Mobil Oil Corp. v. Higginbotham—Confusion Returns To Maritime Wrongful Death Actions

In 1967, a helicopter carrying three passengers and a pilot returning from an offshore drilling platform crashed into the Gulf of Mexico beyond Louisiana’s territorial waters, killing all aboard. The families of the decedents instituted a wrongful death suit in admiralty,1 seeking recovery under general maritime law, the Death on the High Seas Act (DOHSA),2 and the Jones Act.3 The federal district court found Mobil Oil Corporation, the owner and operator of the helicopter, negligent.4 In awarding damages the district court limited recovery to pecuniary losses, holding that a pecuniary loss limitation applied regardless of the theory of recovery.5 Specifically, the court denied plaintiffs recovery for loss of society damages.6 The Court of Appeals for the Fifth Circuit reversed, holding that under recent Supreme Court and Fifth Circuit decisions, beneficiaries of a decedent wrongfully killed on the high seas could recover loss of society damages under general maritime law despite the pecuniary loss limitation of DOHSA.7

1. Higginbotham v. Mobil Oil Corp., 357 F. Supp. 1164 (W.D. La. 1973). The district court based admiralty jurisdiction on a finding that the helicopter performed the functions of a crewboat. Id. at 1167. In reaching this conclusion the court relied on Executive Jet Aviation v. City of Cleveland, 409 U.S. 249 (1972), which held that locality alone is not enough to satisfy admiralty jurisdiction; rather the Supreme Court adopted a “locality plus” test, which requires that “the wrong bear a significant relationship to traditional maritime activity.” Id. at 268. See also Bridwell & Whitten, Admiralty Jurisdiction: The Outlook for the Doctrine of Executive Jet, 1974 DUKE L.J. 757.
3. Id. § 688.
4. 357 F. Supp. at 1174. The court dismissed all claims against Bell Helicopter Co., the manufacturer of the helicopter. Id. at 1172.

If the court had awarded loss of society damages, it would have awarded one family $100,000 and another family $155,000. 360 F. Supp. at 1145-48. Mobil did not challenge the propriety of the amount of these awards at the Supreme Court level. Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 624 n.20 (1978).
Because of conflicting decisions in the circuit courts of appeals regarding the precise limits of the cause of action and remedies for wrongful death under general maritime law, the Supreme Court granted certiorari and, reversing the court of appeals, held in *Mobil Oil Corp. v. Higginbotham* that nonpecuniary damages could not supplement DOHSA's pecuniary loss limitation; thus, the Court reinstated the district court's holding and denied recovery for loss of society damages.

Consequently, DOHSA now provides the exclusive remedy for wrongful deaths occurring on the high seas. By so holding, however, the Court ignored the legislative history of DOHSA, which does not mandate this result. Moreover, *Higginbotham* not only restores various anomalies to maritime wrongful death actions that earlier decisions sought to eliminate, but also contravenes the humane policies of admiralty law. The Court's decision, therefore, retreats from the modern trend toward fashioning a uniform cause of action and remedy for maritime wrongful deaths and creates further confusion in maritime law.

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8. The Fifth Circuit had allowed remedies under general maritime law to supplement DOHSA. *Law v. Sea Drilling Corp.*, 510 F.2d 242, *rehearing denied*, 523 F.2d 793 (5th Cir. 1975). The First Circuit, however, had held that in wrongful death suits on the high seas, DOHSA was the exclusive remedy. *Barbe v. Drummond*, 507 F.2d 794 (1st Cir. 1974).


11. *Id.* at 626.

12. Because Congress limited DOHSA to wrongful death actions on the high seas, *Higginbotham* presumably does not foreclose the application of general maritime law to other high seas maritime tort actions, such as survival and nonfatal personal injury actions. *See, e.g.*, *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 575 n.2 (1974); *Spiller v. Thomas M. Lowe, Jr. & Assoc., Inc.*, 466 F.2d 903 (8th Cir. 1972) (application of general maritime law to survival actions on the high seas).

13. *See* text accompanying notes 46-51 *infra*.

14. *See* text accompanying notes 67-72 *infra*.

15. In rejecting the argument that DOHSA is the exclusive remedy for wrongful death on the high seas, Chief Judge Brown, writing for the court in *Law v. Sea Drilling Corp.*, 510 F.2d 242, *rehearing denied*, 523 F.2d 793 (5th Cir. 1975), stated: "No longer does one need a state court, or The Admiralty as a Court, or DOHSA as a remedy. There is a federal
Prior to 1970, general maritime law, while allowing recovery for injuries, recognized no action for wrongful death absent legislation specifically authorizing such recovery. 16 Although all the states had wrongful death statutes, 17 territorial limitations often prevented the statutes from covering deaths on the high seas. 18 Also, because of the unique status of seamen, 19 the state statutes were often unavailable to them. 20 Thus, to supplement state statutes Congress in 1920 enacted the Jones Act, which provided protection for seamen, 21 and DOHSA, which created a cause of action for wrongful death on the high seas but explicitly left state maritime cause of action for death on navigable waters—any navigable waters—and it can be enforced in any court.” Id. at 798.


Justice Stevens, writing for the majority in Higginotham, sarcastically commented: “The Court in The Harrisburg arrived at its conclusion after rejecting arguments founded on nothing more than ‘good reason,’ ‘natural equity,’ and the experience of nations like France and Scotland.” 436 U.S. at 621 n.14.

17. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 127 (4th ed. 1971). For a list of all current state wrongful death statutes see S. SPEISER, supra note 6, app. A.


19. Seaman refers to any person eligible to recover under the Jones Act, 46 U.S.C. § 688 (1976)—an Act designed exclusively to benefit seamen injured or killed in the course of employment. See note 21 infra. Generally, the Jones Act extends to “members of a crew of a vessel plying in navigable waters.” Swanson v. Marra Bros., 328 U.S. 1, 7 (1946). Courts, however, have varied between a broad and narrow definition of a vessel. Compare Barrios v. Louisiana Constr. Materials Co., 465 F.2d 1157 (5th Cir. 1972) (oiler working on a dragline loaded on a spud barge is a seaman) with Cook v. Belden Concrete Prods., Inc., 472 F.2d 999 (5th Cir. 1972) (carpenter on a floating construction platform moored in navigable waters is not a seaman). See generally G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 6:21 (2d ed. 1975). Because a precise definition of seaman is beyond the scope of this comment, a court’s determination of who is or is not a seaman is accepted.


The Jones Act provided seamen and their personal representatives an action for injury or death caused by an employer’s negligence. The Act adopted the provisions of the Federal Employer’s Liability Act (FELA), 45 U.S.C. §§ 51-60 (1976), which, like DOHSA, limits damages to pecuniary loss. See note 52 infra.
statutes to govern in state territorial waters. After 1920, then, the beneficiary of the victim of a maritime wrongful death had three possible theories of recovery as a substitute for general maritime law: DOHSA, the Jones Act, and state wrongful death statutes.

Between 1920 and 1970, however, anomalies developed because of the territorial and statutory limitations of these three means of recovery. The anomalies stem from the statutes’ failures to provide adequate remedies for the doctrine of unseaworthiness, which predicates liability on the breach of a shipowner’s obligation to provide a ship reasonably able to perform its intended journeys. First, if a Jones Act seaman was injured in territorial waters because of an unseaworthy vessel, he could recover under general maritime law. But if the seaman died in territorial waters, his beneficiary was denied any recovery under all three statutory theories. Second, a breach of the unseaworthiness doctrine on the high seas produced liability under DOHSA, but an identical breach produced no liability within territorial waters, unless the victim was a longshoreman covered by a state statute encompassing unseaworthiness. Finally, a Jones Act seaman had no cause of action for an unseaworthiness-caused death in territorial waters, but a longshoreman, killed in

22. 46 U.S.C. §§ 761-768 (1976). DOHSA gave the personal representative of any person wrongfully killed on the high seas the right to maintain a suit for damages for the benefit of the decedent’s wife, husband, parent, or dependent relative. Congress limited DOHSA to the high seas beyond a marine league from shore and explicitly left state statutes to govern in state territorial waters. See text accompanying notes 46-51 infra.


26. DOHSA, being limited to the high seas, would not apply. Because the victim was a seaman, state statutes were unavailable. See note 20 supra. Finally, the Jones Act limited recovery to negligence and under Supreme Court decisions precluded unseaworthiness claims. See Gillespie v. United States Steel Corp., 379 U.S. 148 (1964); Lindgren v. United States, 281 U.S. 38 (1930).

27. Under Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946), the doctrine of unseaworthiness applied to longshoremen. The Supreme Court, however, refused to supplement state statutes with unseaworthiness claims in the absence of an affirmative holding by the state courts that the statute included unseaworthiness. See Hess v. United States, 361 U.S. 314 (1960); The Tungus v. Skovgaard, 358 U.S. 588 (1959).
the same accident, would have a cause of action if the state statute encompassed unseaworthiness.\(^28\)

In 1970, in *Moragne v. States Marine Lines, Inc.*,\(^29\) the Supreme Court expressly sought to eliminate these anomalies.\(^30\) *Moragne* involved the death of a longshoreman killed in Florida territorial waters. Because general maritime law allowed no cause of action for wrongful death and the Florida wrongful death statute did not encompass unseaworthiness, the longshoreman’s widow had no wrongful death cause of action for unseaworthiness.\(^31\) The Court in *Moragne*, however, created an action for wrongful death under general maritime law.\(^32\) By creating this action *Moragne* sought “to supplant the present disarray in this area with a rule both simpler and more just.”\(^33\) Thus, although the death in *Moragne* occurred in territorial waters, the Court’s desire to eliminate anomalies partly based on DOHSA’s territorial limitation suggests that this new cause of action extended to wrongful deaths on the high seas despite DOHSA.\(^34\) The Court, however, left to future litigation the precise limits of the newly created cause of action, suggesting that lower courts look to both DOHSA and state statutes for “persuasive analogy.”\(^35\)

Four years later in *Sea-Land Services, Inc. v. Gaudet*\(^36\) the Court gave even clearer indications of abandoning the territorial waters/high seas distinction by analogizing to state statutes rather than DOHSA. The issue involved in *Gaudet* was whether the widow of a longshoreman killed in Louisiana territorial waters could maintain a *Moragne* wrongful death action even though her husband had recovered for his injuries prior to his death. The Court allowed such an action and then identified the particular

\(^{28}\) See Gill v. United States, 184 F.2d 49, 57 (2d Cir. 1950) (Hand, J., dissenting).


\(^{30}\) Id. at 396-97.

\(^{31}\) Id. at 376. See also Moragne v. States Marine Lines, Inc., 211 So. 2d 161 (Fla. 1968) (Florida Supreme Court’s interpretation of state wrongful death statute).

\(^{32}\) In order to create this action the Court overruled The Harrisburg, 119 U.S. 199 (1886). 398 U.S. at 409.

\(^{33}\) 398 U.S. at 405.

\(^{34}\) See G. Gilmore & C. Black, supra note 19, at § 6:32. *Moragne* itself contains conflicting language as to whether or not the holding is broad enough to include the high seas. The actual holding of the case contains no territorial limitation. 398 U.S. at 409. Other parts of the opinions, however, imply that the new cause of action only covers situations not covered by DOHSA. Id. at 402. After *Moragne*, lower courts split on whether *Moragne* applied to the high seas. Compare Sennett v. Shell Oil Co., 325 F. Supp. 1 (E.D. La. 1971) with McPherson v. S.S. South Africa Pioneer, 321 F. Supp. 42 (E.D. Va. 1971).

\(^{35}\) 398 U.S. at 408.

damages recoverable in a *Moragne* wrongful death action. In allowing recovery for loss of society damages, the Court rejected applying DOHSA's pecuniary loss limitation, relying instead on the fact that a majority of state statutes allowed recovery of such damages. Justice Brennan, writing for the Court, recognized the decision permitted recovery of damages not recoverable under DOHSA but noted that Congress traditionally has allowed the courts to determine the rules of admiralty law, and that the humanitarian policy of admiralty law "compelled" allowing recovery of loss of society damages. Justice Powell in his dissent also noted that "the Court's holding that loss of society may be recovered is a clear example of the majority's repudiation of the congressional purpose in DOHSA and the Jones Act." Thus, although the death in *Gaudet* occurred in territorial waters, neither the majority nor dissenting opinions indicate any intent to limit the holding to territorial waters; indeed, the fact that both opinions recognize the holding deviates from DOHSA's standard suggests just the opposite. Implicitly, then, *Gaudet* 's loss of society damages were recoverable on the high seas under a *Moragne* wrongful death action despite DOHSA's pecuniary loss limitation.

_Higginbotham_, however, read *Gaudet* narrowly, limiting *Gaudet* to territorial waters. Thus, the DOHSA pecuniary loss standard applies to all actions for wrongful deaths on the high seas, while *Gaudet* 's nonpecuniary loss standard applies to territorial waters. In refusing to supplement DOHSA with *Gaudet*, Justice Stevens, writing for the majority, concluded that the Court has "no authority to substitute [its] views for those expressed by Congress in a duly enacted statute." Justice Stevens is correct if the pecuniary loss limitation of DOHSA is in fact exclusive. If DOHSA is not exclusive, however, nothing prevents the Court from supplementing it if such action promotes

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37. *Id.* at 585-90.
38. *Id.* at 587.
39. *Id.* at 588 n.22.
40. *Id.* at 588.
41. *Id.* at 605 (footnotes omitted) (Powell, J., dissenting).
43. "The *Gaudet* opinion was broadly written. It did not state that the place where death occurred had an influence on its analysis. *Gaudet* may be read, as it has been, to replace entirely the Death on the High Seas Act. It's holding, however, applies only to coastal waters." 436 U.S. at 622-23 (footnotes omitted).
44. *Id.* at 626.
the best interests of admiralty law. Unfortunately, the Court never adequately addressed the issue. As Justice Marshall stated in his dissenting opinion, "the fundamental premise of the [majority’s] opinion—that Congress meant to ‘limit[t] survivors to recovery of their pecuniary losses,’ . . . is simply assumed."45

Had the Court addressed the issue, it would have found a congressional intent that DOHSA damages be nonexclusive. DOHSA’s purpose was to provide a cause of action where none existed without pre-empting state statutes.46 Congressional debate prior to enactment focused on section 7, which, as originally drafted, explicitly stated DOHSA would not pre-empt state statutes within territorial waters.47 An amendment to section 7, however, deleted the words “within the territorial limits of any state.”48 The amendment’s purpose was to assure that DOHSA “would not interfere in any way with rights now granted by any State statute, whether the cause of action accrued within the territorial limits of the state or not.”49 Logically, then, if Congress still intended previously controlling state statutes to govern, DOHSA is nonexclusive on the high seas; that is, DOHSA creates a minimum standard for recovery, not the only standard.50 Therefore, DOHSA’s presence should not preclude supplementing the federal statutory remedy with loss of society damages recoverable under the wrongful death action of general maritime law created in Moragne.51

The Jones Act further supports the conclusion that Moragne

45. Id. at 629 (Marshall, J., dissenting).
47. As originally drafted, the relevant part of § 7 stated: "That the provisions of any state statute giving or regulating rights of action or remedies for death shall not be affected by this act as to causes of action accruing within the territorial limits of any state." S. 2085, 66th Cong., 2d Sess., 59 Cong. Rec. 4482 (1920).
48. As enacted, the relevant part of § 7 states: "That the provisions of any state statute giving or regulating rights of action or remedies for death shall not be affected by this act." 46 U.S.C. § 762 (1976).
49. 59 Cong. Rec. 4484 (1920) (remarks by Representative Mann, the amendment’s sponsor).
50. See Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 629 (Marshall, J., dissenting).
51. Although the amendment to section 7 indicates Congress did not intend DOHSA to preempt state wrongful death statutes, most federal courts held that for purposes of uniformity the presence of any federal statute supersedes state law. See, e.g., Middleton v. Luckenbach S.S. Co., 70 F.2d 326 (2d Cir.), cert. denied, 239 U.S. 577 (1934); Petition of Gulf Oil Corp., 172 F. Supp. 911 (S.D.N.Y. 1959). Contra, Safir v. Compagnie Generale Transatlantique, 241 F. Supp. 501 (E.D.N.Y. 1965). Moragne and Gaudet, however, create a federal action and remedy that in the absence of a showing that DOHSA damages are exclusive, stands on equal footing with it.
and *Gaudet* should supplement DOHSA. Like DOHSA, the Jones Act is federal legislation limiting recovery to pecuniary losses.\(^{52}\) Prior to *Moragne*, the Court held the Jones Act exclusive for seamen killed in territorial waters.\(^{53}\) In *Moragne* and *Gaudet*, however, the Court seemed willing to permit a Jones Act seaman’s survivor to benefit from general maritime law by allowing recovery for loss of society damages for a death occurring in territorial waters.\(^ {54}\) The Court, then, should permit the same recoveries on the high seas under general maritime law where equally “exclusive” federal legislation, DOHSA, operates.\(^ {55}\)

Thus, because the legislative history of DOHSA and the Jones Act viewed in light of *Moragne* and *Gaudet* suggest that DOHSA is not exclusive on the high seas, nothing prevented the Court from supplementing DOHSA with *Gaudet* damages.\(^ {56}\) By refusing to do this, however, and thus limiting *Gaudet* to territorial waters, *Higginbotham* restores anomalies *Moragne* and *Gaudet* sought to eliminate. Because *Higginbotham* holds DOHSA exclusive on the high seas and because earlier decisions limited Jones Act recovery exclusively to negligence, consistency requires the *Higginbotham* Court deny the *Gaudet* remedy to seamen’s beneficiaries for deaths in territorial waters.\(^ {57}\) Denying the *Gaudet* remedy because of the exclusive nature of these acts

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52. FELA, which the Jones Act incorporates, contains no statutory language limiting damages to pecuniary loss. The Supreme Court, however, has interpreted FELA to contain such a limitation. See, e.g., Gulf, Colo. & Santa Fe R.R. v. McGinnis, 228 U.S. 173, 175 (1913).


56. In rejecting this argument Justice Stevens stated: “DOHSA . . . announces Congress’ considered judgment on such issues as . . . damages. . . . The Act does not address every issue of wrongful-death law, . . . but when it does speak directly to a question, the courts are not free to ‘supplement’ Congress’ answer so thoroughly that the Act becomes meaningless.” 436 U.S. at 625.

57. Allowing seamen the *Gaudet* remedy in territorial waters would seem to require allowing the same remedy on the high seas, as the Jones Act contains no territorial limitations. Such an interpretation would lead to the further anomaly of allowing seamen to recover nonpecuniary damages but denying these damages to nonseamen. Since two of the decedents in *Higginbotham* were Jones Act seamen, see *Higginbotham* v. Mobil Oil Corp., 545 F.2d 422 (5th Cir. 1977), presumably the Court does not intend such an interpretation.
also would seem to require precluding *Moragne* unseaworthiness claims by Jones Act seamen for accidents in territorial waters because the Jones Act limits seamen to negligence.\(^{58}\) Thus, *Higginbotham*, if so interpreted, effectively overrules *Moragne* by restoring the anomaly of denying a beneficiary a cause of action for the death of a seaman in territorial waters caused by unseaworthiness while allowing a cause of action for negligence, an anomaly *Moragne* expressly sought to eliminate.\(^{59}\)

Even if not so interpreted, *Higginbotham* still restores anomalies that produce "different results for breaches of duty in situations that cannot be differentiated in policy."\(^{60}\) Once again an artificial line three miles from shore will determine the extent of liability.\(^{61}\) Within the three mile limit a beneficiary can recover all damages, pecuniary and nonpecuniary, under *Moragne* and *Gaudet*. Outside the three mile line, however, nonpecuniary losses are no longer recoverable. Justice Harlan in *Moragne* explicitly denounced such an arbitrary line when he stated that "no rational policy supports this distinction."\(^{62}\) Also, since *Gaudet*, some courts have allowed spouses of longshoremen and seamen to recover for loss of consortium\(^{63}\) in cases involving a nonfatal injury.\(^{64}\) At least one federal district court recognized the right to bring such an action for an injury occurring on the high seas.\(^{65}\) A spouse, then, could recover loss of consortium damages in cases of nonfatal injuries, but under *Higginbotham* the same spouse is denied recovery if death, rather than mere injury, occurred on the high seas.\(^{66}\)


\(^{60}\) Id. at 405.


\(^{62}\) 398 U.S. at 395.


\(^{65}\) Francis v. Pan Am Trinidad Oil Co., 392 F. Supp. 1252 (D. Del. 1975). *Francis* used *Gaudet* as a justification for allowing loss of consortium. Id. at 1257 n.8.

\(^{66}\) For the application of *Moragne* to the high seas in areas other than wrongful death, see note 12 supra.
Not only does *Higginbotham* restore various anomalies to maritime wrongful death actions, it also ignores the humanitarian policy of admiralty law.\(^67\) Because historically seamen were young, poor, and away from home, courts recognized the need for special protection for "this important class of citizens for the commercial service and maritime defence of the nation."\(^68\) Furthermore, extending broad remedies to seamen encouraged seamen to engage in hazardous voyages.\(^69\) As Judge Chase stated in *The Sea Gull*:\(^70\) "it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules."\(^71\) Legislative history, *Moragne*, and *Gaudet* all indicate that DOHSA is not such an "established and inflexible" rule. The *Higginbotham* Court should have allowed loss of society damages as consistent with the traditions of admiralty law.\(^72\)

Until *Higginbotham* the modern trend in maritime wrongful death actions, as exemplified by *Moragne* and *Gaudet*, was toward a uniform cause of action. No longer would artificial lines determine the extent of liability; no longer would liability diminish when the victim died. Such uniformity promoted efficiency and eliminated anomalous results. *Higginbotham*, however, by refusing to apply *Gaudet* to high seas wrongful death actions retreats from the laudatory principles explicated in *Moragne* and *Gaudet* and only creates further confusion. By holding DOHSA damages to be exclusive, *Higginbotham* has clouded rather than clarified post-*Moragne* maritime wrongful death actions.

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\(^67\) In a footnote Justice Stevens suggests that any loss of society award should be "primarily symbolic, rather than a substantial portion of the survivors' recovery." 436 U.S. at 624 n.20. In many cases, however, loss of society constitutes the primary damage suffered by the decedent's survivor, especially in cases involving the death of children or the elderly where little pecuniary loss is suffered. See, e.g., Dagget v. Atchison, Topeka, & Santa Fe R.R., 48 Cal. 2d 655, 313 P.2d 557 (1957); Lane v. Hatfield, 173 Or. 79, 143 P.2d 230 (1943).

\(^68\) Id.

\(^69\) Id.

\(^70\) 21 F. Cas. 909 (C.C.D. Md. 1865) (No. 12, 578).

\(^71\) Id. at 910.