ORIGINAL

In the

Supreme Court of the United States

AMERICAN EXPORT LINES, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 79-1
	)	
GILBERTO ALVEZ, et al.,	)	
	)	
Respondents.	)	

Washington, D.C.
February 26, 1980

Pages 1 thru 43

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

AMERICAN EXPORT LINES, INC., Petitioner,	:	
v.	:	No. 79-1
GILBERTO ALVEZ ET AL., Respondents.	:	

Washington, D. C.,

Tuesday, February 26, 1980.

The above-entitled matter came on for oral argument at 11:13 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

STEPHEN K. CARR, ESQ., Haight, Gardner, Poor & Havens, One State Street Plaza, New York, New York 10004; on behalf of the Petitioner

PAUL C. MATTHEWS, ESQ., 11 Broadway, New York, New York 10004; on behalf of the Respondents

- - -

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 79-1, American Export Lines v. Alvez.

Mr. Carr, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF STEPHEN K. CARR, ESQ.,

ON BEHALF OF THE PETITIONER

MR. CARR: Thank you, sir. Mr. Chief Justice, and may it please the Court:

The issue before this Court today is a simple one. It is whether the wife of a harbor worker, a so-called substitute or Sieracki seaman is entitled to seek non-pecuniary or sometimes called sentimental damages for loss of society or consortium occasioned by her husband's injury, when the traditional admiralty view as expressed by Congress in all the applicable maritime statutes precludes such a right, and especially when the wife of a blue-water seaman is denied such a right under the Jones Act.

This case is here on a petition for writ of certiorari to the New York State Court of Appeals which in a five-to-one decision granted Juanita Alvez the right to sue for her husband's loss of consortium occasioned by his injury.

QUESTION: Do you think this is a final decision

for purposes of our jurisdiction?

MR. CARR: Yes, I believe it is, Your Honor. I believe --

QUESTION: All the New York Court of Appeals said was that you shouldn't have denied the motion to intervene. No damages have been awarded.

MR. CARR: Well --

QUESTION: No determination of negligence has been awarded.

MR. CARR: At that time that was the case, sir. I might update the Court on subsequent facts, however. Since the decision of the New York Court of Appeals, this case proceeded to trial just two weeks ago, and at that trial Juanita Alvez was permitted to join her husband as a co-plaintiff. During the trial, there was testimony from the plaintiff himself that he had been a blue-water seaman for 26 years and had spent the last 14 of those years as a boatswain in the highest unlicensed rating in the deck department. Mr. Alvez testified that because of union regulations he had to take his vacation in 1972, the year of this accident, and that during that vacation time decided to moonlight as a lasher, not as a seaman.

QUESTION: This is all testimony that was brought out at the trial two weeks ago?

MR. CARR: Yes, sir.

QUESTION: But don't we have to take the case as it comes to us from the New York Court of Appeals which rendered its decision sometime previously to two weeks ago?

MR. CARR: Yes, sir. But that decision of the New York Court of Appeals decided the issue as far as Mrs. Alvez is concerned concerning her right to sue for loss of consortium. As a practical matter, the court during the trial submitted separate interrogatories to the jury so that in the event this Court decided she was not entitled to sue for loss of consortium, the award that the jury gave her could be remanded at a later date.

QUESTION: Mr. Carr, can that case come up here?

MR. CARR: That case can eventually come up here, Your Honor, on other grounds --

QUESTION: Well, how could we decide one part and then any other part?

MR. CARR: Well, as far as the loss of consortium claim is concerned, I submit it is a final decision and one which this Court must face at this stage.

QUESTION: It came to the Court of Appeals as a certified question, did it not?

MR. CARR: It did, sir.

QUESTION: As a separate and the only federal question in the case?

MR. CARR: Yes, sir.

QUESTION: Correct?

MR. CARR: Yes, sir.

QUESTION: And the Court of Appeals recognized that it was governed exclusively by federal law and that it was the only --

MR. CARR: The only federal question before it.

QUESTION: -- the only federal question that has been raised in this case and as such separable and unique.

MR. CARR: That's correct, Your Honor.

QUESTION: But they couldn't wait?

MR. CARR: Pardon me?

QUESTION: They couldn't wait for us to decide it?

MR. CARR: Who couldn't wait, Your Honor?

QUESTION: The court.

MR. CARR: The Court of Appeals?

QUESTION: Or the petitioner -- no, the trial court, or the petitioner, or anybody else.

MR. CARR: Well --

QUESTION: Because you have got a judgment here that depends on what we say later on.

MR. CARR: The trial court took that into consideration and felt that the record would be reserved by the expedient it chose of submitting Juanita Alvez's claim to the jury separately.

QUESTION: Yes, that is what I mean.

MR. CARR: So that her claim would be intact upon its presentation to the Supreme Court.

QUESTION: And you're telling us that in a trial a couple of weeks ago the jury returned a verdict for the plaintiff on that claim?

MR. CARR: Yes, sir. At the trial two weeks ago, Alvez himself received a verdict from the jury on the sole issue that was given to the jury of unseaworthiness in the sum of $1 million. That verdict was reduced by 50 percent for his contributory negligence. The separate issue of Juanita Alvez's loss of consortium was also submitted to the jury after her testimony concerning loss of society and other effects that her husband's injury had had on her marriage. The jury awarded Juanita Alvez $100,000 for loss of consortium, the non-pecuniary aspect of her damages, and reduced that by 50 percent also by virtue of her husband's contributory negligence.

QUESTION: The jury effected this reduction in both cases?

MR. CARR: The jury effected this reduction under the instructions of the court in specific special interrogatories.

QUESTION: Comparative contributory negligence.

MR. CARR: Yes, sir.

QUESTION: And judgment was entered on those verdicts?

MR. CARR: Judgment has been entered on those verdicts.

QUESTION: I just have problems with the same case being in two courts at the same time. I mean my old law school bringing up, I am in trouble with that. Now, should we let this verdict that she has color our thinking?

MR. CARR: Well --

QUESTION: Should we ignore it if we could?

MR. CARR: I think that the verdict has to in some way color the Court's thinking. I think --

QUESTION: Is the verdict consistent with what the Court of Appeals of the State of New York decided?

MR. CARR: Yes, the Court of Appeals decided that she did have a right to seek non-pecuniary damages.

QUESTION: The jury was instructed under the majority opinion of that case, wasn't it?

MR. CARR: Indeed it was, sir.

QUESTION: Then what is left for us to decide at this stage in this case?

MR. CARR: What is left for this Court to decide is whether in fact she had the right in the first place to seek consortium damages of a non-pecuniary sort.

QUESTION: In following Mr. Justice Marshall's

question, that is now appealable and although the New York courts will hold it is law of the case, it would remain open in this case on appeal from that jury verdict, would it not, in this Court?

MR. CARR: Well, theoretically if appealed from that judgment ever got this far, that might be the case. But we submit that this hs a tidier way of handling the initial question.

QUESTION: Well, it may be tidier but a lot depends on what Congress has said as to what our jurisdiction is. Have you picked out which of the four exceptions to finality that this comes under in the Cox Broadcasting Company case?

MR. CARR: No, sir, I have not.

QUESTION: It is not only what Congress has said, it really goes to the jurisdiction of this Court which is confined only to questions of federal law and -- it so happens that there has been a jury award for the plaintiff and a judgment entered on that jury verdict, but at least in theory this could have been remanded as it was by the New York Court of Appeals and there could have been a trial in which the defendant prevailed, and the federal question would never have been presented in this case.

MR. CARR: Well, we are not faced with that question here today.

QUESTION: In fact, because of subsequent events. We may be faced with it today, but as suggested by my brother Rehnquist's question, and I must say, none of this questioning is even implicitly critical of you. It is the court that granted certiorari.

MR. CARR: I understand, sir.

QUESTION: Mr. Carr, what happens if the appellate division reverses?

MR. CARR: If the appellate division reverses, it would not reverse on the question of Juanita Alvez's claim for consortium. If the appellate division reverses, it would probably reverse on --

QUESTION: Correct.

MR. CARR: -- instructions to the jury that may have been --

QUESTION: Then the appellate division leaves that intact, the $50,000, right?

MR. CARR: Yes, sir.

QUESTION: It would leave it intact. And then we changed this judgment here, what happens then?

MR. CARR: It changed this judgment of the New York State Court of Appeals?

QUESTION: Yes, sir.

MR. CARR: Then I submit that her verdict becomes a nullity.

QUESTION: Hers is dependent upon his, is it not?

MR. CARR: Hers is a derivative of his.

QUESTION: We in effect reversed the new trial that she just went through.

MR. CARR: Only that aspect of it as pertains to the wife.

QUESTION: That's right. We have two courts going on side by side.

MR. CARR: Well, we gave this --

QUESTION: That is no way to run a railroad.

MR. CARR: -- we gave this considerable thought before the trial and it was the judgment of those people involved in the trial, including the trial judge, that this particular federal question could be reserved by approaching it in this particular fashion. I had supposed that we were proper in doing that.

QUESTION: Isn't any opinion we give -- doesn't it have some resemblance to an advisory opinion on the pure question of law that the Court of Appeals of the State of New York decided?

MR. CARR: Your Honor, if we had settled the case during the trial stages and had come before you seeking your judgment on her cause of action for consortium, I believe it would have been an advisory opinion and we should not have attempted to do that. However, with a

final judgment I do not believe that the nature of this Court's deliberations or determination would be advisory.

QUESTION: You say final judgment, you mean the judgment of the Court of Appeals of New York.

MR. CARR: No, I mean the final judgment of the trial court, the Supreme Court of New York County.

QUESTION: How is that before us except that we have heard about it?

MR. CARR: Well, it is --

QUESTION: I am, frankly, as others seem to be, puzzled about what it is we are being asked to do. To say that the Court of Appeals of New York announced the correct standard as a matter of law?

MR. CARR: Well --

QUESTION: Therefore that would tend to give support to the judgments you have now in the trial.

MR. CARR: Right, but if in fact, as the New York Court of Appeals misinterpreted the federal law, as is our position, then the verdict she received would be a nullity.

QUESTION: Mr. Carr, isn't this in terms of our jurisdiction just as though the intervenor had been a plaintiff who filed a complaint and the district judge dismissed the complaint and then there was an appeal to the court of appeals and the court of appeals reversed for

a new trial? Here in effect they reversed and said let the intervenor come in and have a trial. Is it not perfectly clear that if there had been a reversal such as I described, this Court would have jurisdiction? This Court has many times takn cases where an original trial dismissal has been reversed on appeal and sent back for a new trial, and that is basically what has happened here.

MR. CARR: Yes, sir, that sounds analogous.

QUESTION: Can you give me a case that happened where it went back and then it came back up here?

MR. CARR: I can't, Your Honor.

QUESTION: I'm sure you can't. And I say again, I am not blaming this on you because we granted certiorari.

MR. CARR: I had expected we has passed beyond that threshhold issue --

QUESTION: I'm sorry.

MR. CARR: I would like to, if I may, discuss the merits of the appeal.

QUESTION: You haven't much time left for that.

MR. CARR: Any question concerning the claim for loss of consortium by the wife of an injured harbor worker has to begin and I submit has to end with the decision of Judge Friendly in the Igneri case decided in 1963. Judge Friendly recognized that it was a fresh and novel question when he addressed it at that time, at a time when the

common law permitted a wife's claim for loss of consortium in only 12 of the states of this nation. But despite that fact, Judge Friendly did not dismiss her claim for loss of consortium but felt it was necessary to examine the decisional maritime law on the issue. The decisional maritime law produced only two cases where this particular question had arisen, and in both of those cases involving a claim by a wife of loss of consortium, the claim had been dismissed by the District Court.

So Judge Friendly drew upon analogous maritime statutes to arrive at his decision, and the statute he looked at first and foremost was the Jones Act which was an act designed initially to remove an anomaly that existed in the maritime law. Prior to the passage of the Jones Act, a longshoreman could bring suit for negligence against a ship owner, whereas a seaman could not. In passing the Jones Act, Congress gave the right to the seaman to sue his employer for negligence, but it did so in a limited fashion. It restircted the right to the seaman himself by the very language of the act, which states any seaman may bring this cause of action. As a result, that act has been interpreted and constantly followed by the courts as granting only the right to sue for negligence to the seaman himself and not to his dependents and not to his relatives who might otherwise be entitled to do so were

they governed by state statute.

Judge Friendly also was careful to note that the Jones Act incorporated specifically the terms of the Federal Employers Liability Act which also restricts recovery to the person injured, and this Court so decided in Tonsellito long before the passage of the Jones Act. So judicial construction of the Federal Employers Liability Act imposed the same restrictions on the Jones Act permitting only suit against the ship owner by the seaman himself and not by the wife, not by any dependents or relatives and family.

Using the Jones Act as the analogous law in the maritime field, Judge Friendly concluded that there was no right for a wife to sue for loss of consortium in a maritime cause of action, and that scholarly opinion remained the settled harmonious law in the maritime field until this Court's decision in 1974 in the Gaudet case, a wrongful death action.

It is the petitioner's position that the Gaudet case, in a narrow majority opinion, finding a right for loss of consortium in a widow should have that particular measure of damages confined to the narrow limitations that Higginbotham later placed upon Gaudet, that is a wrongful death situation within the territorial waters of the United States.

After the Gaudet decision, there were some courts, lower courts, district and state courts that split just about evenly on this question as to whether Gaudet had actually had any effect on the viability of the Igneri rule.

The only federal appellate court to address this question after the Igneri decision, after the Gaudet decision was Christofferson in the Fifth Circuit which found that Igneri was alive and well.

We believe that it is the abiding concern of this Court to administer a uniform body of federal law in the maritime field, and that it is this concern that prompted the Court to decide the Moragne case the way it was decided, to reaffirm uniformity in an area that was a patchwork of strange and anomylous results following the Harrisburg decision which denied the right of wrongful death recovery under the general maritime law.

QUESTION: Of course, Gaudet and Higginbotham together don't add up to much uniformity, do they?

MR. CARR: No. That is one of the problems, Your Honor. Gaudet kind of set off in a direction that was without precedent in the maritime field by for the first time awarding loss of consortium in a wrongful death situation, contrary to the Death on the High Seas Act, contrary to the Federal Employers Liability Act, contrary

to the Jones Act. And when this measure of damages was first examined by this Court subsequently in the Higginbotham case, Gaudet's holding on loss of consortium for pecuniary and non-pecuniary damages was confined to the territorial waters in wrongful death actions.

QUESTION: Do you think we should overrule Gaudet?

MR. CARR: Frankly, I believe overruling Gaudet would restore harmony and uniformity to this area of law, and that seems to be one of the ways of avoiding the anomaly which otherwise exists.

For these reasons, we submit that even if Judge Friendly were to address the Igneri issue today as he did in 1963, despite changing times and changing patterns, women's rights, he would decide the issue exactly the same way today as he decided it in 1963, and he indicated as much in the concluding paragraph of his opinion when he said had the sexes of the parties been reversed, that is, had Peter Igneri, the husband, been suing for loss of consortium of his wife, Theresa, had she been injured aboard the vessel, he would have denied a loss of consortium claim to Peter Igneri even though common law recognized such a right in a husband.

So that it is the petitioner's position that there is no discrimination in Judge Friendly's decision with respect to the sexes, that he decided the issue before

him in an even-handed way, and that it was his intention to restore parity between longshoremen and seamen in this area of non-pecuniary speculative damages.

QUESTION: Mr. Carr, to what extent do you think Judge Friendly relied on in an analogy to the common law in his interpretation of the maritime law?

MR. CARR: Well, because it was a fresh and a novel issue, I think he gave scholarly concern to the common law. But by the same token, since he felt at that time that the common law was pretty much of a toss-up, I don't believe he placed that much reliance on the majority view in the common law.

QUESTION: Do you agree that the majority view in the common law is now somewhat different than it was in 1963?

MR. CARR: Oh, indeed it is, sir, but I don't think that has any real bearing because, as I said, when he concluded his opinion, he said were the roles of the sexes reversed he would arrive at the same decision by his analogy to the Jones Act.

QUESTION: Well, whether Judge Friendly would have done it or not, should this Court be guided by the common law in fashioning a somewhat similar body of law in the maritime area, since we don't have any statutory guidance from Congress?

MR. CARR: Well, I think we have astatutory guidance in areas of the maritime law that are analogous and those areas specifically are the Federal Employers Liability Act and the Jones Act and the Death on the High Seas Act. And I feel that those congressional expressions of policy should be paramount in this Court's determination as to whether or not such a cause of action exists under the general maritime law.

I would like to reserve what time I have left for rebuttal, if I may, Your Honor.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Carr.

Mr. Matthews.

ORAL ARGUMENT OF PAUL C. MATTHEWS, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. MATTHEWS: Mr. Chief Justice, and may it please the Court:

The decision below of the New York State Court of Appeals places the maritime law in line with the overwhelming majority of the jurisdictions in the United States. It places it in line with the restatement of torts which allows this remedy of loss of society to either spouse for a serious injury to the other.

QUESTION: What do you have to say about whether we should decide this case now or wait to see what happens as it goes up the hierarchy of courts in the State of New

York?

MR. MATTHEWS: Mr. Chief Justice, before coming down here I had given absolutely no thought to such a question. I had assumed, as Mr. Carr had, with the granting of certiorari that there was no question of the jurisdiction of this Court. I would --

QUESTION: Well, I wasn't suggesting jurisdiction, I was -- suppose, for example, as someone suggested by a question, that the Court of Appeals reverses this and the Court of Appeals in New York for some reason goes along with that.

MR. MATTHEWS: I can only, Your Honor, suggest something. I don't know if it is in keeping with the rules of this Court, but there is a procedure among the state courts of the State of New York when this case came up, that if the defendant will stipulate to judgment absolute upon the determination of this Court, that then we would clearly have a final determination and one which there would be no danger of becoming moot or coming back to this Court --

QUESTION: You say stipulate to judgment absolute, you mean waive any right to review?

MR. MATTHEWS: Waive any right to appeal as far as the decision, as far as the judgment for Juanita Alvez is concerned below. I think that if there is a problem,

that that would solve it. Unfortunately, I have done no research on that point. I know --

QUESTION: And our opinion would be advisory?

MR. MATTHEWS: If they did not?

QUESTION: Yes.

MR. MATTHEWS: Well, I suppose that there is always the possibility that the defendant in this case might find some grounds for error in the record. That sort of thing may always happen. I can't state that, Your Honor.

QUESTION: Well, it is not either your fault or opposing counsel's, as you say when certiorari is granted you have a right to assume that there is jurisdiction. But if you will recall the proceedings this morning, the Chief Justice announced an opinion for the Court in which the writ of certiorari was dismissed as improvidently granted, which suggests that we on occasion recognize mistakes of our own in the exercise of our certiorari jurisdiction. And I think the issue of jurisdiction of this Court is one which we have to look to as well as you.

MR. MATTHEWS: Well, as Your Honor could understand, as we counsel stand here before you arguing the causes of our clients, we think first in terms of those rights, as I think properly we should as attorneys, and perhaps we give less consideration to what the Court may feel is important as far as the possibility of the issue

not being a final one. I know I could speak for myself and I assume for Mr. Carr, that we would both be bitterly disappointed if the Court did not reach the merits of this case not only as far as what is an important question with regard to the rights of the wife of an injured harbor worker, but also which may involve a serious question as to exactly what power the highest court of the state has in interpreting the decisions of this Court in the maritime law.

If it is appropriate --

QUESTION: Mr. Matthews --

MR. MATTHEWS: Yes, sir?

QUESTION: -- I can only speak for myself, but when I participated in the conference on granting certiorari in this case, I didn't have any idea that you were going to try the case, and that is my confusion, that you went through with the trial. That is my confusion. I didn't assume you were going to go through with a trial.

MR. MATTHEWS: Well, if I could state this, Your Honor: I don't see how the issue would have been any different if we had --

QUESTION: Well, what would have happened if we had set this case for argument on the same day as the trial, which one would you have gone to?

MR. MATTHEWS: Well, there isna't any question about that, I would have been here, Your Honor. There is

no question about that.

QUESTION: Well, isn't that a problem when you have a case in two courts?

MR. MATTHEWS: Of course it is.

QUESTION: The same case?

MR. MATTHEWS: Oh, there is no question about that. But I certainly couldn't see where we would be any better off if we had not had a trial. That I could not follow the logic of. I would follow the logic of waiting if it is the will of this Court to do so until the right of the defendant to appeal through the state courts has been exhausted. If that is the determination of this Court, yes, sir.

QUESTION: Now I really have a problem. You couldn't wait for this Court, but you want this Court to wait for your court. Do you see the problem when you have two courts? Do you see the problem there?

MR. MATTHEWS: Your Honor, Juanita Alvez --

QUESTION: I'm not saying you can solve the problem.

MR. MATTHEWS: No, sir. Juanita Alvez had to appeal from the determination made against her by special term which denied her the right to become a plaintiff in this case. If she did not take that appeal and perfect it within one year, her appeal would be dismissed and from there on the matter followed through the appellate processes

of the State of New York and the appellate division reversed and found that there was a right to plead this cause of action and the Court of Appeals found that there was a right to assert it and, of course, this Court granted certiorari.

QUESTION: Of course, you opposed the grant of certiorari.

MR. MATTHEWS: Yes, sir.

QUESTION: You wouldn't have been so bitterly disappointed if we denied cert, would you?

MR. MATTHEWS: In fairness, Mr. Justice White, of course I would not be because I have the rights of the client to protect.

QUESTION: Yes. So I take it that your co-respondent suggested that we should grant.

MR. MATTHEWS: The co-respondent so-named was actually the employer third-party defendant and the co-respondent I think should properly have been the petitioner or co-petitioner here, because as far as this issue was concerned their rights were clearly --

QUESTION: I see that in acting as a respondent anyway, it was probably named that way because of our rules. Anyway, he did assert that the judgment was final within Cox Broadcasting, but in opposing cert you didn't raise any jurisdictional --

MR. MATTHEWS: I did not, sir, no.

QUESTION: Mr. Matthews, you suggested a moment or two ago that the fact that a trial has been held really doesn't have any bearing on the question of whether the order we are now reviewing or being asked to review was final. The question, the jurisdictional question as I understand it is when an appellate court remands a case for trial, is that a final order which we can review. I think we have done it hundreds and hundreds of times.

MR. MATTHEWS: I'm sorry, sir, Mr. Justice Stevens, I'm sorry if I have caused any confusion with respect to my answer to a previous question. I meant to say, if I did misspeak, that I didn't think that it would have made any difference whether the trial had been held or whether it had not been held --

QUESTION: Or had been postponed.

MR. MATTHEWS: -- before the determination of this hearing.

QUESTION: In other words, our jurisdiction to review the order of the New York Court of Appeals remanding the case to the trial court for trial is unaffected by the question of whether or not that trial is held before or after we actually reach argument. That is your point, I take it.

MR. MATTHEWS: Yes, sir, I --

QUESTION: You're dead right, and it seems to me

we have many, many times reviewed appellate court orders when the appellate courts have sent a case back for trial. I think as a matter of discretion it is often unwise for us to do so because the case may go away. You might have lost this lawsuit and then the case would have become moot. But I am puzzled about the concern about the finality of the power to review.

QUESTION: From a state court, before you have a final judgment, the problem isn't just that the case may go away but that Congress has said that you have to have a final judgment in order to bring the case from the highest court of the state to this Court.

MR. MATTHEWS: I regret to say, Your Honor, that I didn't come here prepared to argue that point, so --

QUESTION: Well, perhaps you can help me on this, though. Suppose the case had gone back to trial after the Court of Appeals had for state purposes anyway finally disposed of the federal question and it said that there should be a trial and that the complaint could be amended and the widow should be allowed to try her case, is that issue any longer open in the state courts?

MR. MATTHEWS: The --

QUESTION: The issue of whether or not the widow can state a good cause of action.

MR. MATTHEWS: I would say that it is -- if we

have not been foreclosed by the determination of the Court of Appeals --

QUESTION: Right.

MR. MATTHEWS: -- and that certainly is a final action --

QUESTION: You cannot -- so in the event if the case would have come out a certain way in the lower courts, that issue is definitely foreclosed from any kind of re-litigation in the state courts?

MR. MATTHEWS: I would certainly think so, yes, sir.

QUESTION: Where would this situation be if after the Court of Appeals opinion had come down, while your petition for cert was pending here, the case had been settled, then we wouldn't have granted the petition for cert.

MR. MATTHEWS: We would have been obliged I think, Mr. Chief Justice, to advise the Court that the case had been settled and that the controversy had become moot.

QUESTION: So far as events within the state of New York were concerned, everyone would be bound by the Court of Appeals opinion, whether it was right or whether it is not right, in a federal sense.

MR. MATTHEWS: I feel that that is a good point, Mr. Chief Justice, that regardless of whether the controversy

had become moot, it would remain the law of the state of New York and counsel would have the argument that he advanced in coming before this Court, that this Court should consider the issue to settle for once and for all what the rights are under the maritime law.

QUESTION: Well, suppose no appeal is taken now from the judgments that were described to us for $550,000?

MR. MATTHEWS: Then certainly you have a final determination which is --

QUESTION: Do we?

MR. MATTHEWS: Do you not, sir?

QUESTION: Is that judgment before us?

MR. MATTHEWS: Oh, is it before you here today? I don't see how it could be if it is not on this record.

QUESTION: Would there be anything for us to decide if no appeal is taken?

MR. MATTHEWS: Well, I certainly felt that if the defendant consented to the entry of judgment or waived its right to appeal, that surely that matter would be here before you. But as again I say to you, I didn't come here prepared to argue theory, procedural theory on this and I could be way off. May I be heard on the merits or --

QUESTION: Oh, yes, by all means.

MR. MATTHEWS: I thank you. I feel that it would be strange indeed if a progressive and liberal determination

of the rights of an injured party which prevails throughout the land were not to be granted by the maritime law where this Court certainly in Moragne, a unanimous decision, declared it to be the humanitarian policy to grant a remedy rather than to withhold it, and I think that it would be extremely ironic if such a remedy should stop at the water's edge.

I think that there is no reason to go on now to the Gaudet decision in logic or justice to deny the right to a wife to recover these damages while allowing it to a widow. The analogy I think is compelling. This Court said in Moragne that in most respects the laws applied in personal injury cases will govern questions that arise in death cases.

QUESTION: Of course, whatever result is reached here in the light of Gaudet and Higginbotham is going to be an anomaly. It is either going to stop at the water's edge or it is going to stop at the blue water's edge, isn't it?

MR. MATTHEWS: Well, I think I will skip ahead then, if Your Honor please --

QUESTION: Well, why don't you answer the question because perhaps I misunderstood.

MR. MATTHEWS: I heartily disagree with Mr. Carr that the rights of the blue-water seamen will be

substantially different than those of longshoremen or harbor workers.

QUESTION: Mr. Matthews, isn't it pretty clear under the Death on the High Seas Act as well as the Jones Act that there is no recovery for loss of consortium?

MR. MATTHEWS: Well, it certainly has been affirmatively determined by this Court in Higginbotham that under the Death on the High Seas Act no such right exists. And it is clear enough that this Court 65 years ago in Michigan v. Vreeland determined that no such right existed under the FELA.

QUESTION: Which was incorporated in the Jones Act.

MR. MATTHEWS: Yes, sir. Yes, sir. This Court found no difficulty in overruling the Harrisburg case when that ancient --

QUESTION: That did not involve a statute.

MR. MATTHEWS: It did not involve a statute, but Michigan v. Vreeland involved interpretation of a statute.

QUESTION: Yes.

MR. MATTHEWS: But interpretation, Your Honor, not in any words where the statute had restricted the amounts that could be recovered. But if I could, I think I am now in my discussion on that, to the statutory Jones Act aspects of things --

QUESTION: And Death on the High Seas Act.

MR. MATTHEWS: Yes, sir, and I didn't mean to confine myself to that because, as this Court recognized in Moragne, the unseaworthiness remedy has now become the primary vehicle for the blue-water seamen in recovering for his damages. In other words, the burden of proof of unseaworthiness is so much less than that of proving negligence that it is the rare case where there will be recovery under negligence and not under unseaworthiness.

QUESTION: If there is an anomaly resulting because of Higginbotham, isn't that an anomaly that could be corrected by Congress?

MR. MATTHEWS: It is an anomaly that could be corrected with all due respect by this Court by simply overrruling Michigan v. Vreeland. I think that the interpretation of --

QUESTION: Well, we are still in a statutory construction case.

MR. MATTHEWS: Yes, sir.

QUESTION: Unlike Moragne.

MR. MATTHEWS: Unlike Moragne, yes, sir. I think that in construing the Jones Act in times past, this Court has found no difficulty in going beyond the bare bones of the words of the statute. In Maryland Casualty v. Cushing, this Court held that the Jones Act was broad enough

to embrace an action not against the employer but against the insurance company. And in Kernan v. American Dredging, this Court felt that although the FELA mentioned negligence, that that was broad enough to include a non-negligent violation of a statute.

QUESTION: Well, it is one thing to construe a statute broadly, it is another thing to overrule a previous construction of the same statute, is it not? The cases you mentioned were not overruling previous statutory construction.

MR. MATTHEWS: I would have to concede that point, yes, sir.

I would like to indicate that in two cases cited in the brief, it is clearly pointed out, one of them being the Pesce case, that since we can perceive no logical, sound or reasonable basis to differentiate between the case where the husband was killed as contrasted to injured in respect to the wife's entitlement to recover for loss of consortium, we conclude that Ignerie has been overruled by Sealand Services as construed by Skidmore. And also in the Lemon case, also cited I believe in both briefs, the opinion of the Chief Judge for the Southern District of Georgia, "I am unable to see the rationality of a rule that if a defendant's negligence causes death, consortium can be recovered by the widow, but where it only results in injury

a wife cannot."

I take great issue with my brother, Mr. Carr, with regard to the situation as far as the Ignerie decision is concerned. The decision by Judge Friendly in the Ignerie case was by no means a dogmatic decision. It was an invitational decision, because in the decision it mentioned the common law by saying at least this much is true, if the common law recognized a wife's claim for loss of consortium, uniformally or nearly so, a United States admiralty court would approach the problem here by asking itself why it should not likewise do so. If the common law denied such a claim, uniformally or nearly so, the inquiry would be whether there was sufficient reason for an admiralty court's nevertheless recognizing one.

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock, and you have about nine minutes left.

(Whereupon, at 12:00 o'clock meridian, the court was in recess, to reconvene at 1:00 o'clock p.m., the same day.)

AFTERNOON SESSION -- 1:00 O'CLOCK P.M.

MR. CHIEF JUSTICE BURGER: You may continue.

MR. MATTHEWS: Mr. Chief Justice, and may it please the Court:

This morning I had already discussed the compelling analogy between the right of the widow to recover for loss of society and that of a wife of a badly crippled worker. I would like to spend the remainder of my time discussing the decision of Judge Friendly in the Ignerie case, discussing the Christofferson case, and discussing the contentions of the petitioner with regard to the uniformity.

With regard to Ignerie, I believe that the decision of Judge Friendly was not in any way dogmatic, did not intend to be engraved in stone, but rather was invitational and that it left open a door through which the Alvez court, the Court of Appeals for the State of New York stepped through in the decision below.

Judge Friendly wrote in Ignerie, "If there were evidence that maritime law generally recognized a claim for negligent injury to such an intangible right, or if the common law clearly authorized a wife's recovery, the gravitational pull of such concepts with respect to the wife of a longshoreman might be stronger than that of the analogy to the statute denying such a recovery to a sesman's wife."

At that time, in 1963, when Judge Friendly wrote those words, 19 jurisdictions had denied the remedy. Of those 19, today 15 have reversed the law so that we have at the present time only four jurisdictions of those 19, plus one additional, that being Louisiana where the right has been denied.

In addition, Judge Friendly indicated that the rights were too personal, too intangible and too conjectural to be determined by a jury, but that contention was answered by this Court in Gaudet which indicated that the same argument could be made with regard to any damages for pain and suffering and which indeed indicated that for many, many years, indeed centuries, that courts and juries had been called upon to pass upon the right for loss of consortium.

WIth regard to a contention I think that was made or a mention in Judge Friendly's opinion, that the damages were parasi ic in nature, this I think was well answered by the court below, by Judge Jasen who said, referring to a wife, in the good times she lights the hearth with her own inimitable glow, but when tragedy strikes it is part of her unique glory that forsaking the shelter, the comfort, the warmth of the home, she puts her arm and shoulder to the plow. We are now at the heart of the issue. When her husband's love is denied her, his strength sapped and his protection destroyed, in short,

when she has been forced by the defendant to exchange a heart for a husk, we are urged to rule that she has suffered no loss compensable at the law. But let some scoundrel dent a dishpan in the family kitchen and the law in all its majesty will convene the court, will march with measured tread to the halls of justice and will there suffer a jury of her peers to assess the damages. Why are we asked then in this case to look the other way? Is this what is meant when it is said that justice is blind?"

QUESTION: Mr. Matthews, do you know any way we can get Congress to pass on this?

MR. MATTHEWS: Your Honor --

QUESTION: I mean the more you go on with it, it seems like something Congress should get into.

MR. MATTHEWS: I think, Your Honor, that Congress has quite clearly delegated this area to this Court, and I think that in the Fitzgerald case this Court recognized its duty and its responsibility in that area. So I don't think it is something that in any means is within the province of Congress. I --

QUESTION: Do you think Congress could not pass a law saying the right of consortium shall not be a compensable element in an action like this?

MR. MATTHEWS: Of course they could do so, but the fact that they have not done so one way or the other

is nothing that should be influential on this Court. As this Court indicated in the opinin in Moragne, Congress has specifically left to this Court the duty in the maritime law of declaring what the rights of injured persons should be.

QUESTION: That is not quite the same as saying it is not within the province of Congress.

MR. MATTHEWS: Of course. I would be the last to deny that, sir. This Court indicated in Moragne that certainly it better becomes the humane and liberal character of proceedings in admiralty to give then to withhold the remedy when not required to do so by established and inflexible rules.

The basis for the statement that a blue-water seaman does not have or the wife of a blue-water seaman does not have this right is in the Christofferson case, where the Court of Appeals for the Fifth Circuit considered the right of the wife on three grounds. First, they considered the Jones Act, which they found did not allow this remedy, based upon Judge Friendly's decision in Ignerie. Secondly, they found that with respect to the claim for unseaworthiness, there was no right because of the decision of Judge Friendly in Ignerie. And thirdly, they found that there was no right under the law of the State of Louisiana where the injury had occurred by examining the state law.

This I think, without trying to read their minds, had to do probably with the decision of this Court in Just v. Chambers which indicated that the law of the states may be used to fill in voids in the maritime law.

So we have a situation where, according to the Christofferson case, in some 44 of the jurisdictions of this country, such a remedy would be allowed.

In the name of uniformity, the petitioner in this case would have you to turn back the clock on almost half a century of progressive decisions, affirming the concern of admiralty for the welfare of those injured within its jurisdiction.

I would just point out further that aligning the maritime law with the overwhelming majority of states will eliminate confusion where a single injury may result from violation of duties owed under state law by one defendant and maritime law by another, and it would be a situation similar to that which is involved in the Consolidated Machines case cited by the petitioner in its brief.

Now, if I have any time left, I would mention what I concede to be the role of the Court of Appeals of the State of New York.

QUESTION: You have until the red light goes on.

MR. MATTHEWS: Very well. I simply would like to say on this issue which was designated by the co-respondent

now as a reverse Erie issue, that the -- and which, of course, could not affect the substantive decision of this case -- that unless the state courts are permitted to examine the same data that a state court -- I'm sorry, unless the state courts are permitted to examine --

MR. CHIEF JUSTICE BURGER: Go ahead and finish your sentence.

MR. MATTHEWS: -- to examine the same data that a federal court could examine in reaching the determination, that in fact they would be issuing, they would be giving second-rate justice. And if it was known that the state courts were bound blindly to stare decisus, whereas the federal courts were free to use their reasoning in interpretation of the decisions of this Court, that that would lead to forum shopping.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Carr?

ORAL ARGUMENT OF STEPHEN K. CARR, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. CARR: Yes, sir, just a few words.

The respondent would urge that no distinction be made between the measure of damages in the fatal and non-fatal injuries. In doing so, he would ask the Court to make a distinction between longshoremen and the wives of

longshoremen and seamen and their wives.

It is petitioner's position that it makes eminently better sense if a distinction has to be made to make that distinction between life and death than it does to make an artificial distinction between longshoremen and their proginy and their wives and seamen and their wives.

The longshoremen's rights are a derivative from seamen and to elevate the status of a longshoreman and his wife to a position above the employee from whom he derives his rights makes no sense at all.

If respondent's position were to be accepted, it would mean that every time a longshoreman is injured, whether it be a bump, a scrape, a larceration, a bruise, he would be accompanied in his lawsuit by a spouse seeking sentimental damages.

QUESTION: Well, they would have to produce some evidence to support that, of course.

MR. CARR: I suggest, Your Honor, that that --

QUESTION: If it was a very mild injury, there wouldn't be much prospect, would there?

MR. CARR: It would nevertheless give him or her the right which is the right that we are addressing ourselves to today.

I would like to finish by saying that this right that we were discussing at lunch or just before lunch with

respect to our standing before this Court, is a right -- if there is any reservation among the Members of this Court about our standing -- is something that I would ask your permission to give us leave to brief the question if in fact you feel that we are not here properly.

QUESTION: Could I ask you if the New York court system has finally disposed of this federal issue of the right of the wife?

MR. CARR: The New York state court system has finally disposed of the issue of the right of the wife.

QUESTION: You have lost at trial?

MR. CARR: Well, I don't like to put it that way.

QUESTION: Well, judgment has gone against you, your client?

MR. CARR: There is judgment against my client. I also have an indemnity judgment against the third-party defendant.

QUESTION: Well, on the consortium issue the judgment has gone against your client?

MR. CARR: Yes, indeed it has, Your Honor.

QUESTION: And that issue has not -- if you want to appeal in the state court system, the right of the wife is not subject to relitigation, is it?

MR. CARR: The right of the wife is final as far as the New York state court system is concerned.

QUESTION: Except as to amount, I suppose.

MR. CARR: Except as to amount.

QUESTION: Conceivably a reviewing court might reduce it.

MR. CARR: With respect to excessiveness, that is so. But as far as the wife's right of consortium, that right is final in the state courts and cannot be relitigated in that forum.

QUESTION: Well, suppose you appeal the judgment to the appellate division and one of the grounds for appeal is the wife has no right in the first place under federal law.

MR. CARR: I can't possibly make that argument at this stage.

QUESTION: Well, what would the appellate division say? What would the appellate division say if you did? What would they say?

MR. CARR: The appellate division would say this is res judicata, this has been decided by the New York state Court of Appeals and does not permit you to pursue the matter further.

QUESTION: They might even say that it is a frivolous argument in light of the Court of Appeals holding.

MR. CARR: Exactly.

QUESTION: Well, it sounds to me like then what

you are really arguing beyond jurisdiction is that the only time you could appeal the Court of Appeals judgment that is before us now is now.

MR. CARR: Is today.

QUESTION: Because otherwise you would be untimely.

MR. CARR: I believe that is the case.

QUESTION: Well, suppose you hadnot appeared at the time you did and simply went back, tried the case, gone up to the appellate division, recognized it was law of the case of New York or stare decisus or that there was no bar to consortium rights, argued other issues in the Court of Appeals, do you think you would have been precluded from appealing to this Court on the consortium issue at that stage?

MR. CARR: Yes, sir, I believe I would, having failed to appeal from the appellate division's reversal of the lower court, that I would have lost my right on the consortium grounds.

As I understand the procedure, Your Honor, I had my time to perfect the appeal on that particular issue and, having failed to do so, I would have waived my right.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 1:15 o'clock p.m., the case in the above-entitled matter was submitted.)