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Admiralty - Wrongful Death - The Harrisburg Overruled

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CURRENT LEGISLATION AND DECISIONS

NOTES

Admiralty — Wrongful Death — *The Harrisburg* Overruled

The petitioner's decedent, a longshoreman, was killed by a falling hatch team while working on board a vessel anchored in the territorial waters of Florida. The petitioner, as the decedent's widow and representative of his personal estate, filed a complaint in state court against the owner of the vessel, alleging that a defective locking arrangement caused the hatch beam to become disengaged from its position, thus striking and instantly killing the decedent. The claim was brought under the Florida Wrongful death Act[1] and was predicated on two theories: (1) the alleged negligence of the shipowner in failing to keep the vessel's equipment in a reasonably safe condition; and (2) the maritime concept of unseaworthiness, which imposes upon a shipowner the absolute, continuing and nondelegable duty[2] to provide employed seamen, including longshoremen,[3] with a ship, equipment and crew which are reasonably fit for their intended use.[4] On removal to the United States district court the allegations relating to unseaworthiness were dismissed on the ground that the Florida wrongful death statute did not encompass that concept as a basis of liability. The court of appeals affirmed an interlocutory appeal after receiving a negative answer from the Florida Supreme Court concerning the issue of unseaworthiness.[5] The United States Supreme Court granted the petitioner's writ of certiorari.[6]

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[1] The claim was filed individually under the Florida Wrongful Death Act, FLA. STAT. ANN. § 768.01 (1965), and as personal representative of her deceased husband's estate for the recovery of damages for his pain and suffering prior to death under the Florida Survival Act, FLA. STAT. ANN. § 45.11 (1965). For cases distinguishing survival statutes from wrongful death statutes, see Curtis v. A. Garcia y Cia., 241 F.2d 30 (3d Cir. 1957); The Kaian Maru, 2 F.2d 121 (9th Cir. 1924), *discussed in* Vancouver S.S. Co. v. Rice, 288 U.S. 445 (1938); *see* Just v. Chambers, 213 U.S. 383 (1941) (state law providing for survival of action for personal injuries is applicable in a proceeding in admiralty involving claims against the shipowner for personal injuries received on a ship cruising within the territorial limits of the state). *See generally* Comment, *The Application of State Survival Statutes in Maritime Causes*, 60 COL. L. REV. 534 (1950).

[2] Lowe v. Vessel Madrid, 210 F. Supp. 826 (D.C. Fla. 1962).

[3] *Id. See also* Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); *and see* Alaska S.S. Co. v. Petterson, 347 U.S. 396 (1954); Rogers v. United States Lines, 347 U.S. 984 (1954) (per curiam).

[4] The shipowner's duty does not require him to provide an "accident free" ship; he is under a duty "only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness, not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service." Mitchell v. Travel Racer, Inc., 362 U.S. 539, 549-50 (1960); *accord* Mills v. Mitsubishi Shipping Co., 358 F.2d 609 (5th Cir. 1966).

[5] Moragne v. States Marine Lines, Inc., 211 So. 2d 161 (Fla. Sup. Ct. 1968). The district court was affirmed in 409 F.2d 32 (5th Cir. 1969).

[6] 396 U.S. 900 (1969).

Held, reversed and remanded: the general maritime law provides a right to recover for death caused by violation of maritime duties, notwithstanding whether the action accords with the terms of the local wrongful death statute as interpreted by the courts of the state. The rule established by *The Harrisburg*[7] that there is no such action in maritime cases apart from statute, "dubious even when rendered," is now an "unjustifiable anomaly" that should no longer be regarded as acceptable law.[8] *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

I. The Special Problem of Maritime Wrongful Death

A. *The Problem*

One of the difficult questions concerning the interrelationship of federal and state law has been the application of substantive law to provide a remedy for a maritime tort resulting in death.[9] Historically, courts have held that the constraints of the federal system require that if a state provides a remedy for tortious death which is not in conflict with the maritime law, the appropriate court should enforce that right as it is defined and limited by the state.[10] Directly opposing this state-nation relationship, on the other hand, is the frequently asserted proposition that the constitutional grant to the federal courts of the judicial power in admiralty[11] includes the idea that not only is the federal law supreme over any application of state law in cases where the general maritime law applies,[12] but also that the maritime law should uniformily be applied.[13] The leading cases on the subject is *Southern Pac. Co. v. Jensen*,[14] where the United States Supreme Court held that the Constitution precluded the application of a state workmen's compensation statute to an action arising out of the death of a stevedore killed while working on a vessel within a state's territorial waters. The test used by the Court was that such a statute cannot be applied if it "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations."[15] The problem, of course, has been that heretofore when death resulted from a wrongful act committed within state territorial waters the maritime law has been held not to be applicable.[16] This is so even though maritime law *is* applicable and provides a remedy in situations where for example the tort occurs on the high seas[17] or involves a seaman where death results

[7] 119 U.S. 199 (1886).

[8] 398 U.S. at 378.

[9] *See generally* Day, *Maritime Wrongful Death and Survival Recovery: The need for Legislative Reform*, 64 COLUM. L. REV. 648 (1964). For a critical discussion, see Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259 (1950).

[10] Levinson v. Deupree, 345 U.S. 648 (1953).

[11] U.S. CONST. art. III, § 2.

[12] The Lottawanna, 88 U.S. (21 Wall.) 558 (1874).

[13] *See, e.g.*, Day, *supra* note 9; Stevens, *Erie R.R. v. Tompkins and the Uniform General Maritime Law*, 64 HARV. L. REV. 246 (1950).

[14] 244 U.S. 205 (1917).

[15] *Id.* at 216.

[16] The Tungus v. Skovgaard, 358 U.S. 588 (1959); The Harrisburg, 119 U.S. 199 (1886).

[17] 46 U.S.C. § 761 (1920).

from negligence.[18] These remedies are legislative, however, and Congress has chosen not to legislate within the state's three-mile limit. As a result, the courts have looked to the state-created right, i.e., its wrongful death statute, in deference to the doctrine that since such stautes are remedial, judicial legislaion should be left to the state.[19] Furthermore, unlike the supremacy doctrine, maritime uniformity is not an end to itself, the rationale being that judicial creation of federal law merely for the sake of uniformity might undercut such constraints of federalism as providing local solutions to peculiarly local problems or where state law affords maritime reform, and judicial legislation is held to be proper.[20] Thus, in cases where there is conflict between state law and federal interests of uniformity the Supreme Court has balanced these interests in maritime wrongful death situations and held that the benefits provided by local solution have outweighed the need for a federal rule.[21] Nevertheless, the use of state wrongful death legislation in maritime cases has been subject to increasing attack as producing anomolous situations which are justified neither by constitutional dangers inherent in federal interference with state policy nor by state equitable considerations of sacrificing federal law in favor of state-by-state solutions. More specifically, situations involving those persons for whom the maritime laws was designed to protect are illustrative of an uncertainty inherent in applying state remedial law which can be criticized as undermining *all* considerations of equity.

Nonseamen. In cases involving nonseamen who were merely injured within the territorial waters of a state, both state and federal courts have applied the maritime law, since the scope *and* limitations of recovery for tortious *injury* is defined by the maritime law and therefore excludes any definition by state law.[22] If the injured victim later died, however, courts applied state law, because the maritime law did not define recovery for wrongful death.[23] The criticism directed to this type of situation is that identical conduct violating federal law produced liability if the victim was only injured, but frequently not if he was killed. The result is said to be hardly consistant with equitable principles which demand that conduct be adjudged the same in similar situations.[24] Moreover, the common law rule of contributory negligence is a complete bar to recovery and is thus applied in

[18] 46 U.S.C. § 688 (1915). For a discussion of the application of this Act, see Stumberg, *The Jones Act: Remedies of Seamen*, 17 OHIO ST. L.J. 484 (1956).

[19] *See* The Tungus v. Skovgaard, 358 U.S. 588, 597 (1959) (concurring opinion).

[20] Note, *The Federal Common Law*, 82 HARV. L. REV. 1512, 1517 (1969); *see also* Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

[21] Hess v. United States, 361 U.S. 314 (1960).

[22] Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953).

[23] *See, e.g.*, The Tungus v. Skovgaard, 358 U.S. 588 (1959); Hess v. United States, 361 U.S. 314 (1960); Goett v. Union Carbide, 361 U.S. 340 (1960).

[24] The strongest criticism in this area has come for the United States Court of Appeals for the Fifth Circuit. For example, in Kenny v. Trinidad Corp., 349 F.2d 832 (5th Cir. 1965), the court affirmed the "*strange* principle that the substantive rules of law governing human conduct in regard to maritime torts vary in their origin depending on whether the conduct gives rise to fatal or non-fatal injury." *Id.* at 834 n.3 *quoting Mr. Justice Brennan in* The Tungus v. Skovgaard, 358 U.S. 588, 611 (1959) (dissenting opinion) [Emphasis added.]. In an addedum opinion the court pled for the overruling either by legislative act or by decision of "[t]his vagary in the law . . . ." *Id.* at 840.

local maritime wrongful death actions.[25] In cases where *no* death resulted, however contributory negligence has had no application, the maritime rule of comparative damages controlling the question of the amount of recovery.[26] Thus, identical torts measured against even the "slightest" negligence of the deceased have frequently allowed or disallowed recovery, dependent not upon principles of uniformity and maritime supremacy, but rather upon the forum state in which the suit was brought and local statute construction.[27]

Seamen. A converse situation, but identical in result, has arisen in those cases where state legislation has allowed recovery for death of a seaman caused by unseaworthiness of the vessel. Identical breaches of the duty to provide a seaworthy ship have produced liability for the death of a crew member when he was protected by the Death on the High Seas Act[28] or the death of a longshoreman when protected by state statute,[29] but barred recovery if the crew member was killed on state territorial waters, since by the operation of the Jones Act,[30] the concept of unseaworthiness is not available as a remedy for wrongful death and as such supersedes state legislation to the contrary.[31] Therefore, by holding that the maritime law has no application to such an action, the courts have refused to grant a remedy to those persons for whom the doctrine of unseaworthiness was intended[32] and, at the same time, have granted recovery for death caused by unseaworthiness to those persons for whom the doctrine was extended only because they perform work traditionally done by seamen.[33]

B. *The Source of the Problem*

The maritime rule denying the existence of wrongful death recovery arose out of the common law rule that a civil action does not lie for damages suffered due to the wrongful death of another. In the absence of a specific statute the right of action for the injury dies with the deceased.[34]

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[25] For a listing of the cases, see 25 C.J.S. DEATH § 46b at 1141; 16 AM. JUR. DEATH §§ 130-31 at 88-9.

[26] The Max Morris, 137 U.S. 1 (1890); *accord* Ahlgren v. Red Star Towing Co., 214 F.2d 618 (2d Cir. 1954).

[27] *See generally* Kolius & Cecil, *Maritime Torts Resulting in Death in State Territorial Waters*, 26 INS. COUNSEL J. 567 (1959).

[28] *See, e.g.*, Vessel Judith Lee Rose, Inc. v. Chermesino, 211 F. Supp. 36 (D. Mass. 1962), *aff'd* 317 F.2d 927 (1st Cir. 1963); Maryland v. Weyerhaeuser S.S. Co., 176 F. Supp. 664, 667 (D. Md. 1959) (dictum).

[29] The Tungus v. Skovgaard, 357 U.S. 588 (1959).

[30] 46 U.S.C. § 688 (1958).

[31] Gillespie v. United States Steel Corp., 379 U.S. 148 (1964); Lindgren v. United States, 281 U.S. 38 (1930).

[32] *Id.*

[33] The Tungus v. Skovgaard, 358 U.S. 588 (1959).

[34] The rule at common law that no recovery was available for wrongful death emerged in Higgins v. Butcher, 89 Yelv., 18 Noy (1607). In that case the plaintiff's decedent was denied recovery in trespass for the assault of his decedent for two reasons. First, it was held that the maxim *actio personalsi moritor cum persona* prevented recovery to the plaintiff as *representative* of the deceased. Second, if the plaintiff had brought an action for an injury to himself, the concept that the assault was a felony which could only be punished by the king through a criminal process barred recovery because the civil trespass was thus merged with the felony. In the case of Baker v. Bolton, 1 Camp. 493, 170 Eng. Rep. 1033 (K.B. 1803), Lord Ellenborough, sitting at *Nisi Prius*, declared that "[I]n a civil Court, the death of a human being could not be complained of as an injury;

With the passenge of Lord Campbell's Act[35] in 1846, however, a substantive common law right to sue was given to designated survivors, and became an exception to the common law wrongful death rule which was immediately adopted by legislation in American states.[36] Furthermore, even though Lord Campbell's Act did not of itself apply to admiralty,[37] early cases included the exception within the maritime jurisdiction, reasoning that once the right was given, it should be recognized and compensated by the maritime law as well as by statute.[38] The Supreme Court, however, overruled this proposition in *The Harrisburg*,[39] a case in which the state law barred prosecution of a wrongful death action because of the limitation period expressed in the local wrongful death statute. In dismissing the action on the ground that maritime law was not applicable the Court purportedly overruled cases to the contrary by stating:

> The argument everywhere in support of such suits in admiralty has been, not that the maritime law, as actually administered in common law countries, is different from the common law in this particular, but that the common law is not founded on good reason, and is contrary to natural equity and the general principles of law.[40]

The Court concluded that, while some countries gave a right of recovery for wrongful death, "the maritime law . . . leaves the matter untouched . . . ." and it was the "duty of the courts to declare the law, not to make it."[41] This language implied that the maritime law could not grant greater rights for tortious death than were available at common law, a proposition that the lower courts were quick to adopt in permitting the *states* to grant recovery.[42] With regard to seamen, however, the adoption of state remedies presented difficult problems in attempts to determine the

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and in this case the damages, as to the plaintiff's wife, must stop with the period of her existence." An analysis of the facts in that case shows, however, that no possible felony could have been involved, as the plaintiff and his wife were *negligently* thrown from a carriage in which they were riding. Furthermore, strictly speaking, the maxim *actio personalis moritor cum persona* would not have applied as Lord Ellenborough himself discusses the question of damages for loss of services. It has been suggested, therefore, that the confuion which surrounded *Bolton* resulted in the application of the maxim to *all* subsequent actions for wrongful death rather than those brought soley for injuries which were personal to the decedent (to which the maxim properly applies). Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 L.Q. REV. 431 (1916); Comment, *Judicial Expansion of Remedies for Wrongful Death in Admiralty: a Proposal*, 49 BOSTON L. REV. 114 (1969).

[35] The Fatal Accidents Act, 9 & 10 Vict., c. 93 § 1-6 (1846):

> Whensoever the death of a person shall be caused by wrongful act, neglect, or default is such as would (if death had not ensued) have entitled the party to maintain an action and recovery damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amounts in law to a felony.

[36] See PROSSER, TORTS § 105 (2d ed. 1955).

[37] *See* DeLovio v. Boit, 7 Fed. Cas. 418 (No. 37716) (C.C.D. Mass. 1815); GILMORE & BLACK, THE LAW OF ADMIRALTY §§ 1-1 to 1-19 (1957). *See also* Loing, *Historic Origins of Admiralty Jurisdiction in England*, 45 MICH. L. REV. 163 (1946).

[38] The Garland, 5 F. 924 (E.D. Mich. 1881); *cf.* The E.B. Ward, Jr., 17 F. 456 (C.C.E.D. La. 1883).

[39] 119 U.S. 199 (1886).

[40] *Id.* at 213; *compare* The Highland Light, 12 Fed. Cas. 138 (No. 6,477) (C.C.D. Md. 1867) (right to compensation for wrongful death is a natural right).

[41] 119 U.S. at 213.

[42] *See, e.g.*, Warren v. Morse Dry Dock & Repair Co., 235 N.Y. 445, 139 N.E. 569 (1928), *cert. denied*, 262 U.S. 756 (1929).

applicable substantive law in cases involving death on the high seas or in a state other than the one in which the vessel was registered.[43] Additional problems were created by the Supreme Court case of *The Osceola*[44] which held that the general maritime law did not recognize the existence of a right to recover against an employer under the doctrine of respondeat superior, thus limiting any recovery to the maritime concept of unseaworthiness.[45]

C. *Attempted Solutions*

To meet the above problems and to mitigate the effect of both *The Harrisburg* and *The Osceola*, Congress enacted three statutes which are controlling in their areas.[46] By providing a negligence action for both fatal and nonfatal injuries of a seaman, the Jones Act[47] obviated the inconsistency of prohibiting compensatory damages for negligent injury under *The Osceola* and allowing damages for negligent death by using state-created rights of recovery under the rationale of *The Harrisburg*. Congress provided in the Death on the High Seas Act (DOHSA)[48] that certain classes of dependent survivors would have a remedy for a maritime tort resulting in death when caused by the "wrongful act, neglect or default" or another, and where death occurred more than one marine league from shore. Initially, this language was construed as encompassing only a negligence standard for recovery,[49] but the Supreme Court has since held that death due to unseaworthiness is permitted under that Act.[50] By express terms of the statute, however, the DOHSA has no application

[43] For a detailed analysis of the historical development, see Winfield, *Death as Affecting Liability in Tort*, 29 COLUM. L. REV. 239 (1929).

[44] 189 U.S. 158 (1903).

[45] The four propositions of the case are stated as follows:

> (1) that the vessel and her owners are liable, in case a seaman falls sick, or is wounded in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so far as the voyage is continued;
>
> (2) that the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship;
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> (3) that all the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure;
>
> (4) that the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or by accident.

Id. at 175. *See generally* Cunningham, *Respondeat Superior in Admiralty*, 19 HARV. L. REV. 445 (1906).

[46] Day, *supra* note 9, at 665-74.

[47] 41 Stat. 1007, 46 U.S.C. § 688 (1915):

> Any seamen who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law . . . and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seamen as a result of any such personal injury the personal representative of such seamen may maintain an action for damages at law . . . and in such actions all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable.

[48] 46 U.S.C. §§ 761-67 (1964).

[49] Bugden v. Trawler Cambridge, 319 Mass. 315, 65 N.E.2d 533 (1946).

[50] The Tungus v. Skovgaard, 358 U.S. 588 (1959).

for injuries resulting in death occurring within the state's territorial waters.

The Longshoremen's and Harborworker's Compensation Act[51] gave death benefits with attendant limited liability to survivors of those workers covered by the terms of the Act. It has further been held that harbor workers can recover from the ship's owner as a third-party defendant-tortfeasor and ,since that party is not the harbor worker's employer, the action is not barred by the terms of the Act.[52] Seamen, however, are not provided for in the Act, and thus have no third-party claim against the owner of the vessel since they are employed by that owner. Moreover, the Jones Act negligence standard for death recovery is the exclusive remedy against the seaman's employer, while those persons covered by the Longshoremen's and Harborworker's Compensation Act may recover for wrongful death caused by unseaworthiness when allowed by state statute.[53]

Congress, however, has not promulgated wrongful death legislation that answers the questions which arise concerning the availability of maritime doctrines when injuries result in death within the state's navigable waters.[54] Judicially, the Supreme Court has repeatedly insisted that the ability of the states to incorporate the maritime principles is a matter subject to state rather than federal control.[55] Insofar as state interest is concerned, the cases generally have suggested two reasons why both Congress and the Court have been hesitant to act. First, at least in regard to nonseamen, states have a stronger interest in providing remedies and duties which would apply to deaths occurring within their territorial waters, where most claimants would be citizens of the state applying the remedy.[56] More specifically, Mr. Justice Harlan has maintained that ". . . providing for the victim's family, and preventing pauperism by shifting what would otherwise be a public responsibility to those who committed the wrong . . . are matters intimately concerned with the state's interest in regulating familial relationships."[57] Second, application of state law fulfills a federal interest in giving damages for wrongful death without arbitrary formulations of beneficiary lists or damage limitations, the analogy being the application of state limitations to atcions in federal statutory cases.[58]

These considerations were examined by the Supreme Court in *The Tungus v. Skovgaard*,[59] a case involving the death of a maintenance foreman while on board a vessel within New Jersey territorial waters. The Jones Act was not available as a theory of recovery because the deceased was

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[51] 44 Stat. 1424, 33 U.S.C. § 901 (1927); *see generally* Stumberg, *Harbor Workers and Workmen's Compensation*, 7 TEX. L. REV. 197 (1929).

[52] Lindgren v. United States, 281 U.S. 38 (1930); *but see* Holland v. Steag, Inc., 143 F. Supp. 203 (D. Mass. 1956); Kernan v. American Dredging Co., 355 U.S. 426, 430 n.4 (1958) (dictum).

[53] *Id.*

[54] *See* S. REP. No. 3143, 91st Cong., 1st Sess. (1969); to date, no hearings have been scheduled on the bill.

[55] The Tungus v. Skovgaard, 358 U.S. 588 (1959); Hess v. United States, 361 U.S. 314 (1960).

[56] *See, e.g.*, The City of Norwalk, 55 F. 98 (S.D.N.Y. 1893).

[57] Hess v. United States, 361 U.S. 314, 332 (1960).

[58] Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80, 83 (2d Cir. 1961); *see also* Currie, *Federalism and Admiralty: "The Devil's Own Mess,"* I SUP. CT. REV. 158 (1960).

[59] 358 U.S. 588 (1959).

an employee of an independent contractor hired by the owner of the vessel to unload cargo. The DOHSA inapplicable because of the three-mile limitation. Further, the Longshoremen's and Harbor-worker's Act was utilized, but gave only limited recovery.[60] Thus, the clai mwas brought under the New Jersey Wrongful Death Act[61] on a theory of unseaworthiness. Although the majority upheld the appellate court's decision to allow recovery, relief was permitted only because it was decided that the state statute in question would have been construed to encompass such a remedy.[62] The dissenting Justices, on the other hand, argued that the state statute merely provided a remedy for enforcing a maritime duty, it therefore being immaterial whether the state courts would have granted relief.[63] The premise for the dissent's conclusion was that state wrongful death legislation should be enforced to further federal rather than state policy.[64] Nevertheless, this premise was rejected by the majority, as the lanugage in the opinion shows that state wrongful death statutes were applied in deference to *state* policy:

> The policy expressed by a State Legislature in enacting a wrongful death statute is not merely that death shall give rise to a right of recovery, nor even that tortious conduct resulting in death shall be actionable, but that damages shall be recoverable when conduct of a particular kind results in death. It is incumbent upon a court enforcing that policy to enforce it all; it may not pick or choose.[65]

The traditional position of the Court in *The Tungus* was reaffirmed in *Hess v. United States*[66] and a companion case, *Goett v. Union Carbide Corp.*,[67] but the further division of the Justices in those cases represented an enigma which suggested a growing concern for federal policy and the consequent overruling of *The Harrisburg's* rationale. In *Hess* the issue facing the Court was whether to apply a higher standard of care created by application of the state's wrongful death statute than would be the case under the maritime law. Although the majority upheld the constitutionality of the statute, the opinion left open the question whether a state wrongful death statute "might contain provisions so offensive to traditional principles of maritime law that the admiralty would decline to enforce them."[68] In *Goett* the Court remanded a wrongful death action to determine whether the state statute involved employed a maritime or local concept of negligence. Yet, four of the six Justices who comprised the majority in *Hess* joined in the opinion "solely under the compulsion of the Court's ruling in [*The Tungus*]" and reserved their positions whether

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[60] *Id.* at 589 n.4.

[61] N.J. STAT. ANN. § 2A:31-1 (1953).

[62] This aspect of the holding is questionable as there was no apparent authority for the circuit court's finding that the state statute in question allowed unseaworthiness as a basis for recovery. The Supreme Court affirmed on the basis that such a finding was not "clearly erroneous." 358 U.S. at 594.

[63] 358 U.S. at 597 (separate opinion).

[64] *Id.*

[65] *Id.* at 593.

[66] 361 U.S. 314 (1960).

[67] 361 U.S. 340 (1960).

[68] 361 U.S. 314, 320 (1960).

that decision should be overruled.[69] Mr. Justice Harlan in *Hess* reaffirmed the local interest doctrine, but dissented from the majority's conclusion that the statute was constitutional, reasoning that even hough the maritime law permited the state to create a right of action, it did not follow that the maritime law should permit a stricter standard to be applied.[70] Mr. Justice Harlan's position was unchanged in *Goett*,[71] but the dissenting opinions in that case demonstrate *support* of *The Tungus* to the same extent that the majority in *Hess* demonstrated *opposition* to that case.[72] Both opinions took the view that maritime law can be remedially supplemented by state wrongful death legislation, but state that the characteristic features of maritime law define the conditions and scope of the state remedy.[73] This result leads to the conclusion underlying *Moragne*: if it is desirable that the duties and liabilities of a shipowner for mere injury be determined by a uniform federal law, no reason appears why it is not equally desirable that his liability for death be uniform under federal law.

II. Moragne v. States Marine Lines, Inc.—The Judicial Solution

An analysis of *Moragne* is best accomplished by noting that the petitioner's theory of recovery for death caused by an unseaworthy vessel is precisely the same as the theory advanced in *The Tungus*. Assuming that both petitioners had provable claims, under the doctrine of *The Harrisburg* the same breach of the duty to provide a seaworthy ship would have led to completely opposite results. In *The Tungus* the petitioner was allowed recovery because it was held that the New Jersey wrongful death statute encompassed unseaworthiness as a basis of liability. In *Moragne*, however, it was determined both by the state court and on appeal that the Florida wrongful death statute did not encompass such a claim.[74] Thus, applying the rationale that the maritime law must look to the local wrongful death remedy, *The Tungus* petitioner recovered, while the *Moragne* petitioner was remediless, even though the same conduct would have produced liability in both cases ha dthe decedent survived his injuries.

In *Moragne*, however, the Supreme Court unanimously reversed the holding by the court of appeals that the petitioner was precluded from recovery by the operation of Florida law. In an opinion written by Mr. Justice Harlan the Court stated that such a result "is such an unjustifiable anomaly in the present maritime law that it should no longer be followed"[75] Accordingly, the doctrine of *The Harrisburg* was overruled. In concluding that *The Harrisburg* was neither founded on good reason nor justified by policy the Court declared that where existing law imposes a primary duty, violations of which are compensable if they cause injury, nothing in ordi-

[69] *Id.* at 321.
[70] *Id.* at 322 (dissenting opinion).
[71] 361 U.S. 340 at 344 (dissenting opinion).
[72] For a possible explanation, see Comment, 28 U. Chi. L. Rev. 339, 351 (1961).
[73] *Compare* 361 U.S. 340, 347 *with* 361 U.S. 314, 320. This conclusion is based on the assumption that the majority in *Hess* would have struck the Oregon statute had the standard been so strict as to prejudice the maritime law.
[74] 409 F.2d 32 (1969).
[75] Moragne v. States Marine Lines, Inc., 398 U.S. 375, 378 (1970).

nary notions of justice suggests that a violation should be nonactionable simply because it was serious enough to cause death.[76] This reasoning, however, ignores *any* deference to state interest policy, a consideration that was championed by Mr. Justice Harlan himself throughout the debates among the Justices in *The Tungus, Hess* and *Goett*.[77] The difficulty for Mr. Justice Harlan in making the state interest argument in the present case, however, is that the same argument could be advanced by the states to extend local law to provide a remedy for personal injuries not resulting in death in maritime cases, a proposition that even Mr. Justice Harlan has refused to recognize as tenable.[78] Furthermore, conceding the interest analysis, the opinion in *Moragne* clearly shows that the Court now considers the federal interest of uniformity to far outweigh any justification for applying state law to provide a remedy in wrongful death cases. Finally, there is little logic in saying that the state interest is minimal when a maritime wage-earner is only incapacited by a tortious injury, and maximal when killed.

The Court's holding that the maritime law provides a remedy for wrongful death represents a departure from previous views which attempted to circumvent the decision of *The Harrisburg*. Even the dissenting Justices in *The Tungus* did not advocate the overruling of that case, maintaining that state remedies should be utilized to enforce federal rights.[79] Still, it is felt that this approach stemmed from prevailing concepts of judicial propriety over Congress in light of the DOHSA, which expressly excepted a cause of action for death within state territorial waters. Both the majority and minority opinions in *The Tungus* seem to have regarded that exemption as a pronouncement of legislative policy which would create an obstacle to the Court's own creation of a right of action. In answering to this argument Mr. Justice Harlan maintained in *Moragne* that the discrepancy by the DOHSA simply could not have been foreseen by Congress, and, in acting to fill the void created by *The Harrisburg Congress* legislated only to the three-mile limit "because that was the extent of the problem."[80] So interpreted, "the DOHSA does not by its own force abrogate available . . . nonstatutory federal remedies that might be found appropriate to effectuate the policies of the general maritime law." It can be argued, however, that Mr. Justice Harlan merely assumes the answer in arriving at this result, especially in the light of congressional inaction in spite of growing maritime theories of recovery. Inherent in any congressional inaction with regard to state-created remedies is a problem of federalism which requires an examination of legislative *purpose* in making an adjustment of national and local policies. This is not to say that the Court in *Moragne* has flown in the face of a congressional determina-

[76] *Id.* at 381.

[77] *See generally*, Currie, *supra* note 58, at 186-207.

[78] *See, e.g.*, the dissenting opinion in *Hess* where Mr. Justice Harlan states that the fact that the federal maritime law permits the state to create a right of action does not mean that the states may permit a *stricter* standard han is allowed under the maritime law. 361 U.S. at 333.

[79] The Tungus v. Skovgaard, 358 U.S. 588, 608 (1959) (dissenting opinion).

[80] Moragne v. States Marine Lines, Inc., 398 U.S. 375, 398 (1970).

[81] *Id.* at 400.

tion to grant authority to the states to enact wrongful death legislation in maritime cases. The very ambiguity of the DOHSA leaves ample room for judicial balancing of interests within the traditional concepts of federalism. Nevertheless, the Court in *Moragne* has termed the problem as accommodation of national versus local interests which may require more than mere inquiry into the questionably ascertainable purpose of the DOHSA. Even so, the balancing of humanitarian policy against the disuniformity created by the application of state wrongful death legislation appears to require the result achieved in the instant case and the resulting application of federal law.

The final consideration involving the overruling of *The Harrisburg* concerns the force of stare decisis, i.e., "the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments."[82] Using this test, the Court concluded that the mainstay of stare decisis is "singularly absent in this case."[83] This conclusion is unquestionably correct, as it does not require much reasoning to determine that a shipowner could hardly be justified in relying on any doctrine of stare decisis that requires his observance of a duty to provide a seaworthy vessel to prevent liability to compensate for injury, but not death. Morevore, the mere force of the decision in *The Harrisburg* would not compell an opposite result. The reasoning of that decision "had little justification except in primitive English history—a history far removed from the American law of remedies for maritime deaths."[84]

III. Moragne—Its Meaning and Effect

Although *Moragne* potentially applies to an number of established doctrines in admiralty, from the practical viewpoint of claimants, the significance of the decision is its bearing upon whether maritime law will be applied so as to make the decedent's contributory negligence mitigate recovery, in contrast to the common law rule of a complete bar to recovery; and whether the maritime concept of unseaworthiness will be available along with other maritime doctrines of recovery for wrongful death. In *Moragne* these questions were not directly in issue, the case being remanded in order to make the necessary factual determinations, and the Court left the questions open for future litigation.[85] The decision points out, however, that a determination of these issues "does not require the fashioning of a whole body of federal law . . . ."[86] and the opinion further indicates that the courts may look for guidance in the DOHSA.[87]

The question of the amount of recovery should present no particular difficulty. Under the maritime law, the negligence of a claim does not bar

[82] *Id.* at 403.
[83] *Id.*
[84] *Id.* at 379.
[85] *Id.* at 408.
[86] *Id.* at 405-6.
[87] "The only one of these statutes that applies not just to a class of workers but to any 'person,' and that bases liability on conduct violative of general maritime law, is the Death on the High Seas Act." *Id.* at 407-8.

recovery for personal injuries but only mitigates the damages in proportion to which his negligence contribution to the injury.[88] There appears to be no reason why the mere fact of death should alter the result in this respect.

The scope of the remedy for unseaworthiness presents more difficulty. By virtue of *Seas Shipping Co. v. Sieracki*,[89] the concept of unseaworthiness has evolved into a "species of liability without fault . . . neither limited by conceptions of negligence nor contractual in nature."[90] Moreover, the remedy has been exteneded beyond those injured aboard ship to those workers injured on the peir who are considered seamen *prohaec vice*.[91] Despite the expansion of the remedy, by the application of *The Harrisburg* even a member of a ship's crew who sustained fatal injuries within the territorial waters of a state left his survivors limited to a statutory remedy under the Jones Act, which, by its very terms, excludes unseaworthiness. This proposition was affirmed in *Lindgren v. United States*[92] where the Court held the Jones Act to be the exclusive remedy for the wrongful death of a seaman, thereby precluding recovery under a state death statute.

Lindgren was affirmed in *Gillespie v. United States Steel Corp.*[93] The Court in that case reasoned that the absence of the phrase "at his election" from the Jones Act was an expression of legislative intent to exclude state death remedies for unseaworthiness. Several arguments can be advanced, however, in an attempt to make *Lindgren* and *Gillespie* consistent with *Moragne*. In the first place, unseaworthiness and negligence are not "inconsistent" theories and as such would not be disruptive of the exclusive nature of the Jones Act. Regardless of the standard of care applicable, unseaworthiness still requires a defect that caused the injury or death. Moreover, the "exclusiveness" of the remedy referred to in *Lindgren* was intended only to distinguish the possible conflict between federal and state remedies, and not to the various federal remedies, either statutory or under the maritime law. It can be further argued that since state statutes were the only remedy available when death occurred from a maritime tort in state territorial waters at the time of the passage of the Jones Act, Congress could not have intended that Act to be the only remedy *ever* to exist for wrongful death.[94]

In *Moragne* the Court in a footnote applied this proposition in holding that *Gillespie* "does not disturb the seaman's rights under the general maritime law, existing alongside his Jones Act claim."[95] The detrminative con-

[88] *See, e.g.*, Ahlgren v. Red Star Towing Co., 214 F.2d 618 (2d Cir. 1954).

[89] 328 U.S. 85 (1946).

[90] *Id.* at 90.

[91] *See* International Stevedoring Co. v. Haverty, 272 U.S. 50 (1926); Jamison v. Encarnacion, 281 U.S. 635 (1930).

[92] 281 U.S. 38 (1930).

[93] 379 U.S. 148 (1964).

[94] This conclusion may, of course, beg the essential question. Nevertheless, by the express terms of the statute, the states are not precluded from acting when on-shore death occurs by wrongful act. Furthermore, there is authority for the proposition that the Jones Act is not exclusive vis à vis the Death on the High Seas Act. The analogy has consistently been attributed to congressional intent. See GILMORE & BLACK, *supra* note 37, at 304; S. REP. No. 216, 66th Cong., 1st Sess. (1920).

[95] Moragne v. States Marine Lines, Inc., 398 U.S. 375, 396 n.12 (1970).

sideration, according to Mr. Justice Harlan, is that the maritime action for wrongful death is beyond the preclusive effect of the Jones Act as interpreted in *Gillespie*. Additionally, the Court declared that the existance of such a remedy is desirable because it "will further, rather than hinder, uniformity in the exercise of admiralty jurisdiction . . . ."[96] From this it follows that the Court was more predisposed to limit *Gillespie* and *Lindgren* rather than reversing the holdings. Nevertheless, the effect of *Moragne* is to overrule those cases sub silentio and make the Jones Act an operational nullity. Since the obligation of a shipower to his crew to provide a seaworthy vessel has been held to be substantially greater than the duty imposed by an ordinary negligence action, it naturally follows that claimants will choose the easiest road to recovery. Regardless of that effect, the result of *Moragne* at least eliminates the anomalous situation with which the survivors of seamen were confronted under *The Harrisburg*, and confines *Lindgren* and *Gillespie* to the area which they properly occupy, i.e., state legislation dealing with wrongful death is superseded with regard to seamen.

IV. Conclusion

Analysis of the cases in which state statutes have been applied to maritime death has indicated that when applied, state law is in derogation of the maritime law, and the result is not justified by an assertion of state interest. Therefore, the competing interests which finally overruled the decisions of *The Harrisburg* and *The Tungus* are felt to be justified in the interest of national policy as well as by precedent. The question of the interrelationship of federal and state law was resolved in *Moragne* by resorting to principles of maritime law which were created because of the special nature of the maritime risk that demands uniformity of application, a result that seems both equitable and workable. Nor will there be a difference in resulting if the states are forced to recognize this obligation of the federal law to determine *all* substantive rights of parties according to uniform principles. However, this result seems unlikely. Some elements of state wrongful death law seems most certain to remain, and the Court's assumption in *Moragne* that "the difficulties should be slight . . . ."[97] seems somewhat problematical in this regard. Periods of limitation and, perhaps, liability limitations are examples of a host of problems which have been held to traditionally fall within the sphere of state adjustment. Furthermore, since the state courts are given concurrent in personam jurisdiction in maritime claims,[98] those courts may decline to entertain a consideration of uniformity of the federal law other than as the state court finds it when considering local limitations on liability. An examination of the judicial process casts doubt on whether resolution will ever be forth-

[96] *Id.*

[97] *Id.* at 406.

[98] 1 Stat. 77 (1789). The Judiciary Act was amended in 1948 to read: "Any civil case of admiralty or maritime jurisdiction, savings to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333 (1948). For a critical discussion, see Black, *supra* note 9.

coming without further Supreme Court or congressional action. In view of previous congressional inaction and its hesitation to act within the state's territorial waters, an ardous road of litigation appears to be ahead The courts have often had difficulty discriminating between cases which suggest a need for the federal interest and cases embodying strong state policies with which federal courts should not interfere. These appear to be minor problems, however, in light of the overruling of a condition of law, the primary consequences of which attached responsibility solely upon the fortuity of death. Under such a system, the state *creation* of remedies created only confusion, the very presence of which negated the justification that state law should apply.

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