

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X  
NORFOLK SHIPBUILDING & :  
DRYDOCK CORPORATION, :  
Petitioner :  
v. : No. 00-346  
CELESTINE GARRIS, :  
ADMINISTRATRIX OF THE :  
ESTATE OF CHRISTOPHER :  
GARRIS, DECEASED. :  
- - - - -X

Washington, D.C.  
Wednesday, April 18, 2001

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States as  
11:05 a.m.

APPEARANCES:  
JAMES T. FERRINI, ESQ., Chicago, Illinois; on behalf of  
the Petitioner.  
PATRICK H. O'DONNELL, ESQ., Norfolk, Virginia; on behalf  
of Respondent.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C O N T E N T S

PAGE

ORAL ARGUMENT OF

JAMES T. FERRINI, ESQ.

On behalf of the Petitioner

3

PATRICK H. O'DONNELL, ESQ.

On behalf of the Respondent

23

1  
2  
3 CHIEF JUSTICE REHNQUIST: We'll hear now  
4 argument next in 00-346, Norfolk Shipbuilding & Drydock  
5 Corporation v. Garris.

6 Mr. Ferrini.

7 ORAL ARGUMENT OF JAMES T. FERRINI

8 ON BEHALF OF THE PETITIONER

9 MR. FERRINI: Mr. Chief Justice, if it please the  
10 Court:

11 This is a decidedly local tort action which  
12 defendant respectfully submits does not invoke a federal  
13 uniformity interest; certainly it does not invoke a need  
14 for such interest so compelling as to require this Court  
15 to create or infer a wrongful death cause of action based  
16 on general negligence under circumstances where there is  
17 no claim of vessel liability. What this case is not is a  
18 case which would involve any concept endemic to or  
19 originating in or peculiar to the sea. We are not  
20 concerned about seamen's responses; we are not concerned  
21 about unseaworthiness or any form of vessel liability.

22 QUESTION: Mr. Ferrini, how does your case  
23 differ from the Kermarec case, the one this Court decided  
24 in 1959?

25 MR. FERRINI: In Kermarec, Your Honor, which

1 involved negligence, the negligence was negligence in the  
2 operation of a vessel, either with it navigating or the  
3 manner in which it was operated, but nothing like our case  
4 where we have a local enterprise that was operating a  
5 crane that was located on a pier over a --

6 QUESTION: But it was -- that case did  
7 recognize, didn't it, a claim for negligence under general  
8 maritime law?

9 MR. FERRINI: Your Honor, I believe it did, but  
10 again, that was a case of a visitor on a vessel, and the  
11 captain of the vessel had an obligation to make sure that  
12 the stairway was in good condition, etcetera, but there  
13 you're dealing with a concept which I think to be very  
14 akin to that in Moragne. What we're dealing with there is  
15 a concept of the manner in which a vessel is operated, a  
16 vessel is maintained for the safety of people on it, and  
17 that is the kind of concept which requires uniform  
18 treatment.

19 QUESTION: But Moragne dealt with -- by its  
20 terms at any rate -- with unseaworthiness, and the  
21 question you've presented here is whether Moragne is a  
22 basis for also extending that doctrine to negligence as  
23 well as unseaworthiness, and yet in Kermarec it seems that  
24 we've already recognized a general maritime claim for  
25 negligence. You feel this is different?

1 MR. FERRINI: Your Honor, I think what we have  
2 to do is look at the concept of uniformity in the context  
3 of Article 3, Section 2 in the Federalist Papers, and  
4 think in terms of why is it that this particular body of  
5 law, as of all bodies of law there are -- this substantive  
6 body of admiralty is given to this Court and to Congress,  
7 and the purpose is so that the nation speaks with one  
8 voice under circumstances where there can be an impact on  
9 our relationship with our partners in trade.

10 QUESTION: Well, Mr. Ferrini, the question which  
11 we granted certiorari, I thought, was whether a general  
12 maritime law cause of action for wrongful death in  
13 negligence exists or should exist. In other words,  
14 whether Moragne should extend to wrongful death action  
15 based on negligence, and I didn't -- have you raised below  
16 the question of even if it does -- even if the answer is  
17 yes, it should, it shouldn't apply here because these are  
18 all land-based actors. I mean, I would have thought that  
19 would be a logical defense to raise, but I don't see that  
20 as part of the question.

21 MR. FERRINI: The way they are --

22 QUESTION: Suppose I say yes, Moragne extends to  
23 wrongful death based on negligence, but does it extend to  
24 totally land-based action like this? You didn't raise  
25 that apparently.

1 MR. FERRINI: Your fourth circuit, Your Honor,  
2 quite frankly, the focus of the court and the parties was  
3 upon what does Moragne create rather than should it create  
4 an exception.

5 QUESTION: Well, answer my question. Suppose I  
6 say yes, Moragne, sure it extends to that. We've been  
7 saying that all along in dicta, at least. Suppose I say  
8 yes. Is that open then to make your argument that  
9 whatever Moragne extends to, it doesn't apply to totally  
10 land-based actors like these? Is that open?

11 MR. FERRINI: I think it's certainly open, Your  
12 Honor, because when we -- when you made your decision in  
13 Moragne, the idea was not just is there a general cause of  
14 action for all circumstances for wrongful death? No, the  
15 focus was on unseaworthiness and on maritime duties.

16 And by the same token, if you're going to here  
17 decide if there is a wrongful death action created under  
18 the Moragne rationale, if that much of Moragne is even  
19 left existent, certainly I think this Court has the  
20 jurisdiction to determine under what circumstances, and  
21 just as --

22 QUESTION: I just didn't think you raised that  
23 here. I mean -- and we ended up with this very limited  
24 question about whether Moragne, to the extent it applies  
25 at all, extends to wrongful death actions based on

1 negligence. But these other questions I didn't think were  
2 presented to us.

3 MR. FERRINI: Your Honor, with all due respect,  
4 I view our question as having been raised as whether there  
5 is a wrongful death cause of action under the  
6 circumstances with which the Court is presented.

7 QUESTION: But you're arguing -- the limitation,  
8 it seems to me -- death wouldn't matter. It would be just  
9 as land-locked if it had been mere injury, and that's the  
10 question I'd like you to answer under the law as you see  
11 it. Suppose Mr. Garris had not been killed, he'd just  
12 been badly injured. Would he have an action under Federal  
13 maritime law for negligence?

14 MR. FERRINI: If he were on the vessel at the  
15 time, as he was, yes, he would.

16 QUESTION: This very case. Don't change a  
17 thing.

18 MR. FERRINI: He would. He would.

19 QUESTION: He would? So, then you can't -- then  
20 you're not making a distinction based on land-locked  
21 versus something else; you're making a distinction based  
22 on death versus injury.

23 MR. FERRINI: In that respect I am, Your Honor,  
24 because this Court has created a general maritime body of  
25 law dealing with injury. There is no two ways about that.

1 But the result would be different because that -- the fact  
2 that the state law does not give the same remedy that that  
3 general body of law gives is not an objective of  
4 uniformity.

5 QUESTION: But all of your -- your discussion  
6 about state domain versus admiralty, maritime -- it seems  
7 to fall apart when one recognizes that it can be the very  
8 same accident. It's maritime if he's merely injured, but  
9 no maritime responsibility if he's killed. And that seems  
10 to be a hard line to explain to anyone, at least who's not  
11 a lawyer.

12 MR. FERRINI: Well, maritime law has been  
13 described as one of the most complex areas, and it  
14 certainly is a patchwork, and that is the historical  
15 consequence of the way things developed.

16 QUESTION: But you were giving something beyond  
17 historical patchwork -- you were giving some kind of  
18 rationale distinction between land-locked, sea duty,  
19 Federal/state -- and I could accept all that were it not  
20 for that the distinction is only death versus injury.

21 MR. FERRINI: Well, I respectfully submit that  
22 to create a monistic single area of law covering both  
23 death and injury, the first thing this Court would have to  
24 do is overrule the Tungus. It would have to overrule --

25 QUESTION: Why? Tungus just said you can take

1 the state wrongful death claim. Doesn't -- well, let's  
2 take Yamaha, where we, this Court recognized that you  
3 could have a claim under the state wrongful death act. It  
4 took that position even on the assumption -- and it was  
5 only an assumption in that case -- that you could also  
6 have a claim under Moragne.

7 MR. FERRINI: Yes, this Court did not decide,  
8 however. In footnote 7 we said -- this Court said we are  
9 not deciding that there is such a cause of action, but I  
10 take it a step further. What this Court, I believe, was  
11 assuming was the existence of a cause of action against  
12 the manufacturer of a vessel, because that is what a jet  
13 ski has been determined to be. And it comes back to my  
14 same concept of what is the purpose of uniformity? And I  
15 don't think the purpose of uniformity is that all remedies  
16 be the same in all circumstances, because that's exactly  
17 what Your Honor said was not the objective of uniformity  
18 in the Yamaha case.

19 QUESTION: But that was a case where you could  
20 have both State and Federal remedies if there was a  
21 Federal remedy, and we said if there was a Federal remedy,  
22 that wouldn't preclude also having a state remedy.

23 MR. FERRINI: I think it is very -- I think what  
24 Your Honor is driving at is the possibility of concurrent  
25 existence of a Federal cause of action and a state cause

1 of action.

2 QUESTION: Yes.

3 MR. FERRINI: And I point out -- I hasten to  
4 point out that that is the one thing my opponent has not  
5 raised or urged, and why is that? Because I do not  
6 believe that that is consistent with uniformity. If  
7 uniformity -- the purpose of uniformity is going to be  
8 that there is some semblance of reliability in knowing  
9 what cause of action is going to exist, once you create a  
10 dual system, then everything is up in the air -- your  
11 insurance questions, your rates, everything is up in the  
12 air, because we don't know in any individual death what  
13 law the plaintiff is going to invoke.

14 QUESTION: So then your answer must be in the  
15 case of injury it's only maritime law -- it's only Federal  
16 law, not state law.

17 MR. FERRINI: I think that that is -- in the  
18 case of injury, absolutely. I agree with that. There is  
19 this existing body of law, and I don't think, however that  
20 that -- that the fact that that is a solitary body of law  
21 is a matter of uniformity.

22 QUESTION: But regardless of whether it's a  
23 matter of uniformity or not, if the Federal maritime law  
24 covers it in the case of injury, what is the justification  
25 for a separate regime in the case of death?

10

ALDERSON REPORTING COMPANY, INC.  
1111 FOURTEENTH STREET, N.W.  
SUITE 400  
WASHINGTON, D.C. 20005  
(202) 289-2260  
(800) FOR DEPO

1 MR. FERRINI: Well, just --

2 QUESTION: I mean, I think you -- I think maybe  
3 I misunderstood your answer to several questions, but  
4 going back to the Chief Justice's question about Kermarec,  
5 I understood you to assume that yes, there is a general  
6 maritime cause of action for negligence.

7 MR. FERRINI: Yes.

8 QUESTION: And I understood you to have said  
9 later on in the argument that if this individual had  
10 merely been injured but had not been killed, that that  
11 cause of action would apply. And if that's the case, the  
12 question for us I think is why should we have a separate  
13 regime when the negligence is efficient enough to cause  
14 his death?

15 MR. FERRINI: First, I would like to correct an  
16 answer I gave earlier to the Chief Justice. I forgot -- I  
17 believe Kermarec was an injury case and not a death case,  
18 a totally different situation.

19 QUESTION: It was an injury case, and I think  
20 what we're driving at is why should it be a different  
21 situation?

22 MR. FERRINI: Again, it comes back to what this  
23 Court sees as the purpose of uniformity.

24 QUESTION: Well, before we get to uniformity,  
25 what about irrationality? If we're going to recognize the

1 cause of action for the injured, why are we not going to  
2 recognize the cause of action when death ensues?

3 MR. FERRINI: Because this Court never has,  
4 death was something that was always left to the states.

5 QUESTION: Well, I know. If we had, we wouldn't  
6 have this case. The question is, why shouldn't we?

7 MR. FERRINI: Then I would ask --

8 QUESTION: What is the rational basis for  
9 distinguishing the one from the other?

10 MR. FERRINI: To me, Your Honor, because that  
11 would be result-oriented. You're going the other way then  
12 in a situation where the State law is more favorable --

13 QUESTION: Why is it result-oriented to have  
14 symmetry in the law?

15 QUESTION: Well, isn't your answer historical?

16 MR. FERRINI: It's historical, and it's a  
17 departure from the objective with which this Court is  
18 granted the power of uniformity.

19 QUESTION: Well, is the Court -- is the Court  
20 wrong under uniformity to have Federal admiralty law with  
21 reference to injuries?

22 MR. FERRINI: I think, to be quite frank, that  
23 things developed beyond a clear view of what the mission  
24 of the Court was.

25 QUESTION: You don't agree with Moragne,

1 basically. I mean, if -- if you're saying what you're  
2 saying here about uniformity, you probably don't agree  
3 with Moragne.

4 MR. FERRINI: Not at all, Your Honor. I do  
5 agree with Moragne.

6 QUESTION: You do agree with Moragne? Well, I  
7 really can't say why, having decided Moragne, we want to  
8 draw the line between -- if indeed we didn't already cross  
9 that bridge in Moragne -- I don't know why we would want  
10 to draw a distinction between injury and death.

11 MR. FERRINI: Because this Court has recognized  
12 time and time again that you must treat everybody the  
13 same, no matter where they are on the sea. And when  
14 you're dealing with unseaworthiness, that vessel had  
15 better be operational regardless of whether it's in  
16 territorial waters or in the Sea of Japan or next door,  
17 because everybody has -- let's put it this way, I think  
18 uniformity -- the concept of uniformity is very similar to  
19 the concept of the diversity of citizenship, which the  
20 purpose of which is fair treatment of foreigners.

21 And regardless if you're dealing with a seaman  
22 who gets in, in Italy and he comes over here and he's  
23 injured over here, he has to be treated the same. But  
24 when you're dealing in a case like this with a harbor  
25 worker, and you're dealing with local businesses like my

1 client that's named after Norfolk, and it's in the --  
2 there would have been no, talk about abnormalities or,  
3 there would be no recovery. We wouldn't even be here if  
4 this particular crane had struck him while he was doing  
5 preparatory work on the dock. Never -- not -- there is no  
6 such thing as perfect symmetry; you'll never reach that  
7 because --

8 QUESTION: Then we should go back and overrule  
9 Kermarec.

10 MR. FERRINI: Not at all, Your Honor. I think  
11 that's too far developed to do that. I think that there,  
12 the --

13 QUESTION: In other words it's wrong, but --

14 MR. FERRINI: -- general maritime --

15 QUESTION: -- it's clearly established?

16 MR. FERRINI: Clearly established. And I think  
17 that's the purpose of the Talbot case my opponent relies  
18 on. He says, well --

19 QUESTION: You said -- before you go on to  
20 Talbot, you said that symmetry and treating like  
21 situations alike -- this survivor, this mother -- what was  
22 the recovery that she got? She got a worker's  
23 compensation recovery?

24 MR. FERRINI: Yes.

25 QUESTION: And that was what?

1 MR. FERRINI: I am told -- I have no authority  
2 on this, and I don't believe it's in the record -- I am  
3 told what she got was the funeral expenses, which is what  
4 Congress decided she should get since there was no  
5 dependency.

6 QUESTION: That was up to three thousand  
7 dollars?

8 MR. FERRINI: I have no idea, Your Honor.

9 QUESTION: And yet if her son had survived,  
10 there would have been a large recovery, and you say that  
11 that was okay, to have negligence under maritime law. Why  
12 isn't there a gross inequality in those two situations?

13 MR. FERRINI: Because I think what Your Honor is  
14 looking at is the particular jurisdiction. If this had  
15 happened in New York Harbor where the law is different,  
16 there would be a substantial recovery. But the fourth  
17 circuit got it wrong when the fourth circuit said that  
18 it's happenstance that the man was killed in Norfolk  
19 Harbor rather than New York Harbor. He was in Norfolk  
20 Harbor because that's where he lived and that's where he  
21 worked, and that's where he died. And the state should be  
22 able to provide for their interest in deciding the  
23 familial issues of wrongful death, who should recover, and  
24 how much they should recover. It should be able to decide  
25 that what a statutory employer will get as a quid pro quo

1 for giving the benefits.

2 And I would point out there is a very little  
3 difference between the LHWCA and the Virginia wrongful  
4 death statute. Both of them have the concept of a  
5 statutory employer. Both of them have the concept that  
6 that statutory employer is immune from common law or  
7 statutory actions. The only difference is that in  
8 Virginia they guarantee the money will be there by saying  
9 if you hire somebody to do the job, you have to go out and  
10 get insurance to make sure that comp benefit is there,  
11 where the Federal statute says you only have to go out and  
12 get that insurance if the person you've hired hasn't  
13 fulfilled his responsibility. And that's kind of an iffy  
14 thing, because he can show you a certificate of insurance  
15 and it turns out to be that there's no coverage for one  
16 reason or another.

17 All I'm saying is that this is a very limited  
18 exception -- a very limited case -- where this man's  
19 descendants or his widow -- his mother -- will have no  
20 recovery, but it's not the ordinary case. And I don't  
21 think the law can change based upon the happenstance that  
22 we don't like the result for this particular plaintiff  
23 because in the next case you're going to be very happy  
24 with the results for the particular plaintiff.

25 QUESTION: I think the question is whether it's,

16

ALDERSON REPORTING COMPANY, INC.  
1111 FOURTEENTH STREET, N.W.  
SUITE 400  
WASHINGTON, D.C. 20005  
(202) 289-2260  
(800) FOR DEPO

1 the line between injury and death is a valid one.

2 MR. FERRINI: Well, I think it is, because you  
3 are then dealing with familial issues which the State has  
4 a strong interest in. Who should recover in the event of  
5 death? What should their relationship be to the decedent?  
6 What should be the degree of dependency, if any? These  
7 have always been left to the State.

8 QUESTION: Why couldn't you pick that -- why  
9 couldn't you pick up that part from State law?

10 MR. FERRINI: Well, that's kind of a pick-and-  
11 choose thing, Your Honor. I think that the law has to be  
12 consistent -- either you apply State law or you don't.

13 QUESTION: Doesn't Federal law do that in other  
14 instances, not have an independent Federal law of who will  
15 be the survivors in the case of a Federal tort?

16 MR. FERRINI: I can't comment on the full area,  
17 but certainly the Tungus case said you take state law --  
18 if you're taking state law, you take state law as it is  
19 with the all the parts of it.

20 QUESTION: Yes, but I wasn't asking you, the  
21 state law in Tungus was the liability as well as who picks  
22 it up. But now where -- you seem to be suggesting that if  
23 you had Federal law, you would also have to invent who the  
24 survivors are for purposes of wrongful death, and I'm  
25 suggesting that there is no reason why you couldn't pick

1 that up from state law.

2 MR. FERRINI: I don't see that as consistent  
3 with uniformity but again, Your Honor, what I think the  
4 Court is doing is proposing to fashion a remedy to benefit  
5 an individual in very limited circumstances where the  
6 bottom line is that the state application of state law,  
7 consistent with this Court's majority concurring and  
8 dissenting opinions in American Dredging, has no impact on  
9 commerce. I think we're losing sight of the objective in  
10 order to fashion a remedy. I think that -- I would suggest  
11 that --

12 QUESTION: Again, if you're going to talk about  
13 impact on commerce, there really can't be any difference  
14 between injury and death, so I think once you concede that  
15 the injury would be covered by Federal law, you can't make  
16 an argument about the Commerce Clause that wouldn't apply  
17 to both.

18 MR. FERRINI: I do not believe that everything  
19 this Court has developed in the way of substantive law for  
20 injury is necessarily something that is required for  
21 uniformity in the sense of the constitutional basis of it,  
22 but rather a symmetry. And that's just the way things  
23 developed, but let me point out in Pope & Talbot, my  
24 opponent points out that in that particular case, look,  
25 they refused to apply the state contributory rule because

1 there was a Federal rule of comparative negligence. Why?

2 That wasn't -- this Court didn't say that that  
3 was because of uniformity concerns; the Court did so  
4 saying, look, we have considered -- we've already created  
5 a body of law. In that existing body of law we created  
6 certain rights, and those rights now exist. And if a  
7 right exists by virtue of a Congressional action or by a  
8 decision of this Court, a state can't take it away.

9 So that body of law is not representative as a  
10 whole of a need for uniformity in all aspects of law. I  
11 respectfully submit that what I'm offering this Court is a  
12 predictability, that we look as Professor Fore suggests to  
13 our national interests -- that we look as this Court  
14 suggested in *American Dredging* to the impairment of  
15 commerce or to the *Kamen* court where the Court of Appeals  
16 of New York looked to whether state law had  
17 extraterritorial effect, and if it didn't have that kind  
18 of effect, then there was no need for pre-emption. There  
19 was no uniformity concern.

20 QUESTION: It just seems to me that the language  
21 in *Moragne* itself points in the direction of extending  
22 liability to negligence if it can be characterized as a  
23 violation of a maritime duty. But where our Court has  
24 never really spoken to the question is whether that kind  
25 of liability extends beyond the owners of the vessels to

1 people who are land-based, and I think that's where there  
2 is more of a question, although it certainly wasn't raised  
3 here very clearly.

4 If it were a vessel owner who was the defendant  
5 here, would you take the same position that you're taking  
6 today?

7 MR. FERRINI: My position is if it's a vessel  
8 owner, I can perfectly understand adoption or creation of  
9 a cause of action for the sake of uniformity. I would  
10 point out to Your Honor that my opponent's main argument I  
11 view as saying this Court in *Moragne* talked of maritime  
12 duties. What is a maritime duty? If a man comes on a  
13 vessel and pulls a gun on another man, he's violated  
14 duties but not maritime duties. Negligence as an abstract  
15 concept is not a maritime duty.

16 The maritime duty I submit has to do with the  
17 manner in which the vessel is operated, and this Court has  
18 never said anything to the contrary. I point out that  
19 *Kermarec* and *Leathers*, the two cases that are said to  
20 refer to negligence as a maritime duty or a breach of a  
21 maritime duty, they dealt with vessel liability. Or the  
22 *East River* case which is stated by my opponent to refer to  
23 products liability as a breach of a maritime duty. That  
24 was that the product there was the main propulsion unit  
25 for the vessel. We keep coming back to the same thing.

1 So that you treat people the same no matter where they are  
2 on the sea.

3 QUESTION: Mr. Ferrini, you're trying to make  
4 now something special about ships and their navigation,  
5 and in part that's true, but let's just take your -- a  
6 slip and fall on a deck on a banana peel. That could have  
7 well happened on the sidewalk, but it happened to happen  
8 on the ship. There's nothing about that conduct of  
9 leaving the banana peel that's maritime, or do you see  
10 something that --

11 MR. FERRINI: Well, I don't -- I don't purport  
12 to give you an answer for every case that will arise in  
13 the future, but I think that if that banana peel was  
14 dropped by a crew member, you could have a breach of a  
15 maritime duty, but if it was dropped by another visitor  
16 and the crew had no chance to clean it up, that that's  
17 negligence but that is not a breach of a maritime duty.

18 I think you keep, I keep coming back to the  
19 concept of what is it that we're trying to achieve? And  
20 what we're trying to achieve is a uniform treatment of  
21 foreigners much like the diversity concept.

22 QUESTION: Mr. Ferrini, can I ask you just what  
23 your response is to one of the arguments made in the  
24 concurring opinion below, namely that it would not have  
25 been necessary to overrule Harrisburg unless it was

1 decided to recognize a cause of action for negligence.

2 MR. FERRINI: I think Harrisburg had to be  
3 overruled in order to recognize that it was the  
4 Harrisburg's --

5 QUESTION: But that was just a negligence case.

6 MR. FERRINI: I'm sorry?

7 QUESTION: Wasn't the Harrisburg just a  
8 negligence case?

9 MR. FERRINI: Negligent vessel.

10 QUESTION: Yes, but it was negligence as opposed  
11 to seaworthiness.

12 MR. FERRINI: That's right. But it, again it  
13 dealt with a negligent vessel, it did not deal with  
14 general negligence, and the rule was nothing survives.  
15 After death, no personal action survives. So that had to  
16 be overruled or it was impossible for Moragne to exist.

17 QUESTION: Well, it could have been  
18 distinguished.

19 MR. FERRINI: But Moragne --

20 QUESTION: It could have been distinguished as  
21 Judge Hall pointed out by saying that that's limited to,  
22 this is not a negligence case, therefore the Harrisburg is  
23 not squarely on point.

24 MR. FERRINI: Not if the Court wanted to do as  
25 it did and broadly state we're talking about

1 unseaworthiness and breach of maritime duties, because the  
2 breach of maritime duty was at issue in the Harrisburg,  
3 since it was vessel liability. I would like to reserve  
4 whatever I have left.

5 QUESTION: Very well, Mr. Ferrini.

6 MR. FERRINI: Thank you.

7 QUESTION: Mr. O'Donnell, we'll hear from you.

8 ORAL ARGUMENT OF PATRICK H. O'DONNELL

9 ON BEHALF OF THE RESPONDENT

10 MR. O'DONNELL: Mr. Chief Justice, and may it  
11 please the Court:

12 I would like to first address one of the points  
13 that Mr. Ferrini just raised, and that Justice O'Connor  
14 asked about, and that was whether this new sub-species of  
15 maritime negligence law which has been dubbed vessel  
16 negligence was raised below. In fact it was not; it was  
17 raised for the first time in the reply brief, and we  
18 believe there are a number of reasons not to, for this  
19 Court to adopt yet another difficult distinction within  
20 the very complex law of maritime law.

21 QUESTION: Is this the same thing that Justice  
22 O'Connor inquired of your opponent about there being all  
23 land-based actors here?

24 MR. O'DONNELL: Well --

25 QUESTION: Are those two different things, or is

1 it basically a rephrasing of the same thing?

2 MR. O'DONNELL: Well, we would not contend -- we  
3 would not agree with the characterization that -- it is  
4 true that Mr. Garris did not live aboard the ship.

5 QUESTION: He was a longshoreman, wasn't he?

6 MR. O'DONNELL: He was a ship repair worker.

7 QUESTION: A ship repair worker who did not live  
8 on the ship.

9 MR. O'DONNELL: That is correct. And -- but the  
10 argument --

11 QUESTION: And the employer was a land-based  
12 contractor who did work on ships at dock to repair them.

13 MR. O'DONNELL: Yes, Justice O'Connor. He --

14 QUESTION: Yes. Not a vessel owner.

15 MR. O'DONNELL: No.

16 QUESTION: No.

17 MR. O'DONNELL: The defendant was a  
18 subcontractor to Norshipco that was hired to sandblast the  
19 hulls inside the vessel, and Mr. Garris was asked to  
20 assist in that effort. And in doing so, he was asked to  
21 climb up to some scaffolding whereupon he was knocked off,  
22 fell, and died aboard the ship. But the argument that it  
23 was mere happenstance that he died aboard the ship I think  
24 ignores the very reason he was aboard the ship. It wasn't  
25 as in Kermarec. Kermarec, they had a social visitor

1 aboard the ship. Mr. Ferrini acknowledges that's maritime  
2 in nature. It's hard to imagine a more maritime activity  
3 than what Mr. Garris himself was engaged in.

4 QUESTION: But Kermarec, Kermarec sued the  
5 vessel owner.

6 MR. O'DONNELL: Yes, sir.

7 QUESTION: And here you did not sue the vessel  
8 owner.

9 MR. O'DONNELL: No. We did not have a -- we did  
10 not believe we had a negligence claim against the vessel  
11 owner, as the enterprise was being controlled by  
12 Norshipco.

13 QUESTION: So the case is therefore distinct in,  
14 factually anyway, from Kermarec.

15 MR. O'DONNELL: It is. I would say it is very  
16 close, however, to the Robins Dry Dock case in which the  
17 lawsuit there was not against the shipowner but against  
18 the shipyard, and that was also a negligence case and  
19 achieved the same result. In other words, there the court  
20 refused to apply the State law in deference to the Federal  
21 law in general maritime, and it did so, we contend, out of  
22 uniformity concerns.

23 QUESTION: And Kermarec -- negligence under  
24 Federal admiralty law was not discussed, I take it,  
25 because there was apparently parallel to the state

1 negligence law which was adequate? Is that the way you  
2 read Kermarec?

3 MR. O'DONNELL: I read Kermarec as suggesting  
4 that the law was different; in fact, that there was a  
5 contributory negligence law under the State statute in  
6 that under maritime law, comparative negligence would  
7 apply. And also Kermarec had another issue in that --

8 QUESTION: Well, I thought Kermarec was an  
9 unseaworthiness case, and that this Court did not address  
10 whether there was a Federal admiralty cause of action  
11 based on negligence. Am I wrong about that?

12 MR. O'DONNELL: I think that's Moragne, Your  
13 Honor. Kermarec actually dealt with negligence precisely.

14 QUESTION: Well, there was negligence under New  
15 Jersey law --

16 QUESTION: New York.

17 QUESTION: Well, I'll read it again. You --  
18 what was the holding of Kermarec --

19 MR. O'DONNELL: Kermarec --

20 QUESTION: -- with reference -- Kermarec with  
21 reference to Federal admiralty law of negligence in a  
22 wrongful death case.

23 MR. O'DONNELL: That in Kermarec the law  
24 regarding comparative negligence would be the rule rather  
25 than state contrib -- contributory negligence rule, and

1 also that the State rules regarding different duties owed  
2 to invitees, licensees and the other classifications would  
3 not apply in maritime law because maritime law had  
4 rejected those types of distinctions in favor of a uniform  
5 reasonable care under the circumstances test. So that in  
6 that case I would disagree. I would think that Kermarec  
7 can be read and should be read as a vindication of  
8 maritime uniformity principles in almost all respects.

9 It does involve an injury; it is distinguishable  
10 only because it's an injury case, but I would submit that  
11 that distinction is not a distinction that the Court  
12 should maintain.

13 QUESTION: And the Court, as I understand in  
14 Kermarec, the Court there said that because the guy was a  
15 visitor, there was no duty of seaworthiness owed to him.

16 MR. O'DONNELL: Correct. There would be no duty  
17 of seaworthiness owed to a --

18 QUESTION: Casual visitor.

19 MR. O'DONNELL: -- Social visitor is what the  
20 Court described him as. The injury/death distinction as  
21 Justice Stevens correctly points out is historical, but it  
22 is historical only because it derived out of the  
23 Harrisburg. Prior to the Harrisburg, and if the  
24 Harrisburg itself records those prior decisions, and there  
25 are some that say there is no wrongful death, but on

1 balance the clear majority of the opinions that the  
2 Harrisburg reviews finds a negligence-based maritime cause  
3 of action for wrongful death, and we would submit that  
4 once the Harrisburg was overturned in Moragne, the entire  
5 historical underpinnings of that distinction, which we  
6 submit was not a good distinction to begin with, but even  
7 the historical basis for it was a ruse, and so now that  
8 distinction is floating in air. There is no historical or  
9 logical --

10 QUESTION: But we have -- we have talked in  
11 terms of general maritime duties, I guess, which could  
12 include negligence, a duty not to be negligent.

13 MR. O'DONNELL: Absolutely, and the Court --

14 QUESTION: But I'm not sure that it extends to  
15 all land-based actors.

16 MR. O'DONNELL: Well, I -- I would agree. I  
17 don't think it may extend to all land-based actors but, in  
18 this instance, Mr. Garris was involved in a very  
19 fundamental aspect of maritime activity, and that is the  
20 repairing of vessels -- the unseaworthy --

21 QUESTION: And that was the case in Robins too,  
22 wasn't it?

23 MR. O'DONNELL: Yes.

24 QUESTION: You cited Robins a moment ago. Is  
25 there any -- is there any -- with respect to the concept

1 of land-based, is there any distinction between Robins and  
2 this?

3 MR. O'DONNELL: I would submit not. He was  
4 involved in the same activity, and he was injured in that  
5 activity, and the Court recognized he had a general  
6 maritime cause of action for negligence. So we do rely on  
7 Robins, and the only distinction I can find in that is  
8 that it was an injury versus a death case.

9 QUESTION: Well, why isn't that something that  
10 the Court should now respect, even if it made no sense but  
11 it was -- it emerges from the English common law, that  
12 there was no common law action for wrongful death, and now  
13 we have DOHSA and we have the possibility of picking up  
14 State wrongful death acts for watery deaths.

15 Why couldn't one say, even if it made no sense,  
16 this distinction between surviving injury and death? Now  
17 the field is so occupied by statutes -- State wrongful  
18 death statutes, DOHSA for death on the high seas -- that  
19 the Court ought to stay out of it and leave it all to  
20 legislation.

21 MR. O'DONNELL: I think what exists under a view  
22 that Moragne does not extend to negligence-based wrongful  
23 death is a gap in the Federal remedy scheme in which the  
24 maritime duty to not negligently kill someone has no  
25 corresponding Federal maritime remedy unless Moragne is

1 interpreted as extending such a remedy.

2 QUESTION: Well, when you say gap, that just  
3 means a situation unfavorable to the plaintiff in your  
4 view, I take it.

5 MR. O'DONNELL: Well, it's a gap in that the  
6 Federal law does not permit it, but in this instance and  
7 in other instances, what it will mean is that State law,  
8 State law which incorporate principles which are directly  
9 contrary to Federal maritime principles would govern, and  
10 they would deny the remedy, and we would submit that in  
11 that instance --

12 QUESTION: Well, you say they're directly  
13 contrary. What do you mean by that?

14 MR. O'DONNELL: Well, for instance in Virginia,  
15 the Virginia statutory employer statute says that in these  
16 circumstances, Norshipco would be immune from suit whereas  
17 the Federal statutory employer statute would reach the  
18 exact opposite result. In addition, you have the State of  
19 Virginia having a contributory negligence bar --

20 QUESTION: So the State of Virginia law grants  
21 more immunity to employers -- what, subcontractors -- than  
22 the Federal law does? Because certainly a longshoreman  
23 can't sue his employer under the Federal --

24 MR. O'DONNELL: That's correct. And he was not  
25 employed by Norshipco; he was employed by a subcontractor.

1 But under Federal law, unless Norshipco actually paid the  
2 benefits, they do not receive statutory --

3 QUESTION: Okay, so you have two different  
4 systems, and you know, if you're out at sea there's no  
5 doubt the maritime law. But why when you've got a  
6 situation that's all land-based actors, why shouldn't the  
7 State system prevail?

8 MR. O'DONNELL: Well, we would submit that first  
9 of all there's a presumption that where Federal maritime  
10 jurisdiction exists, Federal maritime law ought to apply.  
11 We would also submit that in this very instance, the  
12 Robins case would hold that maritime law ought to apply.  
13 We would also say that the need for uniformity in the  
14 administration of maritime law counsels in favor of  
15 applying the Federal standards.

16 QUESTION: Well, but you get to a point,  
17 certainly, where you have to pick up some parts of the  
18 various state regimes.

19 MR. O'DONNELL: Well, if this Court recognizes a  
20 Moragne negligence-based wrongful death action, I'm not  
21 sure that's entirely true. I think what would happen in  
22 those instances -- and what we are asking for is just that  
23 -- we are not, as Mr. Ferrini suggested, arguing that all  
24 State law should be preempted within State territorial  
25 waters.

1                   QUESTION: Well, if you're going to get a  
2 wrongful death cause of action, you're going to have to  
3 turn to State law to decide who the beneficiaries are, are  
4 you not?

5                   MR. O'DONNELL: Well, perhaps with regard to --  
6 to simply deciding the beneficiaries, but not the  
7 liability.

8                   QUESTION: Well, then, you say simply deciding.  
9 You couldn't proceed without some scheme for deciding who  
10 the beneficiaries are, could you?

11                  MR. O'DONNELL: Not in ultimately giving out the  
12 remedies. That's true. But the fundamental liability  
13 standards, we submit, must be governed by Federal maritime  
14 law to preserve uniformity, and for that reason we think  
15 that applying the State standard would get the Court  
16 right, and the lower courts, right back into the Tungus  
17 mess, whereas the Court is, the lower courts now have to  
18 analyze every aspect of the State law in order to  
19 determine which it would apply.

20                  I know, the Tungus would say you apply  
21 everything at whole, but on remand in the Yamaha case, the  
22 third circuit said we're not going to --I don't think they  
23 overruled the Tungus, but they suggested another course of  
24 activity was to apply the Federal liability standards, and  
25 that same course was filed in the Amtrak --

1                   QUESTION:  But that's the -- the question we  
2 were given in Yamaha was does the State wrongful death act  
3 apply?  There was nothing about -- there wasn't a claim  
4 before us under Federal maritime law.  The question was  
5 whether you could apply the State wrongful death act.  I  
6 take it what you're telling us is that Mr. Ferrini was  
7 right when he said if you prevail, that there is a Federal  
8 maritime law claim for wrongful death, then there is no  
9 longer the claim that this Court thought was a viable one  
10 in Yamaha, that is, a wholly State-based wrongful death  
11 claim.

12                   MR. O'DONNELL:  We are -- that is not our fight,  
13 Your Honor.  We are asking for the Moragne -- we are not  
14 saying that if you adopt the Moragne, you necessarily  
15 preempt state --

16                   QUESTION:  What I am asking you is a precedent  
17 out there you are urging that we hold for you?  It would  
18 be, I think, quite inexplicable if we didn't say where  
19 Yamaha stands in light of the holding in your favor if we  
20 were to rule for you.

21                   MR. O'DONNELL:  We don't think a ruling  
22 recognizing a Moragne negligence-based cause of action  
23 would infringe on Yamaha.  Yamaha --

24                   QUESTION:  Well, Mr. O'Donnell, didn't Robins,  
25 which you rely on, go on to say that if it is a maritime

1 suit here, then it could not be enlarged or impaired by  
2 State statute or State law? It indicated that was it.  
3 Then you just look to the maritime.

4 MR. O'DONNELL: Yes, Your Honor. The maritime  
5 action itself -- what I thought I was being asked by  
6 Justice Ginsburg was whether or not that precluded the  
7 application of State wrongful death statutes. I would  
8 submit that --

9 QUESTION: In addition to.

10 MR. O'DONNELL: In addition to. The Court in  
11 Yamaha used the term seafarer to describe those  
12 individuals who may not have access to State wrongful  
13 death statutes. It's unclear from my reading of Yamaha  
14 just who is and who isn't a seafarer.

15 QUESTION: So you want to give them both, in  
16 other words. What do you think about Mr. Ferrini's  
17 argument, as I understand it, going back to the question  
18 that you were discussing with the Chief Justice?

19 His point I think, if I understood it, is that  
20 look, I agree -- imagining he's making this argument -- I  
21 agree with you if a seaman is involved, you need a uniform  
22 admiralty law. If the seaworthiness of the vessel is  
23 involved, you need a uniform admiralty law. If a sea owner  
24 is involved, you need a uniform admiralty law. But in the  
25 absence of those things, the word uniformity has no

1 reason.

2           And, moreover, here we're talking about a local  
3 person in a harbor, local circumstances, and so local law  
4 should prevail. And when you come back and say, well,  
5 isn't that equally true of injury, he says yes. But even  
6 if we've decided the opposite in respect to injury, let's  
7 not make matters worse. And here he would say -- I guess,  
8 or I thought I heard him say -- that this particular  
9 wrongful death statute is more local yet, because it is  
10 not the injured person's personal statute. It belongs to  
11 the survivors. They're the ones who are suing, and they  
12 are local people, and that's unlike a personal injury  
13 action.

14           And, indeed, you in fact have to pick up State law  
15 anyway, I've heard, in order to find out who those  
16 survivors are who are going to be able to sue. So he says  
17 this is even more local than the injury action and,  
18 besides, don't make matters worse.

19           Now, I'm trying to paraphrase; I don't know if  
20 I've got it right, but if -- I'm trying to make it as  
21 strong as I can in my mind. Now I want to hear your  
22 response.

23           MR. O'DONNELL: Well, my response comes back to  
24 the activity that he was involved in, and it not being a  
25 purely local --

1                   QUESTION: No, no, it's absolutely on a ship.  
2     It's definitely an activity on a ship, but so what? I  
3     mean, what's the interest there? I mean, anything on a  
4     ship then you win by definition, but his point is, you  
5     see, that just being on a ship is not enough.

6                   MR. O'DONNELL: Well, he used the example where  
7     someone other than a ship -- a crew member drops the  
8     banana peel, and that would not be a maritime matter.  
9     Here Your Honor has mentioned unseaworthiness, and vessel  
10    maintenance, vessel repair goes to the very heart of what  
11    I --

12                  QUESTION: I was really looking for an answer in  
13    terms of precedent, or in terms of what Justice Ginsburg  
14    is talking about, or whether or not Moragne in fact did  
15    involve -- did it? a question of personal injury for  
16    negligence as applied to a longshoreman, or did it? I'm  
17    really looking for an answer. Is he really asking us to  
18    back up too far, or what is the precedent on it? Did  
19    Moragne decide this question for a longshoreman as to  
20    injury?

21                  MR. O'DONNELL: We --

22                  QUESTION: Well, you say what you want to say. I  
23    want to hear your answer.

24                  MR. O'DONNELL: We contend that Moragne, when it  
25    referenced maritime duties in the plural, it meant to

1 incorporate and encompass negligence-based wrongful death  
2 actions. And we think --

3 QUESTION: But that case itself involved an  
4 unseaworthiness claim, not a negligence claim.

5 MR. O'DONNELL: Absolutely, Justice Ginsburg. It  
6 dealt with an unseaworthiness claim. That is correct.

7 QUESTION: And a vessel owner.

8 MR. O'DONNELL: And a vessel owner.

9 QUESTION: Right.

10 MR. O'DONNELL: And I'll keep coming back to the  
11 Robins Dry Dock where again that distinction was not made.  
12 The vessel -- a special subcategory called vessel  
13 negligence was not relied on.

14 QUESTION: Mr. O'Donnell, I hope that you will  
15 complete the answer to my question which I think you  
16 hadn't yet answered. I didn't think your answer was as  
17 clear as the one Justice Breyer gave you which was --  
18 yeah, you have, your argument is now that we take away the  
19 limitations that Moragne is just unseaworthiness; it  
20 applies to negligence as well; then we have Yamaha which  
21 means that anyone in the situation of Mr. Garris or his  
22 survivors has a choice between the state remedy or the  
23 Federal remedy. It's not one or the other. That's what  
24 Justice Breyer said was your answer, but I'm not sure it  
25 was.

1 MR. O'DONNELL: Well, I'm not arguing that if  
2 you recognize a negligence-based Moragne cause of action,  
3 you have swept the field of state wrongful death statutes.  
4 That is not our position. Our position is the elements of  
5 uniformity and to fill this -- the fact that there is a  
6 Federal duty with no corresponding remedy, those issues  
7 counsel in favor of recognizing a Moragne negligence  
8 action, but it doesn't. We are not arguing here  
9 preemption.

10 QUESTION: I know you're not arguing it, but  
11 it's something I have to worry about. To be specific, I  
12 would worry if in addition to all of Mr. Ferrini's  
13 arguments, my deciding you are right in this case means  
14 I've wiped out all the wrongful death actions belonging to  
15 States that somebody who was injured on a ship might  
16 otherwise have. I would worry about that. So I would  
17 like you to either get rid of my worry or confirm my  
18 worry.

19 MR. O'DONNELL: Well, I'm not sure where your  
20 worry springs from.

21 QUESTION: It springs from that just -- maybe I  
22 may not have understood it, but I thought what we were  
23 talking about was the possibility that if you have a  
24 Federal action in the area, you no longer can have the  
25 State action. So maybe it's so far off you're just going

1 to dispose of my worry in a sentence, so do it.

2 MR. O'DONNELL: No, Your Honor. But the state  
3 law may continue to apply. What you've done by creating  
4 the Moragne cause of action is you've gotten rid of that  
5 problem that the lower courts had to deal with in which  
6 they were trying to determine what aspects of State law  
7 they could apply, and which were violative of Federal  
8 maritime principles.

9 I think you've actually cleaned up a problem as  
10 opposed to creating a new one. I don't see the answer to  
11 our request being incompatible with the continuation of  
12 State wrongful death statutes in territorial waters.

13 QUESTION: What was the reason why there was no  
14 State law avenue of recovery here? Because of the  
15 Longshore Harbor Workers' Compensation Act being the  
16 exclusive remedy by reason of Virginia law, or am I wrong  
17 about that?

18 MR. O'DONNELL: No. Our state wrongful death  
19 action would have been met with the application of the  
20 Virginia statutory employer bar.

21 QUESTION: But did the statutory employer bar in  
22 turn depend on the Longshore Harbor Workers' Compensation  
23 Act coverage, or some other --

24 MR. O'DONNELL: No, there are two separate  
25 statutory employer bars -- the Virginia and then the

1 Longshoremen.

2 QUESTION: Yes.

3 MR. O'DONNELL: And if we -- and the Fourth  
4 Circuit in Alumax decided that if you're bringing your  
5 action under the State wrongful death statute, then the  
6 State statutory employer bar applies, and you are -- and  
7 we would have been out of court.

8 QUESTION: Why did the employer -- the state  
9 employer bar apply in this case?

10 MR. O'DONNELL: Why would it apply in the  
11 Federal case?

12 QUESTION: Yeah. Why was the employer entitled  
13 to invoke the bar under Virginia law?

14 MR. O'DONNELL: Because that, unlike the  
15 Longshoremen Harbor Worker bar, the -- Norshipco --  
16 there's no prohibition on Norshipco using that bar even  
17 though it didn't actually pay any benefits. It says if  
18 you're in the --

19 QUESTION: Were the benefits paid under the  
20 Longshore Act?

21 MR. O'DONNELL: Yes.

22 QUESTION: So there is, then, a Federal act  
23 which basically ultimately is the reason for there being  
24 no liability here. There is a Virginia State bar, but the  
25 Virginia State bar depends upon payment of premiums by the

1 subsidiary corporation under the Longshore Harbor Workers'  
2 Compensation Act.

3 MR. O'DONNELL: No. The Virginia act has no --  
4 has no corresponding limit that limits it because you paid  
5 the benefits.

6 QUESTION: But you paid the benefits under a  
7 Federal act, or am I wrong?

8 MR. O'DONNELL: They were paid under a Federal  
9 act.

10 QUESTION: All right. So ultimately it is a  
11 Federal act that is the reason you have a bar.

12 MR. O'DONNELL: No, because the Virginia bar  
13 would apply whether or not he received funeral benefits  
14 under the Federal act.

15 QUESTION: Well, I'll think about it. I still  
16 think ultimately -- I'm trying to help you. I think that  
17 ultimately there's -- it's, ultimately it's the existence  
18 of the Longshore Harbor Workers' Compensation Act, and the  
19 benefits payments that were made by the subsidiary, that  
20 invokes the bar, or am I wrong about that?

21 MR. O'DONNELL: That would not -- that's -- I  
22 believe that's irrelevant to the application of the state  
23 bar. It's only relevant to the application of the  
24 Longshoremen Harbor Worker Act Bar. In other words, if  
25 you -- if you actually pay the benefits under the

1 Longshoremen bar, you receive the immunity. Under the  
2 state there's no similar limitation.

3 QUESTION: Well, what is the State bar? Explain  
4 it. What is the State law in Virginia?

5 MR. O'DONNELL: If you are the -- if you're in  
6 the status of prime contractor and your subcontractor has  
7 employees who are injured, you are considered their  
8 statutory employer under Virginia law. It's much --  
9 there's no exception to it as there is under --

10 QUESTION: And because your subsidiary paid  
11 benefits under the -- and is covered by the Federal -- by  
12 the Longshore Harbor Workers' Compensation Act, you are  
13 entitled to invoke the State bar.

14 MR. O'DONNELL: Where I'm having trouble,  
15 Justice Kennedy, is that --

16 QUESTION: You may be having trouble because I'm  
17 wrong, but I -- I don't know -- I don't know what it is  
18 that the subsidiary employer did that it operated to allow  
19 the parent to invoke the state bar, if it were not payment  
20 of Longshore Harbor Workers' Compensation benefits.

21 MR. O'DONNELL: What I'm -- what I'm -- what I'm  
22 saying is that the payment -- let's assume there was no  
23 payments made to anyone. Norshipco would still have in  
24 the State wrongful death action -- they fall under the  
25 definition of statutory employer and would therefore be

1 able to claim that defense. The fact that they were paid  
2 under the Federal statute doesn't affect that defense in  
3 State law, in the state wrongful death action.

4 QUESTION: All right. Thank you.

5 QUESTION: Would you go back to Robins. You  
6 pointed out in your argument a second ago that the Court  
7 in Robins had made the remark that negligence in the  
8 course of this kind of repair work is not a matter of  
9 purely local concern, that it was properly maritime.

10 Has there been any litigation -- and sorry, and  
11 what I further assume to be the case is that the cause of  
12 action that Robins recognized if it were to have a  
13 counterpart, it had a parallel in state law because Robins  
14 didn't say it was a purely maritime issue. And so Robins,  
15 as I understand it, left State law wherever it might be,  
16 and I presume there would have been a State law negligence  
17 action as well.

18 Two questions: Am I right in that assumption  
19 that there was a State law negligence action parallel to  
20 what we recognized in Robins? And if the answer is yes,  
21 can you tell me whether there has been any litigation in  
22 the ensuing sixty years, I guess, on the issue of whether  
23 the state law action may continue to be recognized in the  
24 light of the fact that there is also a Federal cause of  
25 action?

1 MR. O'DONNELL: Well, it's -- I would concede  
2 it's a confusing area. I don't know if there is any case  
3 that -- first of all, with regard to Robins, I don't read  
4 Robins as preempting State wrongful death statutes  
5 generally. There is language in there about where State  
6 law contradicts some fundamental feature of admiralty law,  
7 and so there is some of that. But I don't think the court  
8 went on -- the court concluded the Federal maritime law  
9 cause of action was to be the action because Federal  
10 maritime jurisdiction existed.

11 QUESTION: Well, that was the only claim before  
12 it, wasn't it, in Robins?

13 MR. O'DONNELL: Yes, yes.

14 QUESTION: Okay. So they said we recognize the  
15 federal maritime claim. Now, is it clear that there was a  
16 parallel State law claim, and there was some kind of a  
17 State law claim for negligence which could also have been  
18 brought on the same facts. Is that correct?

19 MR. O'DONNELL: Yes, and that's why the court  
20 discussed the difference between the two laws.

21 QUESTION: All right. And any litigation  
22 subsequent to that as to whether the state law claim  
23 survives in whole or in part the recognition in Robins of  
24 the maritime claim.

25 MR. O'DONNELL: Well, in the Amtrak train crash

1 litigation, the Court goes through an analysis in which it  
2 looks at the Federal -- the aspects and characteristics of  
3 the state wrongful death statute and concludes that  
4 because there's maritime jurisdiction, those rules cannot  
5 apply because they're directly contrary --

6 QUESTION: Conflict case, then.

7 MR. O'DONNELL: Yeah, it's a conflict case.

8 QUESTION: Okay. In a non-conflict situation,  
9 in other words, a kind of field preemption situation, you  
10 know, in a common law context, any litigation on that?

11 MR. O'DONNELL: I'm not aware of anything except  
12 -- and as Justice Ginsburg points out, Yamaha did not  
13 precisely deal with this issue of negligence, but in  
14 Yamaha, I don't read any suggestion that the existence of  
15 the Moragne cause of action somehow -- the existence --  
16 the Court seems to assume the existence of a negligence  
17 Moragne-based cause of action, else there's nothing for -  
18 -- there's nothing there to displace the state law to  
19 begin with. So there's an implicit assumption in Yamaha  
20 that it did.

21 QUESTION: The Yamaha said if, assuming there  
22 were a Federal claim, would that preclude a State claim,  
23 and the answer was no, it wouldn't. But that's why I was  
24 surprised at your answer is that, well, maybe it would.

25 MR. O'DONNELL: Well, I meant to only talk in

1 terms of where you have these conflicts with the Federal  
2 law that currently exists. My position is --

3 QUESTION: Well, all right. There certainly  
4 would be a claim in any state that was more generous than  
5 Federal law that there was a conflict, so it looks like my  
6 concern -- you win your case in this situation where the  
7 laws --

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
9 O'Donnell. The case is submitted.

10 (Whereupon, at 12:02 p.m., the case in the  
11 above-entitled matter was submitted.)

12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25