

Supreme Court of the United States

OCTOBER TERM, 1969

In the Matter of:

PETSONELLA MORAGNE, as personal
representatives of the Estate of
EDWARD MORAGNE, SR., deceased,
and PERSONELLA MORAGNE, individually,
Petitioner

Docket No. 175

vs.
STATES MARINE LINES, INC., A CORPORATION,
Respondent

vs.
GULF FLORIDA TERMINAL COMEANY, a
A CORPORATION,
Respondent.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

PETSONELLA MORAGNE, as personal)
representative of the Estate of)
EDWARD MORAGNE, SR., deceased,)
and PETSONELLA MORAGNE, individually,)
Petitioner)

vs

No. 175

STATES MARINE LINES, INC., a)
corporation,)
Respondent)

vs

GULF FLORIDA TERMINAL COMPANY, a)
corporation,)
Respondent)

The above-entitled matter came on for argument at
12:45 o'clock p.m. on Wednesday, March 4, 1970.

BEFORE: WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

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1 The two issues removed at the instance of States
2 Marine Lines, Inc. to the Federal District Court in Tampa.
3 And then upon motions by both Respondents, after a third
4 party complaint was filed for indemnity by the shipowner
5 against the stevedore.

6 The District Judge struck Count 2 which had to do
7 with unseaworthiness, and based his decision upon two cases
8 of the Fifth Circuit Court of Appeals, the Graham against
9 A. Lusi, Ltd. and Emerson versus Holloway Concrete Products
10 Company, which held that Florida common law applied and was
11 applicable under the Florida Wrongful Death Statute.

12 One of these cases was decided in 1953; the other
13 was decided with a vigorous dissent by Judge Brown in 1960,
14 right after this Court issued its opinion in the Wungus.

15 But, the District Judge was concerned about the
16 correctness of his ruling, and pursuant to the appropriate
17 rule, gave language in his opinion which allowed us to petition
18 for an interlocutory appeal to the Court of Appeals. The Court
19 of Appeals granted our interlocutory appeal and then, upon the
20 request of the Respondent States Marine Lines, certified the
21 question involved to the Florida Supreme Court.

22 The Florida Supreme Court held that the warranty of
23 seaworthiness is not applicable under the Florida Wrongful
24 Death Act.

25 We then requested the Court of Appeals to ignore

1 this opinion or the certified question of the Florida Supreme
2 Court, and raised the constitutional questions which are here
3 before this Court. Argument was held, briefs were fully
4 made to the Court of Appeals. The Court of Appeals took con-
5 siderable time worrying with the issue, and finally its
6 opinion said they felt nevertheless bound by the Tungus to
7 accord to the Florida Supreme Court, or the Florida courts
8 the right to decide what section of law was applicable to
9 Maritime Death occurring on navigable waters of the United
10 States within the territorial limits of Florida.

11 Q As I understand it, you brought your original
12 action to the State Court under the State's Wrongful Death
13 Act, and under the State Survivor Act.

14 A Yes, sir.

15 Q And that it was removed by the Defendant to
16 the Federal Court, solely on the basis of diversity jurisdic-
17 tion.

18 A Yes, sir.

19 Q Well, in view of that, I have a little trouble
20 seeing what the Tungus or Harrisburg or anything else, any of
21 those cases have -- what bearing they have on this case. If
22 this is a state action for wrongful death, in the District
23 Court only by reason of the diversity and not by reason of the
24 Admiralty jurisdiction. Doesn't Railroad against Tompkins
25 require that the District Court follow the state law, whatever

1 it may be. I am aware of course, that this Court asked you
2 about the Harrisburg and asked the parties to brief it, but --

3 A Let's assume that the injury had not resulted
4 in death. The case would still have been removable for a
5 personal injury not --

6 Q Under diversity jurisdiction?

7 A Under diversity jurisdiction but Federal Law,
8 Federal Maritime Law would have applied in the State Court or
9 in the District Court under diversity jurisdiction or on the
10 Admiralty side of the Court, had the Plaintiff chosen to go
11 there, but she didn't; no, sir.

12 Q And by virtue of --

13 A No, sir. This was a death. This was not an
14 injury.

15 Q Well, but in one of the tests of the continuing
16 validity of the Harrisburg it would seem to me that a plain-
17 tiff should -- you should have added another complaint in
18 Admiralty for wrongful death. You are simply suing under the
19 State Wrongful Death Statute and the State Survivor's Statute.

20 A Well, Your Honor, we --

21 Q And for negligence and unseaworthiness and the
22 Florida Supreme Court has now held that this State, these two
23 state statutes don't embody liability for unseaworthiness.

24 And in order to test the continuing validity of the
25 Harrisburg, it seems to me a plaintiff would have to sue for

1 wrongful death in Admiralty. You have never gone to the
2 Admiralty side; you never -- of the Federal Court, nor did
3 you plead a cause of action in Admiralty in the State Court.

4 A I'm just telling you my guess, Your Honor.

5 Q And I know that we have invited --

6 A Mr. Justice, we were proceeding under what
7 we felt and the Fifth Circuit Court of Appeals agrees with it,
8 we felt was the compulsion of the majority ruling in the
9 Tungus, and every other state since Tungus, which has decided
10 this question; some 11 major Maritime States have held that
11 the Wrongful Death Statutes of both states incorporate
12 Admiralty Substantive Law. It's only in this case --

13 Q But in Tungus and the Harrisburg, the cause of
14 action was in the Admiralty and the holding was that there is
15 no cause of action for wrongful death in Admiralty, but that
16 Admiralty may, in the event of wrongful death, may borrow from
17 the local state statute.

18 But here you sue under the local state statute.

19 A What's the difference, if it please the Court?

20 Q Well -- I mean --

21 A Well, I frankly don't see the difference. I

22 Q Well, I think the Tungus and Harrisburg could
23 be tested by a plaintiff who sued in Admiralty for wrongful
24 death.

25 Q May I ask you: after the removal as a case of

1 procedure, was a claim asserted formally, or formally under the
2 Admiralty law?
?????

3 A No, sir. I had considered the case to be
4 under the Admiralty Law from the beginning. This is the whole
5 issue involved in the State Court, not on the Admiralty side
6 of the Court, but the Maritime Law applied under the Florida
7 Wrongful Death Statute. This has been the position of the
8 plaintiff from the beginning.

9 Q Is it your claim that the Admiralty Law would
10 require a state to have its death statute incorporated into
11 Maritime Law?

12 A Yes, sir. It's my claim that Maritime Sub-
13 stantive Law must apply under the State's Wrongful Death
14 Statute to a maritime death which occurs on the navigable waters
15 of the United States, within the territorial jurisdiction.

16 Q Could I ask a question about the Harrisburg?

17 A No, sir, I haven't gotten to the Harrisburg
18 yet. I'd be glad to talk about the Harrisburg, but --

19 Q If that's the only claim you never will get to
20 the Harrisburg.

21 A Yes, sir. So that what happened, in effect, in
22 this case is that the Court of Appeals applied Florida Law to
23 a maritime death occurring within the territorial waters of
24 Florida, under the compulsion of the Tungus.

25 And a flat section of law which conflicted with the

1 duties and obligations which are rooted in maritime law,
2 speaking there of the warranty of seaworthiness. There is no
3 question but what the warranty of seaworthiness is a duty and
4 an obligation of a shipowner which is owed to a longshoreman.
5 And in the case of injury, a violation of this duty produces
6 the right to sue.

7 Q In other words -- and you could have sued, Mr.
8 Hardee, I gather, in the case of an injury; not a death. You
9 had your option to proceed in the Federal Court or in the
10 State Court.

11 A Yes, sir.

12 Q But in either court, not a death case, the
13 controlling law that would have to be applied would be the
14 Federal Maritime Law.

15 A Yes, sir.

16 Q And I gather you take the same position in
17 death cases.

18 A Yes, sir.

19 Q And you insist that Harrisburg should be
20 overruled.

21 A Yes, sir.

22 Q And a different Federal Maritime rule applied.

23 A Yes, sir; that's right. I say, first of all
24 that Meredith Moran has been decided that the theories ex-
25 pressed by the minority in *Tungus*, have come to fruition, and

1 the State of Florida has caused to be applied to maritime
2 deaths in Florida, a rule different from the substantive
3 Admiralty rule or law.

4 So that I think if this Court receives from the
5 majority reasoning in Tungus and does what the minority
6 suggests, my client is protected in this case.

7 This Court asked the parties to brief the question
8 of whether the Harrisburg should be overruled and I have taken
9 the position that it should be, for a number of reasons.

10 First of all, the Harrisburg, of course, is a very
11 careful, well-reasoned and thought-out decision. The problem
12 is that I think the Court in the Harrisburg at that time went
13 astray on a couple of matters. First of all, the civil law
14 had traditionally been the law applied to Admiralty in England
15 and in this country. The courts generally looked to the civil
16 law.

17 Now, this is not to say that the courts might not look
18 to the common law, but at that time Swift against Tyson was
19 in effect and it was assumed to be a uniform Federal common
20 law, so I think Swift against Tyson had some effect on the
21 Court. Of course, that's been laid to rest in 1936 and 1938.

22 But, in looking to the common law, if a court in
23 Admiralty were going to apply maritime law, were going to look
24 to the common law, it seems to me the court would look and find
25 adoption of the common law, which was a progressive, good

1 adoption and everyone said this is wonderful and is something
2 that should be adopted by the Admiralty.

3 But in this case, the Court adopted a rule of the
4 common law which had been abrogated four years before by the
5 English Parliament, which had been criticized by everybody
6 that had ever said anything about it, which everybody agreed
7 was a terrible rule of the common law and which everybody
8 agrees today is a terrible rule.

9 So, Admiralty went out from the civil law here, to
10 engraft into Maritime Law a rule of the Common Law which no-
11 body defends. That is, that is there is no right of action
12 for wrongful death; that's in the statute.

13 And this is where --

14 Q What is the source to sue for death by wrongful
15 act?

16 A The Wrongful Death Act in Florida was originally
17 felt to be a Lord Campbell-type in the --

18 Q In the statute?

19 A In the statute; yes, sir. It's a Lord
20 Campbell-type statute. However, it was amended in 1953 to
21 provide for actions ex contractu as well as actions ex
22 delicto, which brought in the field of implied warranty of
23 foodstuffs and product liability and so on. So, that it's
24 not technically any longer, really by Lord Campbell's Act.

25 So that the Harrisburg now has resulted by evolution

1 in the situation that we find ourselves now in Moragne and
2 that is: where the State of Florida has effectively abolished
3 the warranty of seaworthiness which is deeply engrafted in
4 admiralty and maritime law. So that a longshoreman who is
5 killed as distinguished from being injured, on navigable
6 waters of the State of Florida, navigable waters of the United
7 States, within the State of Florida, is deprived of this
8 doctrine, this warranty of seaworthiness; and is relegated to
9 common law negligence, which is a very different type animal
10 from the negligence that we note in maritime law.

11 I think that it has been traditional that Admiralty
12 courts, the Supreme Court in particular, has fashioned
13 admiralty remedies and admiralty law where necessary.

14 I need to only point out a few. For instance, in
15 this case, the shipowner seeking indemnity against the
16 stevedore. An indemnity of a shipowner against the stevedore
17 was fashioned by the Court in the Ryan case on such an
18 occasion.

19 We have indemnity involved in this case; in this
20 very case, which is a Court-made or Court-fashioned maritime
21 doctrine, which is unknown in the State of Florida but it's
22 going to be an issue in this case, and yet the respondents
23 say that the plaintiff, the petitioner here should be rele-
24 gated to state law as far as her rights for death are con-
25 cerned, occurring on navigable waters, but they turn around and

1 seek the benefit of the Court-fashioned right of indemnity
2 against the stevedore.

3 Of course, the duty of -- the warranty of seaworthi-
4 ness is a thing that has been fashioned by the Court, and the
5 impleader rules have been fashioned by the Court.

6 I'd like to point out one other thing. Back in
7 1917 and 1924, starting with the Jensen case, the Supreme
8 Court held that a state law, workmen's compensation law could
9 not validly be applied to maritime injuries or death occurring
10 on state waters.

11 After the Jense case, the Congress passed a statute
12 which had the effect of placing state workmen's compensation
13 laws over these injuries and deaths. And the Court in the
14 Knickerbocker case said "you can't do that; that's uncon-
15 stitutional."

16 So then the Congress came back and passed another
17 statute of the same type exempting members -- masters and
18 members of the crew of vessels. And the Court again said:
19 "You cannot constitutionally apply a state statute, workmen's
20 compensation statute to injuries or death occurring on maritime
21 waters."

22 It seems to me in the Tungus that this Court has
23 done in maritime deaths, what the Court three times said back
24 in 1917 and 1924 that the Tungus could not constitutionally do.

25 So, I urge this Court, and I'd like to reserve my

1 remaining time for rebuttal, if I may.

2 But, I would urge this Court to receive from the
3 majority ruling in Tungus and to overrule the Harrisburg.

4 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Hardee.
5 Mr. Claibourne.

6 ORAL ARGUMENT BY LOUIS F. CLAIBOURNE,
7 OFFICE OF THE SOLICITOR GENERAL, ON
8 BEHALF OF THE UNITED STATES AS AMICUS CURIAE

9 MR. CLAIBOURNE: Mr. Chief Justice, and may it please
10 the Court: The United States is here in this case, pursuant
11 to the Court's invitation to file a brief and to participate in
12 the oral argument of the case.

13 We have devoted our submission primarily to the pro-
14 position that the Harrisburg, in answer to the Court's
15 question, ought to be overruled.

16 Incidentally, we see no difficulty in that being
17 done in a diversity case, it being clear, I think, that a
18 state court may apply admiralty law and the Federal Court to
19 which such a cause is removed under the diversity jurisdiction
20 may likewise do so, although the case could not have been
21 brought on the law side of the Federal Court originally,
22 absent the diversity of citizenship.

23 Q And this is removed on diversity and what
24 happens to Erie Railroad against Tompkins?

25 A Well, I thought, Mr. Justice Stewart, this

??????? 1 Court had long settled that under the
2 state courts or Federal courts acting as state courts, that is
3 under their diversity jurisdiction, applied Federal Maritime
4 Law in all maritime cases. At the election of the plaintiff--

5 Q Well, what about -- the plaintiff here elected
6 to proceed under two state statutes: a Wrongful Death Statute
7 and a Survivor's Statute. He didn't through an admiralty;
8 quite unlike the plaintiff in the Tungus case.

9 A Mr. Justice Stewart, there may be a problem
10 of pleading; there's no problem of jurisdiction. The Court
11 here, just as Mr. Justice Burger said a moment ago, if this
12 had been a personal injury case, the claim could have been
13 under the warranty of seaworthiness, a Federal claim, and
14 it could have been vindicated in the state court or in the
15 Federal Court under the diversity --

16 Q Without question?

17 A And it would be no different --

18 Q There is another answer here anyway. This
19 whole thing arises because Count 2, which is framed on un-
20 seaworthiness, was dismissed by the District Court and that
21 dismissal was sustained in the Court of Appeals and that all
22 was founded on unseaworthiness; wasn't it? A Federal question
23 case.

24 A Except to the extent, Mr. Justice, that the
25 claim was unseaworthiness as recognized by the State Wrongful

1 Death Standard. However, as I read the complaint, it's -- the
2 suit is brought simply alleging a claim for wrongful death and
3 unseaworthiness without particularly or uniquely invoking the
4 State Wrongful Death Act.

5 Q The exact statute. Count 2 doesn't uniquely
6 invoke the State Wrongful Death Act.

7 A Nor does Count 4, which is also an unseaworthi-
8 ness count for the longshoremen's own injury.

9 Q Mr. Claiborne, had the suit been, as you
10 suggested, for an injury and not for death, what would have
11 been the source, the basis for the suit?

12 A I would have been a Federal Maritime Law of
13 unseaworthiness as to Count II of the complaint, which is the
14 only one here at issue, which is enforceable in both the State
15 Courts and in -- on the law side of a FEderal Court on a
16 diversity head of jurisdiction, as well as an admiralty without
17 a jury, without diversity.

18 Q And were there no statutes at all, would there
19 have been a right to sue for the injury?

20 A There is no statute whatever that would have
21 been a right to sue for the injury.

22 Q Well, is that a distinction? I'm not suggesting
23 that it's a significant one, but that is a distinction between
24 the death act and the action for injuries; isn't it?

25 A Well, our suggestion here, Mr. Justice, is that

1 once the Harrisburg is overruled, as we submit to the Court it
2 should be, there will likewise be a right to sue for wrongful
3 death without a statute, without invoking the State Wrongful
4 Death Statute.

5 And so, in that sense, this is exactly the same case
6 as it would be for a personal injury in the right court.

7 Q Well, if the law is different from what it is
8 today, then your rates would be different; that's what you're
9 really saying?

10 A That is what I'm saying.

11 Q That wouldn't get us very far.

12 A But there is no jurisdictional problem, there
13 may be a question as to the efficiency of the pleading, though
14 I don't think there is any problem with the sufficiency of the
15 complaint. There may be some question as to the plaintiff's
16 agreeing that the matter ought to be determined at the proper
17 time by reference to Florida law, when the certification
18 to the Florida Supreme Court was made.

19 However, it really is not my place to speak to any
20 defect in the way the plaintiff brought suit here. We assume
21 that the question is before the Court and answer it as the
22 Court -- or requested that we do.

23 The faults of the problems created by the decision
24 in the Harrisburg have been sufficiently exposed. The under-
25 lying principles, both the common law rule denying recovering

1 for wrongful death and the application of that rule to
2 admiralty has been criticized by so many eminent jurists and
3 scholars that I need hardly add anything to what they have
4 said, mentioning only that they include Mr. Justice Holmes,
5 Judge Learned Hand, Dean Fassa and Dean Pound.

6 Congress, in one sense, has also repudiated the
7 result which the Harrisburg required by enacting Federal
8 statutes which, to a large extent supplant the state laws,
9 notably: the Death on the High Seas Act, though it starts at
10 the three-mile line and the Jones Act, which covers all
11 maritime waters, but only with respect to true seamen.

12 The Harrisburg is today, whatever the correctness of
13 decision at the time there was some reason to question that,
14 is today an anachronism. It creates a series of anomalies
15 which are not mere anomalies, they are arbitrary results,
16 often unjust and very much at odds with the desirable
17 uniformity of the admiralty laws.

18 Just taking --

19 Q Did Congress order that situation since the
20 Harrisburg was decided?

21 A No question whatever, Mr. Justice, that
22 Congress could and as the other side will, I am sure, point
23 out, there is pending a bill which would have some such result,
24 although I must.

25 Q It did alter death on the high seas.

1 A They did alter it to the extent of the high-
2 seas, the Death on the High Seas Act did alter it.

3 Q I understand the Jones Act.

4 A The Jones Act for the entire coverage of
5 maritime law, but only with respect to seamen. So we really
6 have a small area left which Congress for reasons which I
7 will try to explain in a moment, did not choose to --

8 Q And yet the submission in this case would be
9 that those people would have a greater right of action for
10 wrongful death, their representatives, for the wrongful death
11 of those people than they would if they were shore, if it had
12 happened on the shore, on the land in Florida, which gives the
13 right of wrongful death only for negligence, I

14 A Yes. Well, putting it the other way, Mr.
15 Justice, we would say they should not have less rights simply
16 because the accident occurred beyond the three-mile limit,
17 nor should they have --

18 Q Well, Congress passed a statute for people
19 beyond the three-mile limit.

20 A I'll come to that, Mr. Justice. Let me say
21 that the anomalies created are really three: the same conduct
22 which imposes liability on shipowners produces one result if
23 the man, if the victim is injured and it produces often a
24 different result if the man is killed, and there is no rhyme or
25 reason to that.

1 Likewise, the same conduct by the shipowner --

2 Q That's true, of course, in -- there's nothing
3 unusual about that. Many states, for example, that have
4 limited liability for wrongful death --

5 A Mr. Justice, there is no state law which
6 provides no remedy when the man is killed, while providing a
7 remedy for the same conduct when the man is merely injured.
8 There may be degrees --

9 Q This isn't a case where no remedy is provided.
10 There is a remedy here for negligence.

11 A The same conduct which, in this case, for this
12 purpose, is unseaworthiness of the vessel. There is no remedy
13 under Florida law when the seaman dies -- when the longshoreman
14 dies, whereas it affords a remedy, as it must under Federal
15 law when the longshoreman is injured.

16 So, it's an all-or-nothing proposition.

17 Now, likewise, the same conduct may give rise to an
18 obligation to pay or a right of recovery, depending on whether
19 it happens within or outside the three mile limit, a line
20 which makes no sense in terms of maritime jurisdiction, which
21 covers the entire area.

22 Q When you say it makes no sense, you are saying
23 that the line-drawing by Congress did not have a logical,
24 sensible basis; isn't that what you're saying?

25 A No. I think it, as I will suggest it, did have

1 some basis. I am suggesting that the result, which I don't
2 think was intended by Congress, because of the differences in
3 law then existing have now become acute and arbitrary, though
4 I don't impute any such purpose to the Congress in 1930 when
5 the remedies were quite different and the state laws, quite
6 adequately -- the State Wrongful Death Statute quite adequately
7 covered the three-mile area.

8 Beyond that, there was a confused situation. Some
9 thought a vacuum and at least an appropriate place to, an
10 urgent need to provide a law, a law that was comparable to
11 the state remedy provided by the Wrongful Death Act.

12 Indeed, the suggestion is that the state law was
13 more generous than the new Federal Law and some complaining
14 to not displace this state law within the three-mile area. We
15 have that now turned around seems to impute a very strange
16 notion of a Congressional purpose.

17 The strangest of all the anomalies produced by the
18 Harrisburg as construed in the Tungus, is that true seamen are
19 often less able to recover than those who recover for un-
20 seaworthiness, or other seamen's remedies, only because they
21 do the work ordinarily performed by seamen, so-called
22 "Sieracki Seamen."

23 So, the question arises: "Why not at a --

24 Q How is that?

25 A Under this Court's decision in Lindgren and in

1 Gillespie, a seaman who is killed, his survivors cannot resort
2 to the State Wrongful Death Act, even where that State Wrong-
3 ful Death Act would provide a remedy from seaworthiness.

4 Q The Jones Act.

5 A They could apply to the Jones Act remedy for
6 negligence, therefore, in the Tungus that remedy would not
7 have been available to a seaman.

8 Q He wasn't a seaman in the Tungus --

9 A No, but the seaman would not have had the
10 benefit of the ruling in the Tungus, given the facts of the
11 New Jersey Law, did provide that remedy.

12 Q So, the Jones Act, insofar as it's been
13 equated with FELA still uses the word "negligence."

14 A I'm assuming there is a difference, and in this
15 case -- the assumption is that there is a difference between
16 unseaworthiness and negligence. Though, I recognize that
17 negligence under the Jones Act is a broader concept than
18 negligence under Florida's law.

19 But there has to be a reason for not setting things
20 right. They could be three reasons. The first is that a long
21 time has passed and it's too late, that this Court has made a
22 lot of decisions premised on the Harrisburg and the Congress
23 has legislated against that background and it is, as a prac-
24 tical matter, impossible to undo 80 years of legislation and
25 jurisprudence.

1 The remarkable fact is that that is not true. A
2 simple overruling of the Harrisburg would recreate the uni-
3 formity, basic uniformity in the maritime laws. And it would
4 erase all the harsh anomalies that I have just mentioned.

5 Now, in saying that, I assume that although the
6 Harrisburg carries with it, first a proposition that now that
7 Federal Law, Federal substantive law is available in death
8 cases, there can be no resort to state laws, even more favor-
9 able state laws.

10 Therefore, the anomalous result in Hess versus the
11 United States, about which Mr. Justice Harlan and others
12 complained would no longer obtain.

13 Q Didn't the Death on the High Seas Act retain
14 the state statutes?

15 A That is the second argument against repealing
16 that Harrisburg by judicial action rather than legislative
17 action.

18 There was -- there were statements in the decision,
19 the majority decision, in the Tungus to the effect that
20 Congress drew a knowing line between the three-miles and beyond
21 the three miles that it explicitly or clearly intended to
22 preserve state remedies within the three-mile area.

23 Having looked at the legislative history, we notice
24 first that the Committee Reports say no such thing. They
25 simply notice the result that state laws will remain available

1 within the three-mile area. That is not to say that Congress
2 consciously meant to preserve that situation forever.

3 The stray remarks that were made on the Floor --

4 Q I can't follow you there, Mr. Claiborne.
5 What did they do when they tried that out?

6 A All I am speaking to, Mr. Justice, is the
7 words of the Committee Reports, which are quoted in the
8 majority opinion. They simply state that the results of not
9 covering this area is that state law remains. That's a far
10 cry from saying: "We are doing this because we think it
11 important to preserve the state remedies in the three-mile
12 area."

13 Now, as I suggested a moment ago, it seems to us the
14 obvious reason why Congress stopped at the three-mile line
15 was because there was no problem within that area then. There
16 was a problem beyond. Nobody quite knew what, if any law
17 would apply. Obviously the coastal law of the state couldn't
18 apply beyond three miles; it was beyond the state boundary.
19 So, what law could apply?

20 One decision of this Court has suggested that at
21 least where defendant and plaintiff were of the same state you
22 could apply the state law, if it was meant to apply, but state
23 laws normally didn't mean to govern accident on the high seas,
24 and there was a vacuum there, which Congress, quite reasonably
25 thought it necessary to fill.

1 As I have also suggested there were those who wanted
2 to preserve state remedies within the three-mile area because
3 they were familiar with them, or because they viewed them as
4 more generous than the pending Federal legislation.

5 Those are hardly reasons for this Court today to
6 hesitate to erase that distinction, a distinction which then
7 was not as great as it is now, because then unseaworthiness
8 remedies were unknown for practical purposes and the remedy
9 beyond three miles was no greater than what the State Wrongful
10 Death Act supplied within the three-mile area.

11 Q Would it be your suggestion that the govern-
12 ment's suggestion that we just overrule the Harrisburg and then
13 spell out on a case-by-case basis the essential elements of
14 this action for wrongful death: who can sue, statute of
15 limitations and -- trappings?

16 A Basically yes, Mr. Justice, but I must point
17 out that overruling the Harrisburg is not fashioning a whole
18 new body of Federal Law; it's simply removing a bar to access
19 to the existing Federal Law.

20 Q I understand. But we would have to spell out
21 on a case-by-case basis who can --

22 A Now, there are some details that would have to
23 be worked out. I wouldn't have thought statute of limitations
24 was one of them. I would have thought the normal admiralty
25 rule of laches would apply, as it does in every other suit --

1 Q How about beneficiaries?

2 A As to beneficiaries, there could be a reference
3 to state law, but --

4 Q What does the Death on the High Seas Act do
5 as to beneficiaries?

6 A Death on the High Seas Act has a list of
7 beneficiaries, the only ones you can take. The Jones Act has
8 a list of beneficiaries, unfortunately not identical.

9 Q We can always adopt either one of those,
10 couldn't we for reference?

11 A I think the normal thing for a Federal Court to
12 do, faced with that problem, would be to borrow from the
13 Federal Statutory Law which governs the same conduct, albeit
14 beyond the three-mile area.

15 Q Didn't they do something like that in, what was
16 it, McAllister or something, and --

17 A Well, that was with respect to the three-year
18 statute of limitations of the Jones Act, which was borrowed
19 when the two suits were brought --

20 Q How about borrowing from the Federal Law that
21 actually covers this suit, i.e., the Federal Longshoremen and
22 Harbor Workers' Act? So far as beneficiaries go.

23 A Well, I would have thought that one would want
24 the uniform rule which, remember that overruling the Harrisburg
25 will permit suits not only by longshoremen, but also by seamen,

1 and also by passengers, all of whom --

2 Q Passengers wouldn't be covered by the sea-
3 worthiness or unseaworthiness; would they?

4 A The Harrisburg now bars a suit for negligence,
5 for wrongful death through negligence.

6 Q Beg your pardon?

7 A The Harrisburg likewise bars a suit for
8 wrongful death due to negligence.

9 Q Well, except just changed by Congressional
10 action of the Death on the High Seas Act.

11 A Beyond three miles or for the seamen in the
12 Jones Act.

13 Q Yes.

14 A But as to the longshoremen who had a suit
15 against the shipowner for negligent injury --

16 Q But there is a Federal --

17 A -- you have no suits of negligent killing
18 because of the Harrisburg. I hesitate to suggest that the Court
19 ought to look to the Longshoremen Act when the plaintiff is a
20 longshoreman and to the Jones Act when the plaintiff is a
21 seaman and to the Death on the High Seas Act when the plaintiff
22 is a passenger --

23 Q A passenger.

24 A -- a passenger.

25 Q Well, why?

1 A I would suppose that it would complicate it,
2 unduly complicate it, but I don't assert an appropriateness to
3 that and I don't reject it as one alternative.

4 Q I suppose you would have -- would you have a
5 comparative negligence rule or --

6 A Yes, adds to the substance of admiralty law.

7 Q Just as it is in a non-death case; wouldn't
8 it?

9 Q Unseaworthiness?

10 A Unseaworthiness, contributory negligence and
11 no negligence is relevant in a negligence case under Maritime
12 Law. Comparative negligence is the rule, not contributory
13 negligence, although substantive rules would, of course --

14 Q Well, you would simply find in the death cases
15 that the substantive rules are applicable in nondeath cases;
16 wouldn't you?

17 A The only thing to be fashioned is a question of
18 who may file a suit, whether it's the widow and the children
19 or only the dependents or only the small children, and how you
20 divide it up between them, and those questions are largely
21 answered if one borrows from the Federal Law. There is no
22 occasion to borrow from the law of the coastal state. It has
23 no conceivable interest in those questions. And the only
24 state that has any interest in those questions is the state of
25 the domicile of the survivor.

1 But the coastal state has no legitimate claim to
2 controlling accidents otherwise governed by Federal Maritime
3 Law, although within its own waters.

4 For these reasons we suggest that the judgment ought
5 to be reversed and that in so doing the Court should overrule
6 the Harrisburg and the Tungus.

7 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Claiborne.
8 Mr. Villareal.

9 ORAL ARGUMENT BY DEWEY R. VILLAREAL, JR., ESQ.

10 ON BEHALF OF RESPONDENT STATES MARINE LINES, INC.

11 MR. VILLAREAL: Mr. Chief Justice and may it please
12 the Court: The shipowner, States Marine Lines, asks the Court
13 not to capsize the law which has been in effect for 80 years
14 or more and not to reverse the decision which has been made in
15 this Court as recently as 1964 and suggest that what we really
16 are concerned with in this case is the balancing of competing
17 interest within a limited geographical area; that is, within
18 the territorial limits of a state and the question has got to
19 be in the end; which of the two interests, Federal or State
20 have more urgent or the more important right to control this
21 sort of death.

22 The law today, we think, is clear on the principles
23 that have been with us since the Harrisburg and right on up
24 through Gillespie in 1964 on the Federal side; principles that
25 have been known and used in Florida in this specific context

1 since 1953 and as recently as 1968 in this very case, and in
2 which Congress and the Florida Legislature have acquiesced
3 regularly.

4 We think that to overturn a body of law that has
5 been developed in this way and to say to the Justices of this
6 Court who have fashioned this body of law and the Congress and
7 the Legislature who have also contributed to it, did this
8 unthinkingly or without realizing what they were doing is just
9 to ask too much of you.

10 The result, limited to the area in which this action
11 occurred is that a nonseaman, like Moragne, the result of the
12 Florida Supreme Court's construction of the Florida statute
13 is that Moragne, the longshoreman has exactly the same right
14 that a seaman or the seaman's widow would have had had a
15 seaman been standing right by him and been hit by the same
16 hatch beam. That is uniformity.

17 No matter which way you turn in this case and in this
18 area, there is going to be some nonuniformity for somebody,
19 and the survivors of Mr. Moragne here, have already, as has
20 been mentioned, they have a compensation remedy and they have
21 a negligence remedy.

22 I would submit to the Court that the distinction
23 between the negligence remedy under Florida Law and under the
24 Jones Act is really more apparent than real. The way it
25 always come up at the jury charge stage, you get practically

1 the same charge on burglar-proof and I'll leave that point
2 with that.

3 Q Well, in an admiralty case you wouldn't have
4 a jury; would you?

5 A That is, of course true, and that's the main
6 reason I would submit that they didn't sue in admiralty, is
7 because they want a jury to weigh this, because they know that
8 juries are better for plaintiffs ordinarily.

9 The survivors here will have, beside the comp
10 remedy, they will have the same right of action that a man --
11 that the survivors of a man who was killed on the dock --
12 suppose this man had been walking on down the gangway to get
13 a sling; a third-party truckdriver comes up, he gets some
14 cargo, knocks him down and kills him. He's got the same rights
15 as the man who works in a mine or mill and lives right next
16 door to it.

17 We submit that this sort of uniformity is just as
18 necessary and is just as appropriately left to the states as
19 it has been by Congress and by this Court up until now, as the
20 uniformity that's contended for by Mr. Hardee.

21 Uniformity has often been urged in this area on this
22 Court but it has never, until today, so far as I can under-
23 stand, been considered to be a thing which required in the
24 wrongful death area. Even in Jensen they start off in Jensen
25 in the majority opinion and much emphasizing the dissents and

1 that wrongful death is an area which does not require the
2 improvisation of uniformity and it has ever been so and it has
3 been repeated and repeated in subsequent decisions.

4 The same sort of thing can be said with respect to
5 the Federal supremacy which is argued that it is something
6 that has somehow cut into by the decisions of the Florida
7 Supreme Court. That is, this Court and Congress have
8 deliberately said, "No; we will not assert Federal supremacy
9 within the territorial waters of a state." When I say
10 Congress, I am thinking of the Death on the High Seas Act,
11 which deliberately leaves to the state the right to regulate
12 recovery for wrongful death within one league of the state's
13 boundary.

14 And by this Court, in 1964 in Gillespie in which
15 you said that the State Act could not extend the remedy
16 available to a seaman.

17 Q I suppose, however, that Congress, with respect
18 to seamen has very broadly legislated, depending on their
19 status. I suppose, conceivably the Jones Act would cover a
20 seaman injured on shore; wouldn't it?

21 A If he were a seaman, a member of -- a bona
22 fide member of a crew of a ship and were, went ashore to buy
23 some stores for the ship's galley, and were injured by an
24 agency of the ship, I suppose he would come under the Jones
25 Act; wouldn't he?

1 A Yes. Well, yes, if he were injured, the
2 fight cases is one example where they would get in a scrap in
3 a bar or something like that.

4 Q He fell through a hole in the floor of the
5 bar.

6 A Or out a window or some other --

7 Q But that would depend entirely on his status,
8 rather than the situs of the injuries; wouldn't it?

9 A Yes, as a crew member, an employee --

10 Q Because of the language in the Jones Act.

11 A We think that the reason that this law has
12 developed in this way results from a consideration of the
13 desirability of having local uniformity for people who are
14 essentially local, like longshoremen.

15 And the thought by the Court and Congress and the
16 Legislature that people like longshoremen, like this plain-
17 tiff's decedent, who lived in Tampa and worked in Tampa
18 every day, should be more like the remedies accorded to his
19 neighbors and friends that live in that state, then the need
20 for uniformity of a man who, on a ship, comes into Tampa today
21 and he's gone to Mobile tomorrow and Panama the next day, or
22 wherever it may be.

23 For people like that it would be a confusing thing,
24 if they never knew from one week to the next which kind of law
25 was going to control their rights for injuries. But, this

1 sort of argument can apply in our submission to a man who is
2 a Florida resident and always has been.

3 Q The Harrisburg rule, was it judicially created
4 or Congressionally created.

5 A It was judicially-announced or created, I
6 suppose you could say, as sort of a recognition of the ---

7 Q It comes from the Court and not from Congress?

8 A Yes, Your HONor.

9 Q Well, the other way of putting it, is that
10 your only area where you have actions for wrongful death come
11 from the legislators, not from the courts. Whether it's the
12 common law or in admiralty; am I correct?

13 A That is true, or as I understood the Harrisburg
14 decision by the civil law and --

15 Q I say wherever you have a Wrongful Death Act in
16 the Anglo-American legal system it's because of legislation;
17 isn't that correct?

18 A That is correct. And I believe in every state
19 in the union the only way you can have an action for wrongful
20 death is by statute.

21 Q But the Harrisburg rule does not come from
22 legislation; does it?

23 A Well, I think it comes from the absence of
24 legislation.

25 Q Comes from the absence of legislation; that's

1 right.

2 Q But if it exists, then it exists on this
3 judicial creation.

4 A I suppose that's correct, sir.

5 As the Florida Supreme Court has pointed out, there
6 seems no reason in policy as far as Florida is concerned, to
7 prefer the widow of a longshoreman over the widow of another
8 man because of the fortuitous circumstances that her husband
9 met his death in the hold of a ship and not on the dock or
10 not in the mill or not in the mine.

11 I think the Solicitor General and Mr. Hardee have
12 said, "Well, all you've got to do to straighten this out is
13 simply to create a common-law remedy for maritime purposes,
14 anyway, that says you can have an action for wrongful death."

15 Well, the other way of saying that is that all you've
16 got to do to straighten this out is, in effect, repeal the
17 Death on the High Seas Act, which very definitely says "to the
18 three-mile limit and no further," would this Federally-created
19 right come.

20 And in doing that, I might say, speaking of
21 anomalies, you will be giving to the widow of this longshore-
22 man a right that the widow of a seaman does not have under
23 Gillespie, which I think is the most recent pronouncement in
24 this general area.

25 Q Because the right of action is exclusively

1 under the Jones Act?

2 A Yes, Your Honor.

3 What really is asked for here, and this is worth
4 thinking of, too, we think, is the fact that they want a
5 fault-free remedy for Mrs. Moragne. This is not conduct on
6 the part of the shipowner, or conduct of the ship. This is
7 a situational thing; by definition, a species of liability
8 without fault.

9 Q Which is something a seaman doesn't have
10 for death?

11 A Which is something a seaman doesn't have for
12 death if it occurs within the three mile of land. If it
13 occurs beyond, he does have it under the decree of the Death
14 on the High Seas Act; yes, sir.

15 I think that's pretty well what I wanted to say,
16 Your Honors.

17 If Tungus and Harrisburg and the Lindgren case and
18 Gillespie and all of those are overruled, repealed, reversed,
19 or whatever, today, it will create, we submit, more problems
20 than it will solve. It will create an uncertainty on the part
21 of the maritime community that would be very undesirable, be-
22 cause none of us would know then if Gillespie is overruled in
23 1970 what's going to happen to Moragne in 1972 or something of
24 that sort.

25 Thank you.

1 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Villareal.
2 Mr. Kerr.

3 ORAL ARGUMENT BY DAVID C. G. KERR, ESQ.

4 ON BEHALF OF RESPONDENT GULF FLORIDA

5 TERMINAL CORPORATION

6 MR. KERR: Mr. Chief Justice, and may it please the
7 Court: I'm representing the Respondent stevedore, Gulf
8 Florida Terminal Corporation that was impleaded by the ship
9 owner, by virtue of the Ryan doctrine, which has been re-
10 ferred to by Mr. Hardee.

11 And before proceeding with the two or three points
12 that I'd like to cover, I might mention, parenthetically,
13 that Mr. Hardee indicated that the Ryan Doctrine was one newly
14 fashioned in admiralty. And if I remember that decision
15 correctly, and it's not directly involved in the appeal here,
16 it was merely an extension of implied contractual warranties
17 which had been recognized as early as Buick versus McPherson
18 and then restated in the restatement of contracts and those
19 were the authorities relied on by the Court.

20 In any event, at this stage of litigation, at least
21 the interest of the shipowner and stevedore are alive and we
22 join, therefore, in urging that the Court of Appeals below,
23 and insofar as they incorporated the opinion in the Florida
24 Supreme Court, that court also be affirmed by this Court.

25 I'd like to make just three points. The first one is

1 one that I think is demonstrated by the Florida Supreme Court
2 in its opinion as one of the ethical factors that it had in
3 mind in trying to arrive at a decision, and that was the pos-
4 ture of the case as it presented itself to that court.

5 In the first place, the court recognized that Mrs.
6 Moragne, the Petitioner her, had available one remedy, irre-
7 spective of fault, already, and they took note of the fact
8 that she had available to her the statutory remedies under the
9 Federal Longshore, Harbor Workers' Compensation Act.

10 They also recognized that she would have, in addi-
11 tion to that right, the right to pursue a course of action
12 based on negligence on the Florida Wrongful Death Statute.

13 So that the sole issue, really, the sole practical
14 issue was whether or not she would also, in addition to those
15 two, pursue a course of action based on a warranty of sea-
16 worthiness, which stated somewhat differently what was already
17 alluded to by Mr. Villareal. It simply boils down to the fact
18 as to what burden of proof she will have to maintain in the
19 trial court.

20 At this stage, then, the oft-repeated cry, which is
21 found in the briefs of the Petitioner and some of the amicus
22 briefs, also, to the effect that: "It is cheaper to kill than to
23 injure," is at least premature. Indeed, should negligence be
24 established under the Florida Wrongful Death Statute it could
25 very possibly be that she would receive as much in compensation,

1 if not more than some other defendants similarly situated
2 while land-based or land-locked.

3 The second point which I think was paramount in the
4 minds of the Fifth Circuit when they considered this problem
5 was that in Tungus the decision and the majority opinion is
6 quite clear and was followed by the parties all the way up to
7 the Fifth Circuit and was followed by the Fifth Circuit in
8 adopting the decision of the Florida Supreme Court.

9 Because, in Tungus, there are at least four points
10 which become eminently clear and which are stated without any
11 equivocation by Mr. Justice Stewart.

12 The first is that: "The State Wrongful Death
13 Statutes do not merely give rise to a right to recover, but
14 further establish what type of conduct is actionable."

15 The second proposition which is stated with equal
16 clarity: "When admiralty courts are called upon to apply on
17 forced rights which are 'rooted,' in state law, then they, the
18 admiralty courts must do so, consonant with state substantive
19 law. They may not," as the decision went on to say, "pick or
20 choose."

21 The third principle, which is eminently clear in
22 that opinion is that: "Congress, in enacting the Death on the
23 High Seas Act, intended to preserve, intact, state sovereignty
24 over maritime deaths within territorial waters.

25 And a fourth proposition which is stated in the

1 opinion is that: "The uniformity argument is inapplicable in
2 the case of rights given to recover in death cases." And it
3 has already been suggested -- this was noted as early as
4 the Jensen case, both in the majority opinion and in Mr.
5 Justice Holmes's opinion where he spoke of the "specter of a
6 lack of uniformity" in referring to this particular area of the
7 law.

8 This latter proposition in Tungus, we submit, is
9 probably or undoubtedly the key question. That is: why is it
10 that in this particular area of the law, with respect to the
11 death cases, there should be a departure from so-called
12 uniformity and there has been consistently in this Court and
13 other courts.

14 We submit that the Harrisburg and Jensen and Tungu
15 and also, and particularly, actually, language in Mr. Justice
16 Harlan's dissent in Hess, suggests several reasons why in this
17 particular area of the law uniformity has not been a compelling
18 factor.

19 In the first place, actions for wrongful death being
20 creatures of statute, are inherently nonuniform in every
21 jurisdiction and it's not very helpful here to point out that
22 the archaic and inhumane treatment given this matter under
23 common law, is no longer fashionable. This, of course, is
24 true, but the simple fact is that every jurisdiction has its
25 own statutory scheme. Indeed, Congress has two separate

1 statutory schemes and they are themselves, dissimilar.

2 Perhaps uniformity or lack of uniformity, for this
3 reason, is a built-in situation.

4 Secondly, as has been pointed out, the Wrongful
5 Death Statutes involve matters which are peculiarly of local
6 concern, and again from the Hess opinion, cites such examples
7 as: pauperism and dissent and distribution and other matters
8 which are really almost within the state's police power.

9 The third reason why this area has perhaps been
10 carved out of the uniformity situation: while the Wrongful
11 Death Statute may be of grave concern in individual cases to
12 certain individuals, they do not, from a maritime concept,
13 involve matters of navigation and commerce.

14 In reading the cases, one notices, particularly in
15 Hess and also in Jensen that the concept of uniformity in
16 admiralty was developed more as a maritime commercial aid.
17 That is, to give a shipowner some degree of certainty as to
18 what his obligations would be, commercial and from the stand-
19 point of commercial obligations and navigational requirements
20 and regulations, from state to state and nation to nation.
21 It was to give him some certainty, indeed, I think this is
22 perhaps an explanation of the Hess case, where the Oregon
23 statute in question increased or imposed an added burden. It
24 was this type of uniformity from the standpoint of the ship-
25 owner's operation that the concept, we suggest, or we submit,

1 was evolved to mean.

2 Q Mr. Kerr, have you filed a brief? I don't
3 find your brief.

4 A Yes, sir; I have.

5 Q In your own name?

6 A I believe it's filed in my partner's name. I
7 wasn't admitted at the time; I was admitted yesterday.

8 Q Now, which one is yours?

9 A It's the brief on behalf of Gulf Florida
10 Terminal Company, Respondent and bears the name of George W.
11 Erickson and James B. McDonough, Jr.

12 Finally, it has been suggested that the Wrongful
13 Death Statute are not efforts to delineate or create standards
14 of conduct or care. That, rather, are designed merely to
15 give a remedy where an existing standard is breached. In
16 this instance, resulting in death, of course.

17 The final point that I would like to make in this
18 connection is that the statutory history of the Florida
19 Wrongful Death Statute was of some concern of the Florida
20 Court. It was discussed at some length in the opinion and
21 this is consonant with the attitude which has been demon-
22 strated by this Court and its concern with the history of
23 Death on the High Seas Act and the Jones Act.

24 We note, for instance, that the Death on the High
25 Seas Act was passed 34 years after the Harrisburg had

1 established that there was no action for wrongful death in
2 maritime law for fatality within the territorial waters of the
3 state. And, as has been demonstrated by this Court, an intent
4 to preserve state sovereignty in this area.

5 There have been no amendments to the Death on the
6 High Seas Act until the recently-proposed Magnuson Bill, which
7 is Senate Bill 3143 and is mentioned in the briefs.

8 Despite the decision in Tungus in 1959 and Hess and
9 Goette in 1960, similarly, with respect to the Jones Act,
10 there has been no amendment to cover death of a seaman in
11 state territorial waters, based on unseaworthiness as a cause
12 of action, despite the decision in Lindgren which was in 1930,
13 and the reaffirmation of that principle in Gillespie in 1964.

14 So, this Court has taken note of Congress's
15 inactivity or, if you will, acquiescence.

16 The Florida Supreme Court was faced with a very
17 similar situation because in Graham v. Lusi, which was decided
18 in 1953 it was held that the Florida statute did not contem-
19 plate a cause of action based on unseaworthiness, and that was
20 reaffirmed in Emerson v. Holloway in 1960.

21 So, there were 15 years without corrective action by
22 the Florida Legislature and yet as noted by the Florida
23 Supreme Court, the Florida Legislature has been sensitive to
24 this statute, because it did amend the statute to cover cause
25 of action based on a warranty on foodstuffs, et cetera.

1 And they did that very promptly, because the decision which
2 held that it was not covered under the statute was in 1952 and
3 the very next session adopted an amendment to the Florida
4 Wrongful Death Statute.

5 They havenot chosen to do so, despite the opinions
6 of the Fifth Circuit which have been in existence for some
7 time.

8 We attach some significance to the sensitivity which
9 has been demonstrated by this Court, as well as the sensi-
10 tivities demonstrated by the Florida Supreme Court to existing
11 statutes and existing statutory schemes.

12 We feel it highlights the fact that if a change in
13 this particular area of the law is to come, it must come
14 through the legislature and not through the Court.

15 Q Well, what the Florida Legislature has done or
16 has not done, doesn't really bear at all upon the fundamental
17 issue here; does it?

18 A No, sir; I don't believe it does.

19 Q What Congress has done or has not done, indeed
20 does have a great deal of relevance.

21 A Yes, Mr. Justice. I was merely emphasizing
22 the Florida Supreme Court was also sensitive to a statutory
23 history which it had and this Court has demonstrated, I be-
24 lieve that same sensitivity.

25 Thank you.

1 MR. CHIEF JUSTICE BURGER: Mr. Hardee.

2 REBUTTAL ARGUMENT BY JAY HARDEE, JR., ESQ.

3 ON BEHALF OF THE PETITIONER

4 MR. HARDEE: Mr. Chief Justice, and may it please
5 the Court: There is one area in particular that I think we
6 want to be certain that we have cleared up.

7 As we understand the law at present, a seaman has a
8 right or the heirs of a dead seaman have a right to recover
9 for negligence within the territorial waters of the United
10 States, and for negligence and unseaworthiness beyond the
11 three-mile limit, by virtue of the Jones Act and the Death on
12 the High Seas Act.

13 Q Now, let's see. He has only the Jones Act
14 within the three-mile limit,

15 A Right.

16 Q And outside he has an option of either the
17 Death on the High Seas Act or the Jones Act?

18 A Yes, sir. This Court has never made a decision
19 on that, but Gilmore and Black at page 304 in their --

20 Q Well, what -- the language of the Death on the
21 High Seas Act is the usual willful --

22 A Just like that New Jersey statute in Tungus,
23 it's --

24 Q Willful neglect --

25 A And neglect to default, I think are the exact

1 words of it. It's very simple language.

2 Q That's broad enough to cover both negligence
3 and unseaworthiness.

4 A Unseaworthiness, and the Federal Court --

5 Q The Jones Act is a straight negligence suit
6 at law?

7 A Yes, sir. And under the Death on the High
8 Seas Act, seamen have been allowed to recover for unseaworthi-
9 ness -- or other area seamen have been allowed to recover for
10 unseaworthiness in a Death Act.

11 Q Has the question ever been squarely raised
12 where they are outside the three-mile limit, with a seaman,
13 whether it's exclusive under the Jones Act or not?

14 A In *Chermesino* versus the vessel JUDITH LEE
15 ROSE, which was reported in the Federal supplement and also it
16 went to the --

17 Q Has this court ever been --

18 A Well, see, cert was denied in that case, but
19 this Court never has written an opinion on this question, but
20 Gilmore and Black have said that "all of the lower court
21 decisions are to this effect," and he assumes that this Court
22 would hold that.

23 Q When was the Jones Act passed?

24 A 1920, the same year, Mr. Justice, as the Death
25 on the High Seas Act.

1 Q Well, why did they need them both?

2 A I think the Government suggested the Death on
3 the High Seas Act was intended by Congress to fill a void or
4 a vacuum --

5 Q For passengers, primarily.

6 Q On the nonseamen.

7 A It includes everybody: seamen or no seamen.

8 Q Why did they need to cover seamen? Why do they
9 need two for seamen?

10 A Well, I'm sure the purpose of it wasn't to
11 cover seamen, because they passed the Jones Act the same year.

12 Q Well, the Death on the High Seas Act uses the
13 word "person," any person.

14 A Yes, sir; any person.

15 Q And the Jones Act has "seamen."

16 Q But, if you apply the Death on the High Seas
17 Act to seamen, why they certainly can recover -- their standard
18 for recovery will be different than in the negligence case.

19 A Yes, sir, and Gilmore and Black suggest that
20 the lower courts have held they can recover under either,
21 clearly or both.

22 Q Or both.

23 Q Incidentally, aren't the beneficiaries dif-
24 ferent under --

25 A Yes, sir; they are slightly different.

1 Q Yes.

2 A Now, what this brings us to is this: that a
3 seaman does not have the -- or the heirs of a dead seaman do
4 not have the right to recover for unseaworthiness within the
5 territorial waters of the United States by reason of Lindgren
6 and Gillespie.

7 Q Yes. And a passenger doesn't have a right to
8 recover for unseaworthiness wherever he is.

9 A That's right, because the warranty doesn't
10 apply to -- doesn't extend to apply to a passenger, unless
11 it clearly was negligent in furnishing a seaworth vessel.

12 Q That's negligence; not unseaworthiness.

13 A But, a longshoreman may recover in all the
14 States except Florida, will decide the question, both for
15 negligence and unseaworthiness in the territorial waters of the
16 United States.

17 So that a seaman, for whom the doctrine of unsea-
18 worthiness was originally fashioned in the Osceola, has a
19 less right by reason of the preemption problem that confronted
20 the Court in Lindgren and Gillespie, than longshoremen had.

21 Q Why?

22 A Because he does not have -- the warranty of
23 seaworthiness does not extend to him in a death case within the
24 territorial waters of the United States.

25 Q Well, why does it apply to a longshoreman?

1 A Well, under Tungus, in New Jersey and New York.

2 Q I know, but why can't the seaman take ad-
3 vantage of the same thing the longshoreman does?

4 A Because Gillespie -- the longshoremen can take
5 advantage of it by reason of Tungus, because he sued under
6 the State Death Act, but in Gillespie the Court held that the
7 Jones Act preempted a state.

8 Q I'm not talking about the Jones Act.

9 A Well, this is why a seaman cannot recover --
10 or the heirs of the seaman who has been killed cannot recover
11 for unseaworthiness within the territorial waters of the United
12 States --

13 Q What is the exclusive remedy for a seaman
14 today?

15 A The Jones Act.

16 Q Is that it?

17 A Within territorial waters of the United States.

18 Q Within territorial waters of --

19 Q It's the Jones Act and that talks about a
20 negligent action at law.

21 A Right.

22 Q And that's exclusive.

23 A Yes, sir; that's correct.

24 Q In territorial waters?

25 A Yes. Now, what we're saying is: if this Court

1 overrules the Harrisburg then the Court, of necessity, has, in
2 effect, overruled Gillespie and the ranks that seamen have are
3 the same as the ranks of longshoremen have and we have a com-
4 plete uniformity as far as death cases are concerned.

5 We were not sure whether we had made this clear.

6 Q Well, I wouldn't think that overruling the
7 Harrisburg would overrule this Court's construction of the
8 Jones Act, which was said to have intended to have made an
9 exclusive remedy for death.

10 A Yes, sir; but if this Court overrules the
11 Harrisburg I assume then that the Court intends to find that
12 there is in maritime law, a remedy for wrongful death, as
13 cited by the statute.

14 Q Toward seaworthiness.

15 A In the statute for whatever the right would
16 have been if he had been injured, his heirs could have the same
17 rights if he is killed.

18 Q Well, yes, but if the Harrisburg is overruled,
19 would you suggest that the seaman on the high seas have any
20 other remedy other than the Jones Act or Death on the High
21 Seas Act remedy?

22 A No, sir; but I would suggest that --

23 Q Well, isn't -- where the legislature has
24 regulated, created and regulated the death remedy, I suppose
25 that would be it.

1 A But I would suggest this, that if the
2 Harrisburg were overruled and this Court decided that there is
3 a remedy for wrongful death in maritime law aside from the
4 statute, that the heirs of the seaman who is killed on
5 territorial waters would have a right to a warranty of -- or
6 to the doctrine of unseaworthiness --

7 Q Not if the Congress intended by the Jones Act
8 to make the remedy of the -- giving the seaman exclusive of
9 all of the remedies.

10 A In any event, this is the way we see it.

11 Q Well, in any event, that issue is not before
12 us.

13 A That is correct.

14 Q Since you are talking about the consequences
15 of overruling Harrisburg, assuming, for the purposes at the
16 moment that you prevailed and that did happen, would it then
17 be appropriate to call for additional briefs and perhaps
18 argument on the guidelines that would have to be provided as to
19 who may sue and how the recovery will be divided and all the
20 other problems?

21 A I think it would be appropriate for the Court
22 to do that, or to say we are going to generally follow the
23 Federal Statutes that are in existence and --

24 Q Well, which ones?

25 A Well, the Jones Act or the Death on the High

1 Seas Act. There is not a great difference between them.

2 Q Why would we have to do that, set up guide-
3 lines?

4 A I don't -- I don't really think that you need
5 to, Mr. Justice. I think it can --

6 Actually, what, as I mentioned in my brief, I think
7 the Court should revert to the civil law which says that
8 any person who suffers damages by the act of another, the other
9 person is obliged to repair it.

10 I think if you start restricting damages, then it's
11 going to create a lot of problems. I don't see it as much of
12 a problem.

13 Q Who's going to define these people who are
14 injured? That's the whole question; isn't it? Is it just the
15 wife, the surviving widow, the surviving widow and minor
16 children, adult children, brothers and sisters?

17 Q How about creditors?

18 A I don't think there is any general law in
19 damages that says his creditors can come in and -- the debtor's
20 statute is pretty generally uniform.

21 Q Well, wouldn't it be better to hold a hearing
22 and sort of like a legislative hearing and get the whole thing
23 thrashed out all at once?

24 A I think you'd do that or --

25 Q Do you want to start down that road?

1 Q In McAllister, I think that's the name, where
2 we did precisely this when we had a void, and we had to fill
3 it and we found an answer by analogy of the Federal statutes.
4 We have got Federal statutes here which give us some answers;
5 don't we?

6 A I think it would be very simple -- I don't
7 see the problem that the Respondents see in this case, in
8 that regard.

9 Q Did the Court have a legislative hearing when
10 it decided the Harrisburg?

11 A No, sir; not that I know of; they certainly
12 didn't.

13 Q They didn't have all these Acts at that time,
14 either, did they?

15 A No, sir, and I think that that came about by
16 reason of the Harrisburg, which --

17 Q There are other Acts, so that would be no
18 trouble.

19 A And I think as the Amicus of the American
20 Trial Lawyers pointed out, this Court is not just an anchor;
21 it also has a sail. If you make bad law you can also repeal
22 it, the same bad law.

23 There is one other thing I wanted to make clear and
24 that is a statement made by the Respondents that Mrs. Moragne
25 has identical rights under the Florida Wrongful Death Statute

1 as presently decided by the Florida Supreme Court, as the
2 seaman has. Now, this just is not so. In fact, if Florida
3 common-law negligence walked down the street and passed the
4 Jones Act negligence, they wouldn't recognize each other.
5 There is absolutely no kinship at all between the two.

6 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Hardee.
7 Thank you for your submissions, gentlemen. The case is
8 submitted.

9 (Whereupon, at 1:55 o'clock p.m. the argument in the
10 above-entitled matter was concluded)