

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: PHILOMENA DOOLEY, PERSONAL REPRESENTATIVE
OF THE ESTATE OF CECELIO CHUAPOCO, ET AL.,
Petitioners v. KOREAN AIR LINES CO., LTD.

CASE NO: 97-704 c.

PLACE: Washington, D.C.

DATE: Monday, April 27, 1998

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 PHILOMENA DOOLEY, PERSONAL :

4 REPRESENTATIVE OF THE ESTATE :

5 OF CECELIO CHUAPOCO, ET AL., :

6 Petitioners :

7 v. : No. 97-704

8 KOREAN AIR LINES CO., LTD. :

9 - - - - -X

10 Washington, D.C.

11 Monday, April 27, 1998

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 1:00 p.m.

15 APPEARANCES:

16 JUANITA MADOLE, ESQ., Irvine, California; on behalf of
17 the Petitioners.

18 ANDREW J. HAKAKAS, ESQ., New York, New York; on behalf of
19 the Respondent.

20 JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor
21 General, Department of Justice, Washington, D.C.; on
22 behalf of United States, as amicus curiae, supporting
23 the Respondent.

C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	JUANITA MADOLE, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	ANDREW J. HARAKAS, ESQ.	
7	On behalf of the Respondent	26
8	ORAL ARGUMENT OF	
9	JEFFREY P. MINEAR, ESQ.	
10	On behalf of the United States, as amicus curiae,	
11	supporting the Respondent	44
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 97-704, Philomena Dooley v. Korean Airlines.

5 Ms. -- is it Madole?

6 MS. MADOLE: Madole.

7 CHIEF JUSTICE REHNQUIST: Madole. Ms. Madole.

8 ORAL ARGUMENT OF JUANITA MADOLE

9 ON BEHALF OF THE PETITIONERS

10 MS. MADOLE: Mr. Chief Justice, and may it
11 please the Court:

12 The issue presented here today is whether there
13 is a general maritime law survival cause of action for the
14 pre-death injuries to a nonseafarer when the conduct that
15 causes the injuries occurs on the high seas and whether,
16 if there is such a survival cause of action under general
17 maritime law, it may be brought independent of but
18 coexisting alongside the death action under the Death on
19 the High Seas Act.

20 In order to understand the argument, it is
21 important to point out the distinctions between the
22 survival cause of action and the wrongful death cause of
23 action. As this Court has stated several times, the
24 survival cause of action traditionally encompassed --
25 encompasses the injuries that the individual he or herself

1 sustained prior to death from the time of the injury.

2 Those traditionally encompassed pre-death pain
3 and suffering, loss of earnings from the time of injury to
4 the time of death, and any medical or associated expenses
5 relating to the injuries until the time of death.

6 In the case that is before the Court today, the
7 petitioners only have a right to claim for pre-death
8 injuries, for pre-death pain and suffering, for the 12
9 minutes that their decedent suffered from the time the
10 aircraft upon which they were passengers were fired upon
11 until a 12-minute controlled descent into the Sea of Japan
12 and their ultimate deaths.

13 By comparison with survival actions --

14 QUESTION: The case, of course, since it does
15 survive -- involve the survivor's action, could mean much
16 more than that. There would be other cases in which
17 people would linger for years with substantial injuries,
18 et cetera.

19 MS. MADOLE: That's correct, and respondent in
20 their response to the petition for certiorari also agreed
21 that the rule of the Court -- that this Court will lay
22 down will be applied whenever the conduct causes the
23 injuries and ultimately causes the death occurring on the
24 high seas.

25 In a more typical accident, they probably will

1 be more boat-based fact patterns, but the context in which
2 the case is before the Court is -- does arise out of an
3 airplane accident and does address only pre-death pain and
4 suffering and injuries.

5 By comparison with survival action injuries,
6 wrongful death remedies -- excuse me, survival action
7 remedies, by contrast wrongful death remedies, are losses
8 that the family members of the decedent themselves have
9 sustained, those losses that are individual to the family
10 members, are as a result of the death of the decedent and
11 are normally economically based.

12 Normally they are for loss of support, for loss
13 of economic support that the decedent would have provided
14 had the decedent continued to live, loss of services,
15 household services and, in the case of a parent leaving
16 small children, loss of parental services to the small
17 children.

18 The beneficiaries are different. In a survival
19 cause of action the estate is the beneficiary, as the
20 holder of the individual injured person's claim after his
21 death. In a wrongful death --

22 QUESTION: Ms. Madole, I think that the Court is
23 generally familiar with the difference between a wrongful
24 death act and a survival act, and getting down to the nub
25 of your problem, as I understand it the FELA originally

1 did not have any survival aspect to it, and this Court
2 declined to create such a claim. It left it to Congress
3 and Congress took care of it. Why shouldn't we follow the
4 same pattern here?

5 MS. MADOLE: What occurred is, I believe,
6 Justice Ginsburg, is that the original FELA was patterned
7 after Lord Campbell's Act. Lord Campbell's Act required
8 that the cause of action exist in the person at the time
9 of the death for there to be a right to recover for
10 survival and for death. The FELA was amended in 1910 to
11 provide for both causes of action.

12 The Death on the High Seas Act, which is the --

13 QUESTION: But am I wrong in thinking that there
14 was an attempt, before that amendment, to get the courts
15 to recognize a survival claim for railroad workers?

16 MS. MADOLE: Yes, Justice Ginsburg. In Michigan
17 Central Railway v. Vreeland the Court said you could not
18 have both a survival action and a wrongful death action
19 under the FELA, and that was then amended by Congress in
20 1910.

21 But the basis for that was because the wrongful
22 death action under FELA was based upon a Lord Campbell's
23 Act type of statute which required the existence of a
24 cause of action in the decedent at the time of the death,
25 and if there had been recovery for survival there could

1 not also be a death recovery.

2 In this circumstance, the statute that we are
3 dealing with is the Death on the High Seas Act, and the
4 argument by respondent and the amicus is that the Death on
5 the High Seas Act precludes the court's traditional
6 development of a survival cause of action.

7 QUESTION: And wasn't the Death on the High Seas
8 Act -- that wasn't modeled on Lord Campbell's Act?

9 MS. MADOLE: It does not in that it did not
10 require the existence of the cause of action in the
11 decedent prior to death, so that there is no foreclosure
12 of a survival cause of action alongside a wrongful death
13 cause of action.

14 The only issue that the respondent and the
15 Government bring up with regard to the Death on the High
16 Seas Act is whether, by enacting the wrongful death
17 remedy, that the Congress intended to foreclose this
18 Court's traditional role in maritime actions to develop
19 law as policies change, so there's nothing in the Wrongful
20 Death Act under the Death on the High Seas Act itself that
21 would foreclose --

22 QUESTION: Well, do you consider it significant
23 that Congress was aware of survival provisions under the
24 Federal Employers Liability Act and it did not incorporate
25 them here? I mean, that's a significant fact in the case,

1 is it not?

2 MS. MADOLE: Well, it is to a limited degree,
3 Justice Kennedy, and that is that Congress decided it
4 wanted to provide a remedy from what it felt was the harsh
5 rule of The Harrisburg, that there was no common law right
6 to recover for wrongful death. They wanted to provide the
7 remedy in a limited area.

8 The debates in the Congressional Record are a)
9 that the Congress wanted to have a remedy and b) how far
10 should that remedy go? Should the remedy go only from the
11 3-miles limit from the shores of the United States, or
12 should Congress legislate into the territorial waters?

13 Congress decided just to legislate for death
14 action and just to legislate from the 3-mile limit
15 outwards, and just as this Court in Moragne said as long
16 as Congress did not speak to an area that was not within
17 its ambit, the Admiralty Court is free to develop in
18 accordance with its traditional capacity to effectuate the
19 policies of the common law as circumscribed for the
20 circumstances on the sea.

21 QUESTION: Well, of course, Congress did, in 42
22 U.S. Code section 765, deal with death of a plaintiff and
23 what's recoverable, so to that extent Congress certainly
24 addressed the subject.

25 MS. MADOLE: To that extent, but that -- thank

1 you. 765 should be put in the context of the statute as a
2 whole. The Death on the High Seas Act was enacted so that
3 the statute of limitations began to run from the date of
4 the wrongful conduct, other than most typical wrongful
5 death statutes, where the statute of limitations begin --
6 begins to run from the date of the death.

7 What Congress was attempting to do in section
8 765 was to say that if an injured person lived past the 2-
9 year statute, then the wrongful death right would be
10 abated to his or her beneficiaries because the 2 years had
11 run, because of the peculiarity of it beginning from the
12 date of the wrongful conduct instead of the wrongful
13 death.

14 The courts below in -- not in the case directly
15 in the court below, but other courts below that have
16 addressed these issues, and the commentators both at the
17 time and subsequently, have said that section 765 should
18 best be deemed a non-abatement section and not a survival
19 section, because what happened under section 9 -- or 765
20 was, the remedy was then turned into a wrongful death
21 remedy so that the heirs and the beneficiaries of the
22 decedent could recover wrongful death damages but nothing
23 was said in the statute about what happened to the injured
24 person's pre-death injuries, and that was not addressed.

25 And again Congress was silent as to the pre-

1 death injuries which is why, if the Court elects to, it
2 has the capacity to develop general maritime law to
3 address pre-death injuries and the survival cause of
4 action.

5 QUESTION: I guess it's hard for me to see that
6 Congress was entirely silent on what would happen to the
7 claims of pre-death injuries because in 765, if I'm
8 reading it rightly, it converts the pre-existing action
9 for pre-death injuries solely into the kind of death claim
10 that is allowed under the statute, and that sounds to me
11 as though it's saying, everything except the claim allowed
12 under this statute goes away.

13 MS. MADOLE: And again, it has to be read in the
14 context of what it was attempting to achieve, and what
15 Congress was attempting to achieve was a rights-granting
16 statute. It wanted to ensure that wrongful conduct that
17 occurred on the high seas would not be such that the
18 conduct -- there would be no compensation for the
19 wrongfulness of the conduct to the one that was injured.

20 QUESTION: But if that's all it wanted to do, I
21 would have thought that in 765 it would have said a
22 wrongful death action may be added to the pre-existing
23 personal injury action of -- that the decedent had begun,
24 and it didn't do that. It in effect said, it gets
25 metamorphosed into a wrongful death case, period.

1 MS. MADOLE: Well, it could be read that way,
2 Justice Souter, but I do not believe that if you look into
3 the historical background of what Congress is trying to
4 achieve, that that effectuates the remedial effects --

5 QUESTION: But we deal with what Congress wrote,
6 not with what someone thinks Congress was trying to
7 effectuate. I mean, I think you have to deal with the
8 language of 765 and you deduce what Congress intended from
9 the language of 765.

10 MS. MADOLE: And again, from the legislative
11 history, it's very hard to decide that.

12 QUESTION: Well, why do we get into legislative
13 history?

14 MS. MADOLE: Pardon me?

15 QUESTION: I say, why do we get into legis --

16 MS. MADOLE: Just from the language itself.

17 Then I suggest that we look to the language that
18 is at Section 763a, which is the new statute of
19 limitations that was enacted in 1980. As I mentioned
20 earlier, the original section 763 provided for a 2-year
21 statute of limitations to begin as of the date of the
22 wrongful conduct.

23 In 1980, Congress repealed section 763 and
24 inserted section -- excuse me, and enacted section 763a,
25 which is --

1 QUESTION: Does that apply to causes of action
2 under than those -- other than those under the Death on
3 the High Seas Act? Doesn't it cover Jones Act or other
4 causes of action, which might well explain that language?

5 MS. MADOLE: It does cover causes of action
6 under general maritime law, under the Death on the High
7 Seas Act, and under the Jones Act, and it changed the
8 statute from one in which the statute began to, begin to
9 run from the date of the wrongful conduct until it begins
10 to run from the cause -- the date the cause of action
11 accrues, and it extended the statute to 3 years for all
12 three of those issues.

13 But if anything can be said from the language in
14 that, is that if Congress ever may have indicated in 1920
15 that it didn't recognize that both survival actions and
16 death actions or both can be brought together, at least by
17 1980 they were saying that they knew that there were two
18 kinds of actions and that one and the other could both be
19 brought concurrently with each other.

20 And it is not clear from the legislative history
21 of 7 -- section 763a the prompting mechanism for that, but
22 it's certainly clear that by that time the courts had
23 begun to develop along the lines of -- along the ken of --
24 the rationale of this Court in Moragne that there were
25 general maritime law of survival causes of action, based

1 upon the same rationale that The Harrisburg, whether or
2 not it was rightly decided when it had been decided
3 originally, the underpinnings of it had changed because
4 the policy had changed and the jurisprudence had changed,
5 and that there was a wholesale acceptance of wrongful
6 death causes of action in the United States.

7 Under the same analysis, many of the Federal
8 appellate courts had found that there was a general
9 maritime law of survival cause of action that, it was as a
10 result of the policy change and the jurisprudence in the
11 United States, because of the widespread adoption of
12 survival statutes amongst the States as well as on the
13 Federal level.

14 QUESTION: Under the Jones Act, which picks up
15 on the FELA, there is both wrongful death relief and
16 survival that's rather circumscribed. Given that Congress
17 has done it all, both the FELA and, borrowing from the
18 FELA, the Jones Act, why should the Court say, well, it's
19 our job to fill in the Survival Act in this DOHSA, Death
20 on the High Seas Act legislation?

21 MS. MADOLE: The lower courts and many
22 commentators have said that the legislative history of the
23 Jones Act is not clear, and that the provision of a
24 survival cause of action in the Jones Act is solely
25 because of its wholesale incorporation of the FELA into

1 it.

2 We have to look at the statute that is arguably
3 by the respondent the one that precludes the court from
4 doing a general maritime law analysis to determine if the
5 policy is such that there should be a survival cause of
6 action and, under the Death on the High Seas Act, our
7 argument is there is no survival cause of action. There
8 is no survival language in the statute, the statute itself
9 addresses only wrongful death remedies, and therefore
10 there is a void left that the court may fill with a
11 survival cause of action.

12 QUESTION: But one can argue equally well, and I
13 think perhaps better, that Congress has addressed itself
14 to this question. It has decided what sort of damages
15 will be recoverable for death on the high seas, and there
16 isn't any void because what Congress has not granted, it
17 withheld.

18 MS. MADOLE: Mr. Chief Justice, what Congress
19 granted certainly was remedies for deaths on the high
20 seas. What it did not discuss was remedies for survival
21 on the high seas, and if you look to this Court's
22 traditional preemption and preclusion procedures, then
23 unless the congressional statute specifically preempts or
24 precludes the court from developing common law remedies,
25 then the court, particularly in its traditional role in

1 maritime matters, has the right to develop what it feels
2 is the proper policy, the better law --

3 QUESTION: What's your authority for that
4 proposition?

5 MS. MADOLE: For the proposition that --

6 QUESTION: That you just stated.

7 MS. MADOLE: I'm sorry, it was in a couple of
8 parts. I'm not sure --

9 QUESTION: Well, that preemption principles as
10 you describe them, where Congress has addressed one
11 particular subject, it doesn't prevent the courts from
12 developing common law policies that may be contrary to
13 that in a related area. At least that's how I took your
14 proposition to be.

15 MS. MADOLE: The cases that are in the reply
16 brief, Your Honor, that deal with preemption, in the
17 context of statutes --

18 QUESTION: Are you talking about preemption of
19 State laws, or --

20 MS. MADOLE: The most common fact circumstance
21 that comes up and appears in the preemption context is of
22 State laws, or of common law remedies under State laws,
23 and what you --

24 QUESTION: What is the closest case you have to
25 support the proposition we're talking about now? I

1 realize you say they're in the reply brief, but tell me
2 what case you would choose?

3 MS. MADOLE: Medtronics.

4 QUESTION: Medtronics?

5 MS. MADOLE: Which is at --

6 QUESTION: Well, that's preemption of State law.
7 I don't --

8 MS. MADOLE: Common law. Excuse me, Your Honor.

9 QUESTION: Well, you know, Congress passes --
10 common law doesn't exist by itself. It exists under the
11 aegis of either State or the Federal Government, and as I
12 recall Medtronics, the Court is talking there about what
13 sort of State law claims are not preempted by a Federal
14 statute, but that isn't the inquiry here.

15 MS. MADOLE: General maritime law is a species
16 of common law, judge-made law.

17 QUESTION: Well, but it's not a species of
18 common law under the aegis of a State.

19 In other words, we may have definite
20 reservations about how inclusive to read a Federal statute
21 as preempting State law, but I don't think any case you've
22 cited so far says those same reservations based
23 essentially on the traditional Federal system of
24 Government we have, with respect for States, would carry
25 over into a statute enacted by Congress as opposed to

1 Federal remedies devised by courts.

2 MS. MADOLE: Then the closest case that is in
3 the context of the issue that we're here before is the
4 Moragne case, where the Court said that Congress had only
5 legislated as far outward as the 3-mile limit, and that
6 because it had not gone into the territorial water
7 jurisdiction with the Death on the High Seas Act, the
8 court was free to develop the common law --

9 QUESTION: Yes, but --

10 MS. MADOLE: -- in a Federal --

11 QUESTION: Go ahead.

12 MS. MADOLE: Under Federal common law aegis, and
13 to then identify a general maritime law right to recover
14 for wrongful death.

15 That is the same context in which we are arguing
16 that the Congress did not address the survival cause of
17 action in the Death on the High Seas Act, and since the
18 remedies are so different, and they don't overlap with
19 each other, then the Court has the capacity to develop the
20 common law survival cause of action for pre-death
21 remedies.

22 QUESTION: Ms. Madole, let's assume we grant
23 that. All it establishes is that we may. But why should
24 we? I mean, there has been no such cause of action.
25 We've not recognized it in the past, and in the past,

1 where we have created new -- you say common law maritime
2 causes of action, we've done it in areas where Congress
3 has not displayed any interest in bringing its
4 intelligence to bear upon the matter.

5 Here, Congress has been active. I mean, if
6 times have changed -- you said in light of changed
7 circumstances. It seems to me, if there are any changed
8 circumstances it is that Congress has displayed a much
9 more lively interest in these matters than it did in
10 previous times, so gee, if we didn't take the initiative
11 ourselves in earlier times, there's even less reason to do
12 so today, it seems to me.

13 MS. MADOLE: Well, when Congress enacted the
14 Death on the High Seas Act in 1920, it was true that there
15 was no common law right of survivorship of personal injury
16 actions. Since then, using the same rationale that the
17 Court has used in Moragne, the Court has the capacity to
18 develop a survival cause of action for pre-death injuries
19 because --

20 QUESTION: I'm giving you that. Let's -- we
21 have the capacity. Why should we use that capacity?

22 MS. MADOLE: Because unless the Court finds
23 there's a general maritime law survival cause of action,
24 there is no recovery for all the pre-death injuries that
25 occur from the date of the injury to the date of death for

1 someone injured on the high seas regardless of the extent
2 of the injury, regardless of the length of time between
3 the injury and the death, and those serious, can be
4 serious and significant and very large --

5 QUESTION: That person's -- he's gone. He's
6 dead and gone. I mean, so long as the survivors are --
7 they have a cause of action under the Death on the High
8 Seas Act if he has begun a suit and dies before the suit
9 is completed.

10 MS. MADOLE: There are two responses, Justice
11 Scalia, to that inquiry. The first is that if the person
12 survives for a lengthy amount of time and incurs
13 significant expenses in the medical care, loss of
14 earnings, and has not had a chance to be compensated for
15 those injuries before his death, which he wouldn't be
16 because it's a survival action, all the debts are still
17 part of his estate that have to be paid from his heirs, if
18 he has any, with no compensation from the wrongdoer.

19 And the second part of that is that I
20 respectfully disagree with the respondent that there will
21 be few times when there will be no wrongful death
22 beneficiaries under the Death on the High Seas Act.

23 Any time a young person is killed, a teenager or
24 a college student who does not have an earning history and
25 has no -- has parents but no -- they have no potential for

1 economic support from them, any time elderly people who
2 are on Social Security are killed and leave adult
3 surviving children, any time a couple is killed together
4 in an airplane accident, and do not leave minor children,
5 there are no wrongful death beneficiaries under the Death
6 on the High Seas Act.

7 The factual circumstances today are that there
8 will be many, many instances where there will be no
9 wrongful death beneficiaries on the Death on the High Seas
10 Act --

11 QUESTION: But Ms. -- may I just ask you a
12 question about that? That's a very appealing argument,
13 because it seems most unjust that a person suffers
14 extensive harm, hospital expense and the rest, in the
15 period between the -- when the injury occurs and when the
16 person ultimately dies before a verdict comes in.

17 But the thing that puzzles me is, that must have
18 happened many, many times. We're talking a huge area, all
19 the deaths -- all the injuries on the high seas that
20 caused deaths that occurred while a case was still
21 pending, and yet we don't have any such cases.

22 I mean, this is kind of late in the day, and I'm
23 just puzzled as to why that issue hasn't arisen before.

24 MS. MADOLE: In the --

25 QUESTION: I don't know of any case that points

1 out that fact pattern. Are there some?

2 MS. MADOLE: There are the cases that arise out
3 of the Korean Air Lines accident that do that for the
4 issue of the pain and suffering, but those are not
5 petitioners' cases before this Court.

6 I think that there are many circumstances that
7 could be shown. The Bodden case, for example, out of the
8 Fifth Circuit, is a case in which Mr. Bodden was seriously
9 injured in an engine explosion.

10 QUESTION: In a what?

11 MS. MADOLE: Engine -- fire -- engine explosion
12 on a ship.

13 QUESTION: Oh, okay.

14 MS. MADOLE: And he died 3 years afterwards.

15 I'm sorry, the fact pattern is not following
16 along in response to your inquiry. I'm sorry.

17 But there are certainly statistics that can be
18 referred to --

19 QUESTION: Oh, I'm sure it happens a lot, but
20 the thing that puzzles me is, why is it 1998 -- this
21 statute's been on the books since 1920. Why are we
22 suddenly confronted with this problem at this stage of the
23 proceedings? I mean, this stage of our history, is what I
24 meant.

25 MS. MADOLE: Well, the issue of the evolution of

1 the pre-death pain and suffering under the survival action
2 claim has been around a long time. It was raised before
3 this Court in Miles v. Apex, and in that context, as a
4 Jones -- in the Jones Act seaman, but the Court referred
5 to in the opinion the development of the common law
6 survival cause of action by the lower courts and did
7 not --

8 QUESTION: Well, of course, most survival
9 actions are justified by statutes that authorize survival
10 of common law claims, I believe just as Lord Campbell's
11 Act took care of the death action.

12 MS. MADOLE: That's true, and twice this Court
13 has refused to approve or disapprove use of State survival
14 actions when the deaths occur on the high seas. That's
15 back in Kernan and Offshore Logistics v. Tallentire.

16 So the courts below have not been prohibited by
17 this Court, because of this refusal to disapprove the
18 conduct, of applying State survival causes of action for
19 deaths that occur on the high seas, so it may be that
20 those actions are compensated by those State survivals
21 when the courts do apply them.

22 In this case, however, we have an action that
23 clearly is far beyond any argument that a State survival
24 statute --

25 QUESTION: Ms. Madole, do I understand that

1 Congress is now considering a bill that would take
2 aviation tragedies out of the Death on the High Seas Act
3 and have another regime for them?

4 MS. MADOLE: That is correct. There's been a
5 bill pending about 2 years. It is a bill that was
6 effectuated or was drafted as a result of the TWA 800
7 accident that crashed off of New York.

8 Because there were a large number of passengers
9 on board that flight who, if there was no survival cause
10 of action, or if the Death on the High Seas Act only
11 applied, the parents of these young kids, a group of
12 schoolchildren from Pennsylvania, would have no
13 compensation at all.

14 QUESTION: Well, what are we supposed to about
15 Higginbotham? That is, Higginbotham seems to support you
16 in that it says admiralty courts have often been called
17 upon to supplement maritime statutes, but then the next
18 sentence is, the Death on the High Seas Act, however,
19 announces Congress' considered judgment on such issues as
20 beneficiaries, et cetera, survival damages, and then it
21 says the act -- the courts are not free to supplement
22 where Congress acts, where Congress addresses those
23 questions, so hasn't this issue -- why doesn't it decide
24 the issue?

25 MS. MADOLE: Higginbotham does not decide the

1 issue, because the issue there was whether the general
2 maritime law -- was whether the general maritime law death
3 action could be superimposed on the Death on the High Seas
4 Act death action.

5 QUESTION: Why isn't what you're doing -- the
6 bite of what you do is, it provides a somewhat different
7 class of beneficiaries when a person dies, and it provides
8 the whole of the beneficiaries with more money, so it
9 seems to speak to both who the beneficiaries are and what
10 the damages are in respect to the harm caused when a
11 person dies.

12 MS. MADOLE: But that's because that is only the
13 wrongful death action idea behind both the Death on the
14 High Seas Act and the general maritime law remedy.

15 The survival action is parallel to. It's like
16 the two columns. They are different remedies. They are
17 different --

18 QUESTION: No, I understand that they're
19 different remedies.

20 MS. MADOLE: And they don't --

21 QUESTION: Why isn't Higginbotham relevant?

22 MS. MADOLE: They don't overlap, and the only
23 language that --

24 QUESTION: You're assuming more knowledge of
25 Higginbotham than I have.

1 The reason that the sentence I just read you is
2 not determinative in your case is because --

3 MS. MADOLE: Because all of the verbs and nouns
4 that you used have to do with wrongful death remedies
5 except for the survival, which I suggest to the court is
6 that argument under 765, which is really a nonabatement
7 provision and not a survival action prohibition, because
8 it doesn't change the cause of action into pre-death
9 injury remedies. It keeps them in wrongful death
10 remedies.

11 QUESTION: Ms. Madole, may I ask if you would
12 complete what you were explaining to me about what
13 Congress is doing about it now?

14 As I understand it, Congress knows about the
15 existence of this problem and the proposed legislation
16 would do what? What is the proposed legislation, and if
17 it passed, how would this case be handled?

18 MS. MADOLE: It currently is in its -- I'm not
19 sure how many reiterations -- it's been changing quite a
20 lot. It's nowhere near, as far as I know, being passed.

21 QUESTION: But what is the solution?

22 MS. MADOLE: The primary focus of it is that it
23 would remove airplane accident cases from the Death on the
24 High Seas Act.

25 QUESTION: And put them under what?

1 MS. MADOLE: Some -- that's one of the reasons
2 why it is not quite fixed. It's not sure if it's a
3 traditional choice of law analysis. It's not sure if it
4 would be the law of the place where the airplane took off
5 from. There are all sorts of proposals that are
6 pending --

7 QUESTION: Picking up on State law, is that what
8 it would do? I mean, what body of law?

9 MS. MADOLE: It would be some State law.
10 However you would get there is not -- has not been
11 decided.

12 QUESTION: So it would not be the -- creating a
13 new counterpart to the Death on the High Seas Act, only
14 more general. It would be picking up some law that is,
15 and it would be a State law, is that --

16 MS. MADOLE: As best I know, as it's currently
17 pending.

18 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Madole.
19 Mr. Harakas, we'll hear from you.

20 Is it Harakas, or Harakas?

21 MR. HARAKAS: Harakas.

22 CHIEF JUSTICE REHNQUIST: Mr. Harakas.

23 ORAL ARGUMENT OF ANDREW J. HARAKAS

24 ON BEHALF OF THE RESPONDENT

25 MR. HARAKAS: Mr. Chief Justice, and may it

1 please the Court:

2 Just to pick up Justice Ginsburg's questions
3 regarding the pending legislation, back in 1996, in the
4 summer of '96 they did pass -- Congress passed a bill in
5 the House of Representatives which would have just removed
6 aviation cases from the Death on the High Seas Act.

7 However, there also was similar legislation
8 pending in the House of Representatives which would have
9 taken aviation cases but set forth the types of
10 recoverable damages. Under the proposed bill, Senate bill
11 943, it would say you could recover damages under State
12 law, any damages available under Federal common law,
13 and/or any damages available under the Death on the High
14 Seas Act. As you can see, it could create a choice-of-
15 law nightmare as to what types of damages you could
16 recover.

17 However, there was a hearing last October and
18 just as recently as last week there was a Senate hearing
19 on the proposed legislation. It's been through markup,
20 and one of the current versions being proposed right now
21 is that it may be extended not just to apply -- to exclude
22 aviation cases, but they may just amend the Death on the
23 High Seas Act to make it more generally applicable.

24 However, even in one of the current versions
25 there's no survival provision written into the act.

1 Rather, what they would do is just allow nonpecuniary
2 damages under the wrongful death provisions of the act
3 with these type of statutory cap on them.

4 QUESTION: Under the present law, if a victim
5 lingers, say, for a year and has medical expenses and lost
6 wages, are those pecuniary losses recoverable when it
7 converts into a Death on the High Seas Act action, or into
8 a wrongful death action?

9 MR. HARAKAS: If it converts into the Death on
10 the High Seas Act, generally lost wages would not be
11 recoverable. What you would recover are -- is loss of
12 support and loss of inheritance, and then when you combine
13 those two elements of damages, you in effect get lost
14 wages and lost future earnings.

15 With respect to medical expenses it's kind of an
16 interesting issue, because -- Justice Stevens said, why
17 hasn't this arisen before. Well, one of the reasons it
18 hasn't arisen before is that when you're dealing with
19 these DOHSA-type actions, mostly in a maritime context,
20 there are usually -- there is usually an element of that
21 in a settlement or even in a recovery, because medical
22 expenses can be viewed as a asset of the estate, so if a
23 decedent had \$100,000 and \$20,000 had to go to pay medical
24 expenses, well, you're depleting the loss of inheritance
25 award, so that way they're recoverable as part of the loss

1 of inheritance award.

2 I think if you look at Higginbotham, in note 20
3 of Higginbotham they talked about burial expenses and
4 whether they're recoverable, and it makes a similar type
5 of analogy as to burial and funeral expenses.

6 QUESTION: But for pain and suffering for the
7 decedent, who might have lingered several years, you say
8 there is no recovery.

9 MR. HAKAKAS: There is no recovery, that's
10 correct.

11 QUESTION: Now, what's the situation in
12 territorial waters, where Death on the High Seas Act
13 presumably doesn't govern?

14 MR. HAKAKAS: With respect to the territorial
15 waters the courts have taken two -- well, the courts have
16 basically taken two approaches.

17 Before the Calhoun decision some courts would
18 recognize a general maritime survival action applicable to
19 the territorial waters and allow recovery that way, but in
20 view of the Calhoun decision State statutes have always
21 been applicable and they would allow recovery under the
22 applicable State statute if it provided a survival statute
23 with respect to the territorial waters.

24 QUESTION: So the recovery would be
25 substantially different, depending on whether it's -- the

1 death occurs from the accident on the high seas or in
2 territorial waters.

3 MR. HARAKAS: Yes. You would be able to recover
4 additional damages in territorial waters, but that's a
5 legislative scheme that exists even in the wrongful death
6 case.

7 Higginbotham dealt with that exact situation
8 with respect to loss of society damages, where the Supreme
9 Court, the Court in Gaudet had found that those type of
10 damages are recoverable under general maritime law, but
11 when it came to Higginbotham the Court said, you can't get
12 those under general maritime law in a DOHSA case, because
13 Congress has set forth what type of damages you can
14 recover and they've limited those damages to pecuniary
15 losses only.

16 And that's where we get to -- in this case here,
17 there isn't -- the real situation here is the issue of
18 pecuniary versus nonpecuniary, and pre-death pain and
19 suffering damages are not pecuniary. It would require the
20 Court to recognize a type of damages not allowed by DOHSA,
21 to add the estate as a beneficiary, which is not included
22 in DOHSA.

23 In 1920, Congress did know the difference
24 between a wrongful death and a survival action, and it
25 opted to adopt basically a modified type of wrongful death

1 statute, because DOHSA is not just like Lord Campbell's
2 Act. It has section 765, which is a little different from
3 Lord Campbell's Act, which didn't contain such a
4 provision, and I think when you look back to 1920, what
5 was Congress thinking when they enacted DOHSA, well, I
6 think the language of the Death on the High Seas Act was
7 very clear.

8 With -- at that time, they thought it was
9 exclusive because there was no other action out there.
10 This was the only action that was available for a death on
11 the high seas. That's where, with respect to this
12 preemption issue that was addressed earlier, in this
13 context you have Federal common law, and there is a
14 different preemption analysis than you do apply with State
15 law.

16 When you're looking at State law, because of
17 their inherent police powers you have to see an
18 affirmative intent to preempt that State statute, but with
19 respect -- when Congress enacts a statute and the
20 preemption is of Federal common law, the analysis really
21 is, did Congress speak to that issue?

22 And in our case here, did Congress speak to the
23 issue of damages, and the Death on the High Seas Act
24 specifically deals with that issue and the issue of
25 whether there is an affirmative prescription of Federal

1 common law doesn't arise in this situation, because the
2 Death on the High Seas Act deals with this issue.

3 QUESTION: But one can argue that the analysis
4 in Moragne was partly based on when there's a hole in the
5 law on the high seas, and when the universal judgment of
6 State legislatures all over the country have changed from
7 what it used to be on the death act, that with regard to
8 survival, the same thing happened.

9 There used to be no survival at common law and
10 all of the State legislatures have now said there'll be
11 survival, and therefore if we wanted to be just as
12 creative as the Court was in Moragne, we would have
13 authority to do the same thing with regard to a survival
14 action, which is not squarely covered.

15 Arguably it's covered by that one section, by
16 DOHSA.

17 MR. HARAKAS: Well, that's --

18 QUESTION: So at least we'd have the power to do
19 it.

20 MR. HARAKAS: Well, with respect, with the Death
21 on the High Seas Act, I don't think the Court would have
22 the power, because it's a different situation than the
23 situation presented in Moragne. There were a number of
24 critical factors in Moragne that drove that decision.

25 QUESTION: Well, Moragne, of course, was

1 geographically outside the scope of the statute, but the
2 counterargument we hear in a legal category sense,
3 survival actions, are -- or preexisting common law actions
4 by the injured party himself or herself are outside the
5 scope of the statute, too. They just weren't addressed,
6 except in the one section that you talked about.

7 MR. HAKAKAS: They were not addressed, but when
8 you go back to the Moragne case, what was the driving
9 force in Moragne? The driving force in Moragne was not a
10 recognition of damages. It was a recognition of a cause
11 of action for unseaworthiness --

12 QUESTION: Right.

13 MR. HAKAKAS: -- to make unseaworthiness a base
14 of liability uniform within the class.

15 In addition, again, as Your Honor recognized,
16 Moragne dealt with an issue in the territorial waters, so
17 the Court looked to, what has Congress enacted for
18 territorial waters, and they withheld the remedy of DOHSA
19 from extending into territorial waters, so there was a gap
20 that the Court could come in and fill.

21 But when you look to the decisions subsequent to
22 Moragne, Higginbotham, Miles, and Zicherman, we look -- we
23 see there is that the Court has made crystal clear that
24 when Congress has spoken we have to abide by what Congress
25 has said, and Congress has spoken in the Death on the High

1 Seas Act with respect to pecuniary damages.

2 And to take the argument here that because
3 Congress then specifically say we're not going to allow
4 loss of survival damages, then any time Congress enacts,
5 they don't enact -- they don't legislate for the entire
6 scheme, so there's always some type of a hole, but at that
7 point then any court can come in and create any remedy
8 they want.

9 QUESTION: Well, of course, the prohibition
10 against pecuniary -- I mean, the limitation on pecuniary
11 damages doesn't entirely solve the problem, because you
12 can have a decedent whose beneficiaries are not among the
13 people who are entitled to sue under DOHSA. They can be
14 second cousins, or friends, or something like that, and
15 they lose whatever benefit the estate would have from the
16 recovery.

17 MR. HAKAKAS: Well -- under a survival act?

18 QUESTION: Yes.

19 MR. HAKAKAS: Well, they --

20 QUESTION: See, there's no -- if there's no
21 survival statute, those -- the defendant just gets off
22 scot-free on that.

23 MR. HAKAKAS: Well, they don't get off scot-
24 free, because there is still the wrongful death action,
25 but --

1 QUESTION: No, but the wrongful death action
2 under DOHSA, as I say, is limited to a specific category
3 of plaintiffs, and I'm assuming an estate where none of
4 the beneficiaries of the estate are within that category.

5 MR. HARAKAS: Well, then the beneficiaries set
6 forth in DOHSA are the ones closest to the decedent, so --

7 QUESTION: Oh, I understand, yes.

8 MR. HARAKAS: You have the parents, spouse --
9 parents, spouse, and children, and dependent relatives, so
10 anyone who's very close to the decedent, even a niece who
11 thinks she was a dependent relative, would be entitled to
12 recover under DOHSA and, of course, if you have a survival
13 action --

14 QUESTION: No, I agree it covers most of the
15 cases, but there are cases where the beneficiary under the
16 will might be not a dependent but just a friend, or an
17 associate of some kind. That person would get nothing,
18 whereas if there were a survival statute he would.

19 MR. HARAKAS: That's correct, Your Honor, but
20 even the State law statutes draw lines as to who can
21 recover and --

22 QUESTION: Oh, but not the survival statute.
23 The estate gets the money.

24 MR. HARAKAS: Well --

25 QUESTION: And whoever will participate in the

1 estate would share in the recovery.

2 MR. HARAKAS: Under typical State statutes, but
3 if you look to the provisions under the Jones Act and FELA
4 incorporated by reference, it's a very similar scheme to
5 DOHSA --

6 QUESTION: Yes.

7 MR. HARAKAS: -- with respect to the estate
8 doesn't recover, the personal representative recovers on
9 behalf of certain named --

10 QUESTION: Yes.

11 MR. HARAKAS: -- people, and it's an exclusory
12 class.

13 QUESTION: The obvious group is grandchildren.
14 I mean, imagine grandchildren. There's an accident, older
15 people die, they all had some estate, they left it all to
16 their grandchildren. Maybe even there was lingering and
17 so forth. In that case, nobody could recover.

18 MR. HARAKAS: No. If the descent and
19 distribution laws are -- if they were --

20 QUESTION: Right.

21 MR. HARAKAS: -- someone in the will they would
22 not be -- if they weren't named in the will they would not
23 be able to recover the recovery for pain and suffering,
24 that's correct, but again --

25 QUESTION: They wouldn't recover anything, I

1 mean, because there's nobody who has anything in a case
2 where the -- I mean, what could they recover for? There's
3 no dependency, they're older people, the beneficiaries of
4 the estate are grandchildren, there's no lawsuit. Nobody
5 brings a lawsuit. Who could bring one?

6 MR. HARAKAS: With respect to -- for --

7 QUESTION: To the death of the person -- I mean,
8 imagine any kind of awful case you want, but I mean, you
9 know, the terrible suffering or whatever, or people linger
10 for a long time, the medical bills eat up the whole
11 estate -- I mean, I could go on if you want, but --

12 MR. HARAKAS: No --

13 QUESTION: -- the point is that then there's no
14 money left and the grandchild who was going to get the
15 money has no lawsuit and no money, and nothing.

16 MR. HARAKAS: Well, that's --

17 QUESTION: So they're saying you should fill in
18 that hole.

19 MR. HARAKAS: Well, you can fill in that hole,
20 but you have to work within what Congress --

21 QUESTION: No, but am I right about the facts?
22 Is it -- am I right about the assumption?

23 MR. HARAKAS: I'm sorry.

24 QUESTION: Am I right about the assumption that
25 in such a circumstance nobody -- it's -- nobody would get

1 any --

2 MR. HARAKAS: Well, if there were no proper
3 DOHSA beneficiaries, then there --

4 QUESTION: There are, but they didn't suffer any
5 harm, because you see, they weren't left any of the money.

6 MR. HARAKAS: Well, there are other types of --
7 you can recover loss of support.

8 QUESTION: No -- they -- all right. No, No,
9 you're right, if there was the harm, so I -- assume that
10 out.

11 This Court has the power to supplement,
12 presumably, because of Moragne.

13 MR. HARAKAS: Well, I respectfully disagree with
14 that, Your Honor, because I think Moragne was a very
15 limited --

16 QUESTION: Well, even Higginbotham said that the
17 Court has the power.

18 MR. HARAKAS: If the Court has the power, but
19 Moragne dealt with a different situation than when you're
20 on the high seas, where Congress has legislated, and I
21 think Higginbotham recognized that. Even Moragne
22 recognized the supremacy of the maritime statutes.

23 QUESTION: So in order to distinguish it you'd
24 have to draw a negative assumption from the enactment of
25 the Death on the High Seas Act. You'd have to assume

1 Congress -- which you argue, that Congress didn't want it
2 supplemented.

3 MR. HARAKAS: That's correct.

4 QUESTION: And the reason that Congress wouldn't
5 have wanted it supplemented is?

6 MR. HARAKAS: Because they affirmatively set
7 forth what they decided was recoverable, because when
8 Congress was enacting DOHSA they said there was no other
9 possible action for a Death on the High Seas Act. There
10 was no general maritime law action at that time.

11 QUESTION: Exactly, so they're operating against
12 an environment where nobody gets a penny.

13 MR. HARAKAS: Exactly.

14 QUESTION: So they say, hey, nobody gets a
15 penny, now we're going to give a few pennies to a few
16 people, so what is it that suggests that they wouldn't
17 have wanted more pennies to go to some other people?

18 MR. HARAKAS: Well, I think when you look to --

19 QUESTION: If everything changed.

20 MR. HARAKAS: Well, when you look to the
21 structure of -- I'm just sticking with the language right
22 now of 765, what's the reason for 765. There, they said
23 if there's a personal injury action that action shall be
24 so -- in its essence cease and be subsumed in the DOHSA
25 action.

1 Now, if they wanted a -- if they want to allow a
2 survival type of action, they wouldn't have put language
3 in there.

4 QUESTION: Well, maybe Congress wasn't all that
5 crazy about awarding noneconomic damages.

6 MR. HARAKAS: Well, I -- well, that's --

7 QUESTION: It seems pretty clear that's the way
8 they felt in 1920.

9 MR. HARAKAS: It is pretty clear when you go
10 back. I don't want to get into the history right now, but
11 if you look through the records, because DOHSA was a
12 compromise. It wasn't just -- it was to grant a remedy
13 where none existed before, but there were also interests
14 of the shipowners.

15 In fact, the first version of DOHSA had a \$5,000
16 limit on recoverable damages, so -- and that was --

17 QUESTION: What is in the Jones Act -- picking
18 up on the FELA, what is the survival feature of that act,
19 and how does it compare with State legislation?

20 MR. HARAKAS: The difference between the
21 survival provision in the Jones Act and most State
22 statutes is, the Jones Act, section 59, sets forth that
23 there is a survival -- this is the 1910 amendments, when
24 they added the survival provision.

25 It sets forth that the personal representative

1 can continue any personal injury action the decedent had
2 but for the benefit of certain named beneficiaries,
3 whereas State survival -- many State survival statutes
4 says -- say that you -- the personal injury action of the
5 decedent shall continue and will be -- and the estate
6 recovers.

7 So whereas under State statutes the estate
8 itself, being a fiction where the decedent recovers, under
9 the Jones Act, specific beneficiaries recover.

10 QUESTION: That's who recovers. Now, what can
11 be recovered? Is there any difference?

12 MR. HARAKAS: Well, various -- State statutes
13 vary. It depends on the State, but here, under section 59
14 of FELA, which is at the -- in the back of our brief at
15 page 7, it -- the act says that any right of action given
16 by this chapter to a person suffering injuries shall
17 survive to his or her personal representative for the
18 benefit of the surviving widow or husband and children of
19 such employee, and if then none -- if none, then such
20 employee's parents, and if none, then the next of kin
21 dependent upon the employee, so it sets forth exactly who
22 recovers. Whereas State statutes, the recovery goes to
23 the estate and it's distributed under the will.

24 QUESTION: But you haven't told me anything
25 about what is recoverable. That doesn't sound like it's

1 limiting the --

2 MR. HARAKAS: Oh, with respect to the damages
3 recoverable, whatever damages would be recoverable under a
4 personal injury action, so pain and suffering damages are
5 recoverable under this, Your Honor.

6 QUESTION: Without any ceiling?

7 MR. HARAKAS: Correct. There is no ceiling on
8 that.

9 None of the Federal statutes currently have any
10 type of ceilings on the types of recoverable damages as to
11 monetary caps.

12 When you look to DOHSA overall, and what it
13 intended to do from 1920 to the present day, DOHSA did
14 draw certain lines, as all States do, and these lines are
15 based on policy decisions made by the legislature, just as
16 Congress today is considering what is the policy they
17 should have for a death on the high seas and they're
18 considering various amendments of the Death on the High
19 Seas Act, and if someone can't recover under the
20 applicable statutes, a person should not be allowed to
21 recover under judge-made maritime law.

22 We have to stick strictly within the boundaries
23 set forth by this statute and by Congress, because the
24 role --

25 QUESTION: May I ask a question that will kind

1 of reveal my ignorance, but supposing you have a slip-
2 and-fall case on an ocean liner out in the middle of the
3 Atlantic Ocean and they come back and sue, what law
4 governs the measure of damages?

5 MR. HARAKAS: The measure of damages is general
6 maritime law, actually.

7 QUESTION: Generally maritime law.

8 MR. HARAKAS: It's traditionally recognized,
9 personal injury actions for injuries on the high seas.

10 QUESTION: And that's all judge-made, isn't it?

11 MR. HARAKAS: And that is all judge-made, and
12 the Jones Act does deal -- the Jones Act does deal with
13 personal injuries, but the Death on the High Seas Act does
14 not deal with personal injuries.

15 One version that was proposed with respect to
16 the Death on the High Seas Act would have made DOHSA akin
17 to FELA, and would have allowed further recovery of
18 personal injuries, but that was soundly defeated in 1916,
19 and what we have today is the version that currently was
20 enacted basically, except for the repeal of 763 in 1980.
21 It's the same version.

22 And I just want to make one point with respect
23 to 763. That really isn't part of the -- 763a. That
24 isn't part of the Death on the High Seas Act. That is a
25 statute of general application which Congress enacted in

1 1980 to make a uniform limitation period whether in
2 actions brought under the Death on the High Seas Act,
3 maritime law, whether it's a Death Act or a personal
4 injury action, and it was just codified at 763a, but
5 there's a codification note that says this was not enacted
6 as part of the Death on the High Seas Act.

7 QUESTION: Well, what is the general description
8 of the causes of action that 763a pertains to?

9 MR. HAKAKAS: It pertains to personal injury, or
10 death.

11 QUESTION: But it has to be on the ocean?

12 MR. HAKAKAS: It -- any time there's maritime
13 jurisdiction.

14 QUESTION: Any time there's maritime --

15 MR. HAKAKAS: That's correct, Your Honor.

16 If you have no further questions --

17 QUESTION: Thank you, Mr. Hakakas.

18 MR. HAKAKAS: Thank you.

19 QUESTION: Mr. Minear, we'll hear from you.

20 ORAL ARGUMENT OF JEFFREY P. MINEAR

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

22 SUPPORTING THE RESPONDENTS

23 MR. MINEAR: Mr. Chief Justice, and may it
24 please the Court:

25 The United States submits that the Death on the

1 High Seas Act provides the exclusive remedy in this case,
2 and I'd like to explain why.

3 Congress enacted the statute in response to this
4 Court's decision in The Harrisburg, which held that
5 general maritime law does not provide a remedy for persons
6 who die from injuries at sea.

7 Congress legislated with the understanding, in
8 the wake of The Harrisburg, that the Federal statutory
9 regime that was created would be the only remedies that
10 would be available for death on the high seas. Congress
11 considered the policy question of appropriate remedies in
12 that light, and it struck what it felt was the proper
13 balance.

14 Here, as in Mobil Oil v. Higginbotham, and as in
15 Offshore Logistics v. Tallentire, this Court should not
16 supplement the statutory wrongful death remedy with other
17 remedies that Congress did not provide.

18 We think that course would be inappropriate
19 here, because it is clear from the text and the
20 legislative history that Congress considered the
21 possibility of a survival action and decided not to
22 provide one.

23 The most instructive provision of the act for
24 the purposes here is section 5. That section recognizes
25 that the plaintiff might die after commencing a personal

1 injury suit for activities on the high seas.

2 The plight of an injured person who begins a
3 suit, but dies before a final judgment is reached,
4 provides an especially sympathetic case for allowing a
5 survival remedy, but even in that case, Congress decided
6 that only a wrongful death remedy would be available.

7 Congress could easily have --

8 QUESTION: So the personal representative sues,
9 but the beneficiaries are those named in DOHSA?

10 MR. MINEAR: That is correct, yes.

11 Now, Congress could have easily written
12 section 5 to provide a survival type remedy, but it made a
13 legislative choice not to provide that type of remedy, and
14 we think that is important here, that Congress was making
15 what is essentially a legislative choice.

16 The legislative history confirms --

17 QUESTION: What do you say to your opponent's
18 argument that at least you can explain that provision as a
19 way of saving an action that otherwise would not exist.

20 MR. MINEAR: Yes, that is -- well, what I think
21 that Congress was attempting to do here is, it recognized
22 that in the absence of section 5 the personal
23 representatives would have to commence a new suit, and
24 what they're allowing here is --

25 QUESTION: And it might be barred by

1 limitations.

2 MR. MINEAR: Yes, and they will just -- can step
3 right into the shoes of the decedent --

4 QUESTION: Right.

5 MR. MINEAR: -- and continue on, but the action
6 would be transformed into a wrongful death remedy for the
7 particular class of survivors.

8 QUESTION: May I ask you how you'd decide this
9 case if Congress had omitted section 5 from DOHSA?

10 MR. MINEAR: If Congress had omitted that
11 section, then we would be faced with the question of,
12 well, what did Congress intend to prevent this type of
13 cause of action, and I think the argument would still be
14 quite clear that Congress did, and I think it's the
15 legislative history that we would then turn to under that
16 circumstance.

17 QUESTION: You'd have to rely on legislative
18 history, then.

19 MR. MINEAR: I think that would be one of our
20 primary sources.

21 QUESTION: Yes.

22 MR. MINEAR: It would certainly figure more
23 prominently, but I think even then the text would be quite
24 helpful, because the text was written to indicate that
25 these would only be pecuniary damages that would be

1 provided, and here we are seeking a different type of
2 remedy that would not have been available in 1920.

3 QUESTION: No, but where -- your opponent's
4 seeking the kind of remedy the Court created, in effect,
5 in Moragne, and everybody seems to agree we have the power
6 to create such a remedy here --

7 MR. MINEAR: Yes. I --

8 QUESTION: -- if we think it is not inconsistent
9 with any congressional direction.

10 MR. MINEAR: Yes. I think this Court does have
11 the power to create it.

12 QUESTION: Yes.

13 MR. MINEAR: But the principal thrust of our
14 position here is that this is a legislative choice, that
15 the question -- that deciding that there's a survival
16 remedy doesn't put an end to the number of questions that
17 will come up.

18 There will still be questions with regard to who
19 should that survival remedy inure to, what should be the
20 measure of damage, how would it be reconciled or
21 coordinated with the wrongful death --

22 QUESTION: But those are all the same kind of
23 questions we get if the plaintiff doesn't die, if it's a
24 slip-and-fall case.

25 MR. MINEAR: Not necessarily. At least with

1 regard to the coordination of the wrongful death remedy
2 with the survival remedy, there would still be a
3 requirement.

4 Here, if you're allowing both of those remedies,
5 this Court is going to have to make decisions in terms of
6 what remedies are compensable under each of those two
7 different causes of action, and where there might be an
8 overlap between the type of remedy that's provided --

9 QUESTION: Yes.

10 MR. MINEAR: -- so there will be some, I
11 think -- some additional questions that would come up, and
12 some additional complications.

13 Now, as I said, I think the legislative history
14 here makes it clear that Congress was making a conscious
15 choice. The legislative history, both the reports and the
16 hearings, indicate that Congress was aware of the
17 difference between a wrongful death action and a survival
18 action.

19 Furthermore, Congress understood that the
20 statutory remedy here would be exclusive, and Congress was
21 also apparently aware of this Court's decision in Michigan
22 v. Vreeland, the case that Justice Ginsburg alluded to
23 earlier, in which the Court indicated that only Congress,
24 only a legislature could create a survival remedy and,
25 indeed, as has already been discussed, Congress has

1 created those types of survival remedies in the Jones Act
2 and also under the Federal Employers Liability Act.

3 But Congress nevertheless made a conscious
4 policy decision not to provide a survival remedy here,
5 and --

6 QUESTION: Was Congress aware -- at that time,
7 had Federal courts created new tort remedies in admiralty
8 law, or tort-like remedies on their own at all?

9 MR. MINEAR: I think that this Court had
10 followed what was traditionally English practice, which
11 meant that there was an action for maintenance and cure
12 for seamen, and there was also an action for negligence,
13 general negligence for passengers --

14 QUESTION: What I'm driving at is, would
15 Congress at that time also have been aware of the
16 possibility that Federal admiralty courts could create
17 remedies?

18 MR. MINEAR: No. I think it probably --

19 QUESTION: No.

20 MR. MINEAR: -- that would have caught it by
21 surprise, but that has changed now with Moragne.
22 Certainly this Court indicated a different view on that
23 matter.

24 But again, that was -- Moragne was in response
25 to the actions of State legislatures, and here I think

1 it's appropriate for this Court to defer to the actions of
2 Congress on this question.

3 As I said before, this is a legislative policy
4 issue here, and Congress --

5 QUESTION: And can you enlighten -- give us any
6 more enlightenment than we've already had from counsel on
7 legislative policy? What is the current thinking about
8 what to do with air crashes?

9 MR. MINEAR: It's my understanding that the
10 House bill 2005 did pass the House, and that would have
11 simply removed aviation claims from the Death on the High
12 Seas Act.

13 QUESTION: Left it all to State law, then, and
14 Moragne-type --

15 MR. MINEAR: Yes. We'd then be faced with a
16 choice-of-law question that was relatively easy after
17 Zicherman, where this Court simply looked to the question
18 of Death on the High Seas Act, that we'd then be faced, in
19 Warsaw cases, of determining what is the appropriate body
20 of law. Most likely it would be a State, or perhaps a
21 foreign cause of action.

22 There is action pending in the Senate, but I
23 don't believe that anything has passed the Senate at this
24 point, and I believe the provisions are different from the
25 House bill.

1 Now, as I've said, I think that the Court cannot
2 take action in this case in providing a survival remedy
3 without overruling, or at least overriding the judgment
4 that Congress made in 1920. Perhaps that judgment should
5 be changed, but perhaps not, but that's a decision, we
6 believe, that is for Congress.

7 If there are no further questions --

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Minear.

9 The case is submitted.

10 (Whereupon, at 1:57 p.m., the case in the above-
11 entitled matter was submitted.)

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

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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:

PHILOMENA DOOLEY, PERSONAL REPRESENTATIVE OF THE ESTATE OF
CECELIO CHUAPOCO, ET AL., Petitioners v. KOREAN AIR LINES CO., LTD.
CASE NO: 97-704

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

BY Donna Marie Federico-----

(REPORTER)