State law should govern?

3 I mean, territorial waters encompass navigable
4 waters within a State, do they not, rivers, lakes, so
5 forth, and up to 3 miles out to sea. Is that what we're
6 talking about?

7 MR. BARTLETT: Yes. Well, this Court in
8 Foremost and Sisson held that admiralty jurisdiction
9 extended to all navigable waters, and certainly where a
10 recreational boat collision, as was the case in this case,
11 was involved.

12 QUESTION: Well, there can be admiralty
13 jurisdiction in territorial waters, we've so held, but
14 perhaps it's limited to where there's really a Federal
15 interest, where there are seamen involved, or longshoremen
16 and harbor workers, or something of that sort.

17 Is it necessary that it extend -- admiralty rule
18 of law extend to recreational boating accidents?

19 MR. BARTLETT: I believe it is, because the
20 Constitution, Article III, section 2, spoke to the
21 exclusive jurisdiction of the courts, and with that this
22 Court has held time and time again that that power meant
23 that the Federal courts were to fashion this general
24 maritime law, exactly what this Court did in Moragne.

25 QUESTION: But I had thought -- you're referring

1 now to admiralty jurisdiction. Tell me if I'm wrong,
2 please, but I had thought that for many years admiralty
3 jurisdiction has been a forum for enforcing any number of
4 State rules and State primary duties.

5 MR. BARTLETT: Sir --

6 QUESTION: I mean, it seems to me that we're
7 mixing up jurisdiction here with the source of the primary
8 duty.

9 MR. BARTLETT: This Court has held in the East
10 River case and articulated in several other cases that
11 with admiralty jurisdiction comes admiralty substantive
12 laws. Certainly that isn't a situation that always
13 occurs. There are certain situations that this Court has
14 recognized where State law or State interests will be
15 allowed to overcome that presumption, if you will, that
16 maritime substantive law applies.

17 QUESTION: Mr. Bartlett, I think you conceded,
18 and you were very forthright in this, that pre-Moragne,
19 the law that was applied in cases like this was State law,
20 State wrongful death acts, State survival acts, and you
21 are not suggesting now, are you, that that was an
22 unconstitutional course?

23 MR. BARTLETT: Not at all. I believe that was
24 this Court trying to, without specifically overruling The
25 Harrisburg, nevertheless allowing a remedy.

1 The Harrisburg was a wrong decision. This Court
2 later in Moragne said it was. But in the meantime,
3 without overruling Harrisburg, this Court allowed the
4 State wrongful death statutes to ameliorate, as it were,
5 the harsh effects of the Harrisburg rule.

6 QUESTION: On your theory, is there any role
7 left for the enforcement of a State rule on a kind of
8 borrowing theory by an admiralty court?

9 MR. BARTLETT: In this particular area, wrongful
10 death remedies, I think not. However, what an admiralty
11 court should do --

12 QUESTION: What about the death of a swimmer?

13 MR. BARTLETT: It would depend on how the
14 swimmer died, Your Honor.

15 For example, I would contend that if a boat in
16 navigation was the force that caused the swimmer to die,
17 then admiralty jurisdiction would be present, and
18 substantive admiralty law would apply.

19 If the swimmer, on the other hand, was just
20 swimming from shore with no relationship --

21 QUESTION: Two swimmers collide.

22 MR. BARTLETT: Excuse me?

23 QUESTION: Two swimmers collide, no -- State law
24 can apply in that case.

25 MR. BARTLETT: Yes, Your Honor.

1 QUESTION: Yes, but the swimmer collides with
2 water skis -- admiralty jurisdiction.

3 MR. BARTLETT: It would depend, I think --

4 QUESTION: It would be meaningful in this case.

5 MR. BARTLETT: I -- certainly we're getting
6 toward that line there, but if the water ski --

7 QUESTION: Well, what is your answer? In this
8 case, if the vehicle -- if the vessel used in this case
9 had hit another swimmer, and that swimmer had been killed,
10 there would be no State law remedy.

11 MR. BARTLETT: There would be no State law
12 remedy. The Moragne --

13 QUESTION: Even if it was the negligence of the
14 water skier, not the manufacturer --

15 MR. BARTLETT: I believe you are still going to
16 have to do that because you've still got navigation of a
17 boat.

18 QUESTION: But that's where your position takes
19 us, that's what I --

20 MR. BARTLETT: Yes.

21 QUESTION: This is very odd, because in State
22 territorial waters, local sheriffs routinely enforce
23 safety ordinance, they inspect for life preservers, they
24 tag vessels that are operating at illegal speeds, and then
25 suddenly the law is displaced because a State has no

1 interest.

2 MR. BARTLETT: Oh, well, the State certainly has
3 an interest, but so does the Federal Government. I think
4 you'll find in this area that there are specific statutes
5 and regulations. For example, the Coast Guard administers
6 safety on navigable territorial waters, but there is also
7 legislation and regulations that cede certain
8 responsibilities to the State.

9 QUESTION: Mr. Bartlett, what Federal interest
10 is disturbed by allowing State law to control this kind of
11 accident? This is a complicated case. There's a very
12 long opinion, but at the end there's a line that says,
13 this case at base is no different than a cause of action
14 arising out of the average motor vehicle accident. Why
15 should it be handled differently? Is it a constitutional
16 compulsion? Is it this Court's development of the
17 maritime law?

18 MR. BARTLETT: I believe it's both, Your Honor.
19 I believe it's Article III, section 2, and this Court's
20 and the lower court's, as is to be done forming the
21 general maritime law that admiralty practitioners such as
22 myself depend upon.

23 QUESTION: The question -- I don't see what
24 difference it makes, frankly, whether conceptually you say
25 State law has its cause of action and applies, or whether

1 you say, this is a maritime tort, exclusive jurisdiction
2 of which is given to an admiralty court, saving to
3 suitors, but that's a remedial and not a positive
4 question.

5 But so -- for we have an admiralty tort under
6 Federal law, but by the way, we'll borrow State law,
7 which, of course, is what we should do, unless it's
8 hostile to statutes.

9 All right, so I don't understand why it makes a
10 difference, but I did think of an example where it would
11 tell us it might. Can you, in a personal injury action
12 not leading to death, under current law get punitive
13 damages?

14 If the answer to that question is yes, and I
15 suppose that what's been happening in personal injury
16 cases is they've been borrowing the entire State action,
17 or not borrowing it, just following it. But if the
18 answer's no, it must be that in personal injury cases
19 what's been happening is grafting good State law onto an
20 admiralty cause of action, so what's the answer to that
21 question?

22 I think it's pretty important, since Moragne
23 says follow personal injury precedent.

24 MR. BARTLETT: Well, punitive damages are
25 available under maritime law.

1 QUESTION: In personal injury cases?

2 MR. BARTLETT: Yes, but --

3 QUESTION: So they have a lot of cases where you
4 get --

5 MR. BARTLETT: Well, the current jurisprudence
6 is a trend against them, I must admit, but as it stands
7 now --

8 QUESTION: Well, my theory -- maybe it isn't a
9 good example, is, are there instances -- look, you have
10 millions of personal injury cases on territorial waters in
11 ships. I would think there are --

12 MR. BARTLETT: Yes.

13 QUESTION: -- quite a few involving passengers.

14 MR. BARTLETT: Yes.

15 QUESTION: Okay. What's the understanding of
16 the bar in the States? Is it that you take the State law
17 and apply it, nothing else?

18 MR. BARTLETT: I think you look to the entire
19 body of not just one State's law but many States' laws.

20 QUESTION: And can you demonstrate that in the
21 law, because if you can demonstrate that in the law, I
22 guess that's what Moragne tells us to do.

23 MR. BARTLETT: Well, I believe this Court, for
24 example in the East River case, looked to see what the
25 other -- what all of the States were doing with respect to

1 the remedy for strict liability for product defect, also
2 looked to the Restatement, and then formed the general
3 maritime law rule from that, so --

4 QUESTION: What do you do about the one
5 precedent against that, which is Holmes in The Hamilton,
6 because Holmes in The Hamilton certainly says that you can
7 have a State statute, pure and simple. Otherwise, where
8 did they ever get it in the State wrongful death survivor
9 before Moragne?

10 MR. BARTLETT: Well, Your Honor also looked to
11 State law in Lyon v. The Ranger III, when you sat on the
12 First Circuit --

13 QUESTION: Yes. Yes.

14 MR. BARTLETT: And you looked to Rhode Island
15 law on an issue of law that the maritime law was silent
16 on, and that's exactly how the general maritime law is to
17 be formed, looking to other sources.

18 QUESTION: I'm trying to find differences
19 between the theory of, what we're doing is just borrowing
20 State laws in an admiralty matter, and State law applies
21 pure and simple. Punitive damages doesn't work, but
22 Holmes in The Hamilton seems to apply State law pure and
23 simple, doesn't he, because there was no Federal admiralty
24 law.

25 MR. BARTLETT: That's correct.

1 QUESTION: So what's his theory there? Well --

2 MR. BARTLETT: Again, well, that was post-
3 Harrisburg and pre-Moragne, Your Honor.

4 QUESTION: Thank you, Mr. Bartlett.

5 MR. BARTLETT: Thank you.

6 QUESTION: Mr. Engelmayer.

7 ORAL ARGUMENT OF PAUL A. ENGELMAYER

8 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

9 SUPPORTING THE PETITIONERS

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

12 Our position is twofold. First, the general
13 Federal maritime death remedy applies to the death of any
14 nonseaman in territorial waters within admiralty
15 jurisdiction and, second, that remedy may not be
16 supplemented by State remedies.

17 Let me begin very briefly with the first point.

18 QUESTION: Will you when you -- before you get
19 through explain why the second count of Moragne survived,
20 then?

21 MR. ENGELMAYER: The issue is not before the
22 Court, Justice Stevens.

23 QUESTION: But it was decided in that case, was
24 it?

25 MR. ENGELMAYER: No. I believe what happened in

1 Moragne was that the difficulties accommodating --

2 QUESTION: If Moragne didn't decide it, what
3 did?

4 MR. ENGELMAYER: What decides the --

5 QUESTION: Decide your view.

6 MR. ENGELMAYER: Right. What decides the
7 displacement of State remedies issue is the settled
8 principle noted by this Court in Tallentire that State law
9 may not apply where it would change substantive admiralty
10 law.

11 That has applied in the context of remedies both
12 where the remedies were developed by statute, as in the
13 cases of Tallentire and Chelentis -- excuse me, Tallentire
14 and Gillespie, dealing with the statutory death remedies
15 under the DOHSA and the Jones Act. It's applied in the
16 context of injury in the Chelentis case -- where this
17 Court developed a substantive maritime law that said at
18 the time that only maintenance and cure were recoverable
19 by seamen, and therefore State remedies were precluded
20 where they sought full indemnification, and that same
21 principle --

22 QUESTION: You say Tallentire decided --

23 MR. ENGELMAYER: Yes. I think Tallentire is,
24 well, factually not on point, as a matter of legal
25 principle on point, for this reason.

1 Tallentire, after establishing that there was no
2 affirmative preservation of State death remedies on the
3 high seas then had to confront the issue of whether, under
4 settled principles of admiralty law, whether there was any
5 room for a conflicting State damages remedy.

6 The Court held that there was not, and the Court
7 stated the operative principle -- I believe it's on pages
8 223, 222, 224 -- that the State law cannot change
9 substantive admiralty law. In this case --

10 QUESTION: Well, what's the substantive
11 admiralty law here? Aren't we addressing the question
12 here, assuming admiralty jurisdiction to begin with,
13 should there in fact be a substantive admiralty rule to be
14 applied, and therefore to displace State law? Aren't we
15 addressing a different question?

16 MR. ENGELMAYER: Well, I guess that's the
17 threshold issue I meant to address, which is just what is
18 the scope of the general --

19 QUESTION: Okay, and until that threshold issue
20 is addressed, Tallentire isn't on point, or we can't tell
21 whether it's on point.

22 MR. ENGELMAYER: I agree. Let me explain why I
23 believe that issue is settled.

24 Moragne, although it was brought here because of
25 the specific problems accommodating unseaworthiness to

1 State statutes, issued a more broad holding. There would
2 have been no reason to overrule The Harrisburg, which was
3 a negligence case, and the Court throughout Moragne made
4 clear that it was reluctant to -- that it felt that the
5 bar to recovery in death cases had been anachronistic,
6 whereas the Court put the point, barbarous, and so it
7 wrote that an action does lie under general maritime law
8 for death caused by violation of maritime duties. Those
9 duties include no negligence, the duty of due care.
10 That's in the Kermarec case from 1959.

11 And so our point here is that there is no reason
12 the maritime death remedy should not apply to when the
13 person killed by maritime tort just happens to be a so-
14 called recreational boater.

15 QUESTION: In this case, I get the sense we
16 don't know what the State remedies are, and we don't know
17 what the admiralty remedies are.

18 MR. ENGELMAYER: Right.

19 QUESTION: So we're talking about a very
20 abstract proposition that may make no difference at all.

21 MR. ENGELMAYER: Conceivably, although I think
22 at the end of the day the issue would be, are State
23 remedies precluded because they are inconsistent with the
24 Federal maritime remedy, so while it's possible at the end
25 of the day a State remedy could apply, that is only

1 because it is thoroughly consistent with the Federal
2 remedy developed in Moragne.

3 QUESTION: What, in fact, you're saying is --

4 QUESTION: Well, but it seems to me --

5 QUESTION: I'm sorry.

6 QUESTION: It seems to me that we have two
7 choices to make.

8 MR. ENGELMAYER: Right.

9 QUESTION: If we agree with you, we displace a
10 substantial body of State law on products liability
11 personal negligence, et cetera, in all death cases, areas
12 in which States have very substantial expertise, very
13 well-developed bodies of law.

14 If we agree with the respondent, we displace the
15 rules of most of the circuit courts that have ruled in
16 this area, but it seems to me that it's asking the Federal
17 courts to begin developing, to continue to develop
18 wrongful death rules in territorial waters where we don't
19 really have that much of an interest.

20 MR. ENGELMAYER: Let me address those first as a
21 matter of precedent, second as a matter of policy.

22 With regard to precedent, the Federal courts in
23 admiralty are already in this business. In a series of
24 cases, this Court has held that State rules of liability
25 cannot apply in admiralty, where they would be

1 inconsistent with Federal standards.

2 I would cite to the Court Robins Dry Dock,
3 involving an inconsistent scaffold regulation, Pope and
4 Talbot, Kermarec, the workman rule which was discussed in
5 the Chicago case recently, the Messel case -- we're
6 already in this business, and there already is an
7 admiralty duty to not commit products liability.

8 With regard to the policy reason, it's the same
9 reason that the Court noted in Foremost, which is the
10 interest in freedom of navigation.

11 If State remedies are allowed to be used on the
12 territorial waters, there will be different and
13 potentially onerous State tort law regimes that will
14 govern maritime actors as they go up and down the Nation's
15 coastlines, as they go along the State, the Nation's
16 interstate waterways.

17 Now, that, in turn, could inhibit the primary
18 conduct of actors, not just manufacturers of jet skis --

19 QUESTION: But why does that lead to the rule
20 that there must be absolute uniformity? Why can't State
21 law apply up until the point where there's a genuine
22 collision with some authentic Federal interest?

23 MR. ENGELMAYER: I agree with your proposition.
24 Our -- my suggestion is that there is a Federal interest
25 in having uniform remedies, because remedies affect

1 primary conduct. If a person --

2 QUESTION: I don't understand the Federal
3 interest in having a different remedy, a different regime
4 for the jet skier who is off the coast of Puerto Rico and
5 the one who is on an inland lake.

6 MR. ENGELMAYER: The interest is that Article
7 III has committed the admiralty jurisdiction, which has
8 been defined to include the former, Puerto Rico, and not
9 the latter.

10 Article III has established an interest in
11 maritime uniformity in order to protect commerce. If
12 there are different --

13 QUESTION: You've already -- I think you've
14 agreed with me that for years maritime jurisdiction
15 coexisted peacefully with picking up wrongful death and
16 survival acts from State laws and plugging them into
17 claims like this one.

18 MR. ENGELMAYER: Right, and I think historically
19 the reason between The Harrisburg and Moragne, why State
20 remedies were picked up, was akin -- was simply because
21 there was a gap in Federal remedial coverage, and the
22 admiralty does what it does when there is no Federal law
23 on point, which is to borrow State law, as Judge Breyer
24 did in his First Circuit opinion. When there's no rule on
25 point, you can look to State law, providing the admiralty

1 court elects not to develop one.

2 Our position is that this court in Moragne has
3 developed a Federal remedy. That remedy is measured by
4 the remedies available in DOHSA and the Jones Act.
5 There's no reason for any -- for the disuniformities that
6 would occur across classes of plaintiffs or in different
7 areas of a territory.

8 QUESTION: I think you also make the more
9 general point, if I understood your answer to my earlier
10 question, and that is, Tallentire applies because Moragne
11 requires you -- requires the Federal admiralty courts to
12 develop substantive law in this area.

13 MR. ENGELMAYER: Exactly.

14 QUESTION: There is no choice left. We may not
15 know what it is yet, but there is no choice but to develop
16 it.

17 MR. ENGELMAYER: I couldn't put it better, and
18 essentially the lower Federal courts for 25 years have
19 fleshed out the Moragne remedy in the nonseamen
20 territorial waters context, following the cues sent by
21 this Court, for example in the Miles case.

22 QUESTION: That's what I want to know, what they
23 do.

24 MR. ENGELMAYER: Right.

25 QUESTION: In personal injury cases, in

1 territorial waters, don't admiralty courts by and large
2 apply for nonseamen, nonlongshoremen, State law?

3 I mean, there may be a curlicue that they lop
4 off, but that's why I don't understand what this is about,
5 because the normal thing would say, just as we did in that
6 range, or whatever it is, borrow State law, unless the
7 State law is -- what happens in personal injury cases?
8 The only time I have to look it up in that case, it looked
9 as if what I was supposed to do was, here it is, an
10 admiralty cause of action, it doesn't concern a seaman,
11 doesn't concern a longshoreman, so I should borrow State
12 law, and I would borrow State law unless it was
13 inconsistent with some admiralty principle.

14 Now, isn't that what you should do even aside
15 the conceptual -- I mean --

16 MR. ENGELMAYER: Yes.

17 QUESTION: All right, then if that's what you
18 should do, then isn't -- then here, wouldn't State law
19 apply across the board, with possible exceptions for
20 punitives and survival of pecuniary damages? That seems
21 to be what the issue was.

22 MR. ENGELMAYER: But once you -- but you've --
23 you're -- the last thing you said, Justice Breyer, I think
24 answers the question.

25 In other words, if the -- if Yamaha is correct

1 in this case --

2 QUESTION: Yes.

3 MR. ENGELMAYER: -- there is a Federal remedy
4 that does not extend to nonpecuniary damages, and --

5 QUESTION: Well, that's what Judge Pollack
6 thought. Judge Pollack thought it didn't extend to
7 survival of pecuniaries, and he also thought it didn't --
8 that punitives shouldn't be picked up, and nobody's really
9 focused on that at the court of appeals level.

10 MR. ENGELMAYER: I think the Wahlstrom case, to
11 the extent that any court of appeals deals with this
12 systematically, does -- that's out of the Second
13 Circuit -- does address the issue.

14 I suppose the point, though, is that if the
15 Federal damages remedy in this quadrant of territorial
16 waters, nonseamen, is to be calibrated to the remedies
17 available under DOHSA and the Jones Act, because there
18 would be no really good equitable reason. In that case,
19 State law could apply only insofar as it is consistent
20 with the outlines of that remedy, which the lower courts
21 have generally believed not to include nonpecuniary
22 damages and punitive damages.

23 We're certainly not saying as a formal matter
24 there's no reason State law can't apply in the abstract,
25 and State recreational boating statutes can apply because,

1 by and large, they are not inconsistent --

2 QUESTION: Thank you, Mr. Engelmayer.

3 Mr. Morrison, we'll hear from you.

4 ORAL ARGUMENT OF ALAN B. MORRISON

5 ON BEHALF OF THE RESPONDENT

6 MR. MORRISON: Thank you, Mr. Chief Justice, and
7 may it please the Court:

8 The question presented in this case is whether
9 the historic use of State law for wrongful death accidents
10 that occur in territorial waters that has existed for more
11 than 100 years has been displaced by Federal maritime law.
12 The accident here occurred in territorial waters, not on
13 the high seas.

14 QUESTION: And you concede the Federal court has
15 admiralty jurisdiction over the case?

16 MR. MORRISON: We allege jurisdiction, subject
17 matter jurisdiction both on the diversity statute and
18 under the admiralty statute. We believe that we clearly
19 have it under diversity.

20 I would prefer not to debate whether we have it
21 under the admiralty jurisdiction. This Court's
22 jurisprudence is quite complicated on that, and we think
23 that one of the reasons, indeed, that we should continue
24 to use State law is because if we accept the petitioner's
25 position, we must in every case -- the first inquiry must

1 be subject matter jurisdiction, because it's only if you
2 have admiralty jurisdiction based on maritime law that you
3 get into this displacement problem to --

4 QUESTION: That's the first inquiry in any
5 Federal court --

6 MR. MORRISON: Precisely, Your Honor.

7 QUESTION: -- is subject matter jurisdiction.

8 MR. MORRISON: But we have subject matter
9 jurisdiction here because there is diversity, and we
10 didn't need to allege admiralty jurisdiction, and we want
11 to rest our claim on the diversity jurisdiction because we
12 are relying on substantive State law in this case.

13 QUESTION: May I ask you one question? It might
14 sound like a quibble, but it's important to me, in any
15 event.

16 You said the question is whether or not State
17 law has been displaced. Is the question whether or not
18 State law should be displaced?

19 MR. MORRISON: Well, Your Honor, that is, of
20 course, the Court's prerogative. I would note that the
21 way the case has been argued, the way the Solicitor
22 General said may they continue after Moragne --

23 QUESTION: Yes.

24 MR. MORRISON: -- it is -- it has been argued
25 that way, but I would agree that the Court could now, as

1 Justice O'Connor said earlier, extend Moragne to say, even
2 though we didn't displace State law back then, we're going
3 to do it now. The Court clearly has in its power to do
4 so, and I want to first address the question of whether it
5 has been displaced, and then to explain to you why I think
6 it would be a bad idea for the Court to do so.

7 QUESTION: Well, what if a seaman, the executor
8 of a seaman comes into court and says, my -- the seaman
9 had an unseaworthiness claim against a vessel, and so I'm
10 suing -- I'm suing the shipowner, and I'm suing him
11 diversity of citizenship. I don't want to get into all
12 this admiralty business. Do you think that that simply
13 forecloses admiralty jurisdiction?

14 MR. MORRISON: No, Your Honor, it doesn't for
15 one very important reason, and that is because as to the
16 seaman, there is a Federal statute, the Jones Act, and as
17 to death on the high seas, there's the Death on the High
18 Seas Act, and for longshoremen or harbor workers there is
19 another Federal statute, and so when -- cases like Miles
20 and Tallentire and Higginbotham all involve cases where
21 there was a comprehensive Federal statute, and this Court
22 said in every one of those cases, we are not in a position
23 to second guess the judgment made by Congress. They've
24 created a set of rights with remedies, offsetting
25 benefits. We can't go beyond that.

1 So Your Honor, in that case, it's controlled by
2 the Jones Act and its terms, and you do not have an
3 alternative State remedy, as this Court has held in
4 several cases.

5 QUESTION: Not only that, but may I just throw
6 in, in Moragne itself, they referred that question to the
7 Florida State supreme court, and they held there was no
8 State remedy for unseaworthiness, so there's an absence of
9 a State remedy as well as the presence of a Federal remedy
10 in the hypothetical.

11 MR. MORRISON: That is correct, Your Honor.
12 That is correct.

13 I would also say, of course, that --

14 QUESTION: Mr. Morrison, but I'm not still clear
15 on this pleader's choice that the Chief was raising.

16 I was under the impression that the pleader
17 could not type -- even in a personal injuries civilian
18 claim like this, that if you could bring it under
19 admiralty, then you must -- then it does fall under the
20 Federal maritime jurisdiction, that you could not, by
21 having the alternate diversity, come in as an ordinary
22 diversity case. I thought there was precedent to that
23 effect. There isn't pleader's choice.

24 MR. MORRISON: Well, I -- I'm not sure that I
25 understand Your Honor's question precisely. I agree that

1 if -- that in certain situations this Court has held that
2 the existence of Federal maritime law precludes the States
3 from applying their substantive law, Pope and Talbot and
4 so forth.

5 QUESTION: No, let me -- you don't understand my
6 question. I want to make it --

7 MR. MORRISON: I think I do not, Your Honor.

8 QUESTION: -- as simple as I possibly can. You
9 plead maritime jurisdiction. You please diversity. I had
10 thought there was precedent for -- that the Federal courts
11 must take this under the admiralty wing and do not have
12 the discretion, either at the pleader's request or as a
13 matter of the court's own choice, which side of the court
14 this is going to go on, that if you fit within the
15 admiralty peg, you must go there even though you would fit
16 under diversity as well.

17 MR. MORRISON: I think Your Honor is referring
18 to the cases in which the substantive law to be applied is
19 Federal maritime law. That is, that you cannot get around
20 the application of the substantive law by pleading
21 diversity, but the question -- but that is the case
22 because in that case there has been displacement, which is
23 itself the question presented here.

24 I would agree, for instance, as the Chief
25 Justice's example said, that you can't get around the

1 application of the Jones Act by pleading diversity and if,
2 in fact, we had a substantive maritime claim, that was
3 clearly a Federal maritime claim that applied and that was
4 mandatory because of the necessity for uniformity. We
5 couldn't get around it by pleading diversity. That is not
6 this case.

7 QUESTION: But you would envision a different
8 result, then, if there had been no diversity of
9 citizenship in this case. Then the person would have had
10 to come into admiralty, and I take it it must mean make
11 some difference to you if you're insisting on diversity.

12 MR. MORRISON: Your Honor, in that case, we
13 probably would have filed it in State court, but I would
14 agree with Justice Ginsburg that in that case, even by
15 going into the State court, if Federal maritime law
16 applies the substantive principle, the reverse Erie issue,
17 we would have had to apply Federal maritime law even if
18 the choice of forum was the State court.

19 QUESTION: I'm not sure what you're saying, Mr.
20 Morrison. Do you care whether it's maritime jurisdiction
21 or diversity jurisdiction? I mean, you don't really care,
22 do you? You say we simply do not have to decide that
23 question.

24 MR. MORRISON: That is -- we certainly do not
25 have to decide it.

1 QUESTION: So long as Federal admiralty law
2 doesn't apply.

3 MR. MORRISON: Correct, Your Honor. Correct.

4 QUESTION: Are there any circumstances where it
5 would make any difference so long as Federal maritime law
6 doesn't apply?

7 MR. MORRISON: No, Your Honor. As long as we
8 have that qualifier, that's right.

9 QUESTION: I thought that was your point, not
10 that --

11 MR. MORRISON: That is my point, Your Honor.

12 QUESTION: Do you care whether it makes a
13 difference whether the court were -- and does it, whether
14 the court says, of course maritime law applies, but in
15 territorial waters, Federal maritime law picks up State
16 law insofar as it is not hostile to the policy of Federal
17 maritime law, or the Court says, of course State law
18 applies to the extent that it is not inconsistent with the
19 policies of Federal maritime law.

20 I mean, that's my basic problem with this case.
21 What difference does it make, and is anybody arguing for a
22 different rule than either A or B?

23 MR. MORRISON: Well, I believe that the
24 petitioners are arguing that in this case anything that
25 looks to State law automatically undermines Federal law.

1 QUESTION: But do you care? I mean, that is --

2 MR. MORRISON: Yes, I -- well, I care in the
3 sense that I know what they are arguing for. They argued
4 before Judge Pollack that we're entitled to nothing but
5 funeral expenses for the death of --

6 QUESTION: Yes, but you could easily say that
7 Federal maritime law picks up in territorial waters. In
8 fact, the cases seem consistent with that. Federal
9 maritime law --

10 MR. MORRISON: Well, they pick up a lot less o
11 the remedy side than most State wrongful death --

12 QUESTION: But they're dealing -- on the remedy
13 side they're dealing with Jones Act seamen and
14 longshoremen. When you talk about passengers, it would be
15 much harder to make a case, wouldn't it, that remedies of
16 certain sorts -- I mean, maybe the survivor pecuniary is.
17 Maybe the punitives are. I don't know, but the --

18 MR. MORRISON: Well, part of my plea is that
19 when we are dealing with civilians -- that is, nonseamen,
20 nonlongshoremen -- that we ought not to start pushing them
21 into the maritime field when there's no Federal interest
22 in doing so except this rather generalized interest in
23 uniform --

24 QUESTION: What happens in personal injury
25 cases? I'm back to that because of the statement in

1 Moragne which says, in most respects the law applied in
2 personal injury cases will answer all questions that also
3 arise in death cases, so when you have a personal injury
4 case of a civilian in territorial waters, what is the
5 state of the law, and I've oddly -- perhaps my fault. I
6 haven't really been able to figure it out.

7 MR. MORRISON: Well, I have not been able to
8 figure it out entirely either, Your Honor, but I do think
9 that there is probably on the remedy side, as opposed to
10 the primary duty side, a fair amount of differences among
11 the States -- that is, nuances differences.

12 Indeed, even in the Federal statutes that we're
13 dealing with here, the Jones Act, the Death on the High
14 Seas Act, the Longshore and Harbor Workers Act, even those
15 Federal statutes sometimes you get full compensation, the
16 longshoreman statute only gets \$3,000 in funeral expenses,
17 everybody else gets --

18 QUESTION: Mr. Morrison, I don't think that's
19 the question, because it is the same one that's troubling
20 me, and let me put it this way. Suppose Natalie Calhoun
21 had been sorely injured but not killed in the same place.
22 Would there have been any reference to State law, or would
23 it have been general maritime tort law?

24 MR. MORRISON: In my view, it would have been --
25 she should have and would have been entitled to sue under

1 State law, and -- but I recognize that there are some
2 cases that call that into question.

3 I'd begin with Jensen, and I don't want to take
4 part of the Court's debate about the continuing validity
5 of Jensen in this context, but I would point out Jensen
6 did involve the marine worker, a longshoreman, in that
7 case.

8 The Pope and Talbot case and some others have
9 suggested that State law cannot apply where it would be
10 inconsistent with maritime law. In my view, there's no
11 principle of maritime law that would be applicable to this
12 case.

13 As Justice Kennedy said, there's no Federal
14 interest in the regulation of this kind of jet ski
15 accident involving civilians, so in my view we would not
16 have the situation where we would have to apply maritime
17 law, but I recognize that there are some portions of some
18 of the opinions of this Court, cited by the petitioners
19 and the Government, that suggest that State law as a
20 personal injury as opposed to a death case would not
21 apply.

22 QUESTION: Well, our Foremost decision, which
23 says that pleasure boating comes within admiralty, is
24 certainly a precedent that might suggest there's admiralty
25 jurisdiction just on the basis of the jet ski here.

1 MR. MORRISON: There may be jurisdiction, Your
2 Honor. The question then is, what substantive law must we
3 apply, and I am confident, as this Court mentioned in some
4 of its cases, this is like Bell v. Hood. That is, on the
5 one had, the question is subject matter jurisdiction;
6 having gotten over that, what cause of action, and what
7 cause of action depends upon what substantive law is going
8 to apply.

9 I want to --

10 QUESTION: Well, maybe it's Federal law, but
11 Federal law says we'll look to State law. I think that's
12 what Justice Breyer has directed himself --

13 MR. MORRISON: Well, I guess my -- there's
14 certainly a logical possibility. My suggestion to you is
15 that that kind of roundabout approach is unnecessary here,
16 and was not followed for 100 years from before The
17 Harrisburg right up through Moragne, where we looked to
18 State law because it was available and there, and there
19 was no particular reason to look for Federal law.

20 QUESTION: Yes, the reason would have been
21 because of the admiralty -- you say, a) is it a maritime
22 tort? Yes -- you're in admiralty jurisdiction, which is
23 exclusive, saving to suitors their common law remedies.
24 You say, and then we have the law which says remedies just
25 means the remedial thing.

1 And then Holmes in *The Hamilton* seems to the
2 contrary, but maybe he's just making State law part of
3 admiralty law in the absence of --

4 MR. MORRISON: I don't believe so. I don't
5 believe so at that time, because the admiralty law was
6 clear that there was no Federal maritime wrongful death
7 remedy, and you had to look to State law, as there was in
8 *The Harrisburg*, as there was in *Moragne*, as there has been
9 in other cases.

10 I want to point out that this case, the
11 defendant in this case is not the owner of the vessel. It
12 is not anybody who was driving the vessel. It is the
13 manufacturer of the vessel, and the claim in *Moragne* was a
14 claim based on unseaworthiness, and I know of no case in
15 which a manufacturer of a vessel has been held liable for
16 a maritime tort based on the claim of unseaworthiness, nor
17 has this Court ever allowed civilians to sue for
18 unseaworthiness.

19 The *Kermarec* case in this Court in 1959 involved
20 an invitee aboard a vessel. It was clearly in territorial
21 waters. The Court refused to allow a person aboard a
22 vessel to sue for unseaworthiness.

23 QUESTION: Mr. Morrison, if I understand you
24 correctly, *Moragne* would be a rather small thing -- that
25 is, if the personal injury claimant retains the same right

1 that the or she had before Moragne for the civilian
2 torts -- and what claim would Moragne apply to other than
3 a sailor who dies and there's a claim for unseaworthiness
4 which is not covered by the Jones Act.

5 Would -- tell me, if you are right, to what
6 claims does Moragne apply?

7 MR. MORRISON: Well, the Court has never decided
8 how -- who might be eligible to rely on a claim of
9 unseaworthiness. That is, we know in Kermarec that a
10 person aboard a vessel that was moored to a ship, to a
11 dock, was not entitled to it.

12 There may be other persons. For instance, if
13 someone, a civilian were riding a pleasure boat in
14 navigable waters, a pleasure boat or a tug of some kind or
15 other, and the vessel was actually underway, it would be a
16 different case from Kermarec.

17 I don't know what other cases it would apply to.
18 The statute now has been amended so that the longshoreman
19 in Moragne would not even make it available.

20 It was, of course, in Moragne an additional
21 remedy, in addition to the State court remedy, in addition
22 to the State court remedy, and in addition to the
23 longshoreman's remedy that he had -- that the State had
24 against the employer. This was a third claim that was
25 made available in the face of two existing claims, this

1 third claim being against the owner of the vessel.

2 I'm not sure, Your Honor. These cases come up
3 in a variety of contexts, but it does seem to me to be
4 important to remember that Moragne was a case of
5 generosity. This Court said, we're going to apply
6 additional remedies. There was not a hint in Moragne of a
7 cutback, of a displacement.

8 The price of getting the unseaworthiness remedy
9 was the loss of the remedy for State law violations, and
10 that seems to be the question as to whether -- in terms of
11 the intent of Moragne, it seems very difficult, in terms
12 of classical preemption analysis displacement on the
13 water, to find the kind of intent to make the price being
14 paid the loss of one remedy in exchange for the grant of
15 the other.

16 Unlike --

17 QUESTION: I don't think the opinion speaks that
18 way, Mr. Morrison. It seems to me you really understate
19 the thrust of the opinion toward uniformity. I mean, the
20 big argument is really whether Moragne is the signal of a
21 new era of admiralty law in which, contrary to what
22 preceded Moragne, we're going to seek to get uniform -- as
23 your opponent said in his presentation, uniform treatment
24 for --

25 MR. MORRISON: I was addressing the question of

1 whether Moragne itself did it.

2 I want to turn now to the question of whether it
3 makes any sense --

4 QUESTION: The holding of Moragne could be
5 limited as narrowly as you say, but I don't think the
6 language of Moragne --

7 MR. MORRISON: Well, there is clearly some
8 language about uniformity in there, Your Honor --

9 QUESTION: Sure is.

10 MR. MORRISON: -- and I certainly would not
11 extend to the contrary.

12 When this Court has concerned itself with
13 problems of uniformity, it has focused principally on the
14 primary conduct of the persons being affected, citing, in
15 American Dredging and elsewhere, the need to focus on
16 primary conduct.

17 The primary conduct argument is irrelevant here.
18 It's irrelevant because Yamaha makes jet skis. Those jet
19 skis operate on inland waters, but they also -- they
20 operate on territorial waters, and they also operate on
21 purely inland waters, as to which there is no Federal
22 maritime claim at all.

23 QUESTION: Right, and you make that argument in
24 your brief, and what it raises in my mind is whether you
25 expect us to valuate each case and decide whether a

1 uniform admiralty law will apply or diverse State law will
2 apply on the basis of who the particular manufacturer is.
3 I mean --

4 MR. MORRISON: Well --

5 QUESTION: -- can't we have more predictability
6 than that?

7 MR. MORRISON: I would at least say, Your Honor,
8 as to manufacturers as opposed to vessel owners, which is
9 what Moragne was actually dealing with, we are in a
10 different category of individuals, companies, and I think
11 the principle difference is that the connection between
12 the manufacturer and the territorial waters is a good deal
13 more attenuated than the connection is between a vessel
14 owner or a vessel operator with concerns about commercial
15 navigation, other kinds of commercial activity, which has
16 animated this Court's maritime --

17 QUESTION: Well, I suppose the admiralty law
18 could take that into account. The question is whether or
19 not we're going to foist onto the legal profession and the
20 citizens a very, very complex requirement to determine
21 which law they're proceeding under.

22 MR. MORRISON: Well, Your Honor --

23 QUESTION: And I might just say that I take it
24 your position is contrary to the law of most of the
25 circuits --

1 MR. MORRISON: That is, most of the circuits
2 have come out the other way. I don't think most of them
3 have gone through the analysis that we have gone through,
4 looking at the history. They've simply said, Moragne
5 represented what some of them referred to as a sea change,
6 and we have simply -- don't believe that Moragne itself
7 did it.

8 But I think the point, Your Honor, is, rather
9 than creating a whole new complicated set of maritime
10 rules we should continue to do what the court did before
11 Moragne, which was to say -- and there was no great
12 problem before Moragne applying State wrongful death
13 statutes in territorial waters to persons who are not in
14 the maritime trade. After all, it's a relatively small
15 number of cases.

16 QUESTION: Have they before picked up punitives?
17 Have they --

18 MR. MORRISON: To my knowledge they have not.

19 QUESTION: Have not. All right, then, have
20 they --

21 MR. MORRISON: -- but the law of punitive
22 damages had --

23 QUESTION: Yes, fine.

24 MR. MORRISON: The law of punitive damages has
25 developed considerably since 1970, in the era of Moragne.

1 QUESTION: Had they previously awarded future
2 pecuniary damages to a person who dies in a survival
3 action?

4 MR. MORRISON: I --

5 QUESTION: Do you know?

6 MR. MORRISON: You mean -- Your Honor, you're
7 talking about State law?

8 QUESTION: Yes, the State law.

9 MR. MORRISON: I believe the answer is yes, but
10 I can't cite you chapter and verse on it.

11 QUESTION: What I'm wondering is, is if we're
12 interested in maritime jurisdiction as an odd historical
13 court for maritime shipping business, then from that
14 perspective, is it better for the shipowners and for the
15 sailors and the seamen to have a generous system of awards
16 which would pick up most State law and a degree of
17 certainty, because the outliers of State law get lopped
18 off. I mean, looking at it --

19 MR. MORRISON: Well, most maritime workers are
20 now covered by Federal statutes, longshoremen and harbor
21 workers and Jones Act seamen. Accidents on the high seas
22 are covered by Federal statute, so the only thing we're
23 talking about now is civilians injured and killed in --
24 killed in territorial waters.

25 QUESTION: But Mr. Morrison, since you are

1 asking, the reason you're so anxious to have the State
2 law, bluntly, is it's more generous.

3 MR. MORRISON: It's also more predictable. That
4 is, we know what the State law is now --

5 QUESTION: Well, you know, if you shape the
6 maritime law based on the Death on the High Seas Act, then
7 you have something that's even more predictable than State
8 common law. It's a Federal statute.

9 My question is, why should the civilian get a
10 more generous recovery than the sailors who are supposed
11 to be wards of the court, or anybody who happens to go
12 down when the ship is at sea?

13 MR. MORRISON: Well, I don't think the question
14 is why -- with all respect to Your Honor, why there should
15 be that way. The question is that Congress has set up a
16 scheme for the compensation of various categories of
17 persons.

18 QUESTION: It has to be that way because we are
19 making the law, and my question is, why shouldn't the
20 court be governed by a statute that Congress passed to
21 state that the recovery for wrongful death that is a
22 matter of court-made law ought to resemble as closely as
23 possible the law that Congress passed?

24 MR. MORRISON: Well, there are, of course -- the
25 question is which law one would apply. That is, the Death

1 on the High Seas Act only applies to deaths. It doesn't
2 apply to personal injuries. So if a person is a personal
3 injury victim on the high seas, he or she has to repair to
4 some other law to begin with.

5 So could we look to the Jones Act? Well, the
6 Jones Act deals with sailors. It provides certain levels
7 of compensation. It has a modified scheme of liability
8 which is different from the Jones -- from the Death on the
9 High Seas Act.

10 The Longshore and Harbor Workers Compensation
11 Act is a no-fault, entirely no-fault scheme, and so that
12 even within the Federal system, there's a significant
13 amount of disunity.

14 And I guess my answer to your question, Your
15 Honor, is that this Court has permitted State wrongful
16 death, and I would think personal injury cases, to exist
17 in territorial waters for many years. Congress has said,
18 we're going to come in with certain remedies.

19 Congress is fully within its power, if it thinks
20 that uniformity is necessary as to this rather narrow
21 category of groups, to come in and say, we want to do for
22 territorial waters what we did for deaths on the high
23 seas, and by the way, we also ought to do something about
24 personal injuries in --

25 QUESTION: Maybe Congress thought we already did

1 it in Moragne. I --

2 MR. MORRISON: Well, Congress hasn't said --
3 Congress hasn't passed --

4 QUESTION: Like the majority of courts of
5 appeals. Maybe -- maybe Congress agreed with them.

6 MR. MORRISON: Well --

7 QUESTION: Let me ask you --

8 MR. MORRISON: But I don't think -- Congress has
9 not addressed the issue except in one respect, Your Honor,
10 and I will point this out. In 1980, Congress passed a
11 statute which is applicable to this case, or to a limited
12 part of this case.

13 It said that the statute of limitations for all
14 maritime torts is 3 years -- death, personal injury, high
15 seas, territorial water -- and I think that's evidence
16 that when Congress has seen a need for uniformity, a need
17 for clarity, it has come in and superseded both Federal
18 statutes and State statutes.

19 QUESTION: Yes, well, we've never felt that we
20 had judicial authority to create statutes of limitations.
21 We've always looked to State law for those, even in areas
22 where it's a Federal cause of action, so that would
23 explain that statute rather readily.

24 MR. MORRISON: Well, Your Honors applied laches
25 beforehand. In the maritime --

1 QUESTION: Well, I mean the Congress would not
2 have expected us to adopt a statute of limitations.

3 But I want to get to another question. You said
4 that at least State law is well-known, whereas we'd be
5 making up new Federal admiralty law.

6 Well, I suppose it's well-known if you know what
7 State laws apply. Now, is that a matter of Federal -- I
8 note that here you're seeking to apply Pennsylvania law to
9 an injury that occurred in Puerto Rico. Now, who would
10 have guessed that?

11 MR. MORRISON: Your Honor --

12 QUESTION: Is this something that's easy to
13 figure out?

14 MR. MORRISON: Your Honor, let me -- we are
15 talking about Pennsylvania's remedial statute. She was a
16 resident of --

17 QUESTION: Oh, I see. She may have other
18 connections to other places, too.

19 MR. MORRISON: Your Honor, as far as we know,
20 there is no difference on the substantive standard of
21 liability in any one of -- in any of these cases.

22 QUESTION: Then why are you picking Pennsylvania
23 law?

24 MR. MORRISON: She was a -- I'm talking about
25 the substantive standard applied to the primary conduct.

1 She was a resident of Pennsylvania.

2 We believe under choice of law principles we're
3 entitled in the measure of recovery for wrongful death to
4 apply the law of the residence of the person whose death
5 we are -- at issue here, that that is consistent and
6 proper, and that is the reason that we filed this -- this
7 case was filed in Pennsylvania.

8 There is, of course, another aspect which the
9 plaintiffs, the petitioners don't want to talk about, and
10 that is, the theory of displacement of Moragne is that we
11 are -- we take the Moragne cause of action and apply it.
12 If you do that literally, what you have done is, you must
13 have applied the doctrine of unseaworthiness, because
14 there is no case that I know of which displaces something
15 with nothing, and that is, presumably if this case is
16 governed by Federal law of Moragne it is the law of
17 unseaworthiness.

18 And then the question is, how does one determine
19 the seaworthiness or unseaworthiness of a jet ski, and I
20 suggest to you that simply is a further reason that if
21 you're talking about uniformity, you've got to take the
22 good with the bad, which in this case would be
23 unseaworthiness, and it ought not to be an inquiry of the
24 Federal courts when we have had for more than 100 years
25 perfectly adequate State law remedies.

1 The only reason that they are here is not
2 because they're complaining that States are imposing
3 primary conduct obligations that are inconsistent, but
4 because they want to pay less, and they think they can do
5 it by doing it that way.

6 QUESTION: Do you acknowledge that it's up to
7 the Federal admiralty court to decide which State law
8 applies, that the choice of law rule is a Federal rule?

9 MR. MORRISON: Not --

10 QUESTION: Or do you think that it has to be
11 bound by the law of the State in which the Federal
12 admiralty court sits?

13 MR. MORRISON: If the court is sitting in the
14 diversity side, under subject matter jurisdiction --

15 QUESTION: Ah, now it becomes important whether
16 it's a diversity case or --

17 (Laughter.)

18 MR. MORRISON: No --

19 QUESTION: -- an admiralty case, huh?

20 MR. MORRISON: No, Your Honor, if you're
21 applying State law, which is what you are doing in the
22 diversity --

23 QUESTION: No, no, no, but let's assume I think
24 it's an admiralty case. I think it's an admiralty case.
25 Should the Federal law of admiralty determine choice of

1 law?

2 MR. MORRISON: Yes, if it is a Federal -- if it
3 is an admiralty case in the sense that it is a Federal
4 maritime cause of action --

5 QUESTION: Not substantive. Not substantive.

6 MR. MORRISON: Well, Your Honor --

7 QUESTION: Jurisdiction is under admiralty.
8 Should not Federal law determine at least choice of law?

9 MR. MORRISON: Not if the substantive law
10 applies as State law. Obviously, the Federal court --

11 QUESTION: Well, I mean, I don't know which
12 State law it is until you answer the preliminary question.
13 I mean --

14 MR. MORRISON: No, I think that that -- well,
15 the first question is a choice between Federal and State
16 law. I think that we -- that the complainant in a case
17 like this has the right to choose to go under State law,
18 taking with it the good and the bad. Maybe there's a
19 claim under Federal law. We haven't made it.

20 QUESTION: Which State law? I mean, let's
21 assume he has a right to go -- which State law? I mean,
22 that's the question, which State law?

23 MR. MORRISON: We believe it would be -- the
24 choice of law rules would be --

25 QUESTION: Of the State in which --

1 MR. MORRISON: Yes.

2 QUESTION: -- the admiralty cause sits, you
3 said.

4 MR. MORRISON: Yes. Yes.

5 QUESTION: But Mr. Morrison, if it's like -- if
6 it's admiralty jurisdiction and it's like, say, the
7 Federal Tort Claims Act, you will get to a State law, but
8 it's a Federal -- Federal jurisdiction, not diversity
9 jurisdiction, you have a Federal pointing rule, a Federal
10 choice of law rule that tells you which State's law to
11 apply --

12 MR. MORRISON: Yes.

13 QUESTION: Then you pick up the law of that
14 State.

15 MR. MORRISON: It is in the Federal Tort Claims
16 Act, Your Honor. It is in the statute. It says the law
17 of where the accident shall have occurred, because
18 Congress has specifically enumerated that shall be the
19 choice.

20 QUESTION: Yes, but if we are into Federal law
21 in this case, then by default this Court must be the
22 lawmaker.

23 MR. MORRISON: Yes. If we have Federal
24 substantive law, I would agree with Your Honor on that.

25 QUESTION: Well, no, what she means is, Federal

1 substantive law even when that consists of adoption of
2 State law.

3 MR. MORRISON: Yes.

4 QUESTION: All right.

5 MR. MORRISON: But I am saying that the
6 governing principle is State law, not State law as there
7 because it's been adopted as analogous to Federal law.

8 QUESTION: -- what would have happened in all of
9 this if your client had been injured and not killed,
10 because I would be so curious to know the answer.

11 MR. MORRISON: I think the answer is unclear,
12 Your Honor. The Government has cited a bunch of cases in
13 its brief saying that we would be bound by Federal law.
14 We have explained in our brief why we think those cases do
15 not necessarily apply, but I think -- this Court has
16 never, to my knowledge, decided that question.

17 But I believe -- I would confess that the answer
18 to that question must be the same. It would make no sense
19 that -- to have a regime under which the question of
20 whether someone lived or died would be a matter of State
21 law in one case and Federal law in the other. It would
22 not be a sensible regime.

23 QUESTION: Are the petitioners going to agree
24 with that last statement?

25 MR. MORRISON: I don't know, Your Honor. You'll

1 have to ask them.

2 CHIEF JUSTICE REHNQUIST: Thank you,
3 Mr. Morrison. The case is submitted.

4 (Whereupon, at 12:09 p.m., the case in the
5 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

*The United States in the Matter of:
YAMAHA MOTOR CORPORATION, U.S.A., ET AL., ET AL.,
Petitioners v. LUCIEN B. CALHOUN, ETC., ET AL.*

CASE NO. : 94-1387

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

(REPORTER)