NOTES

ADMIRALTY LAW—WRONGFUL DEATH—UNDER GENERAL MARITIME LAW SURVIVOR'S CAUSE OF ACTION IS NOT PRECLUDED BY DECEDENT'S RECOVERY FOR INJURIES PRIOR TO HIS DEATH—*Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974).

Awtrey C. Gaudet, a longshore foreman, was severely injured while participating in loading operations aboard the S.S. Claiborne which was moored in Louisiana navigable waters.[1] Alleging that the accident and resulting injuries were proximately caused by the vessel's unseaworthy condition,[2] Gaudet sued Sea-Land Services, Inc., the owner and operator of the vessel, to recover for his personal injuries and lost earnings. A verdict of $175,000 was returned in Gaudet's favor,[3] but he died before final judgment was entered.[4] After final disposition of the case, and payment to the deceased's estate, Helen Gaudet com-

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1 Stein v. Sea-Land Servs., Inc., 440 F.2d 1181, 1181 (5th Cir. 1971).

2 *Id.* Seaworthiness is a duty imposed by general maritime law to provide a safe working place for the vessel's crewmen. The vessel must be "reasonably adequate, in materials, construction, equipment, stores, officers, men and outfit for the trade or service in which the vessel is employed." Doucette v. Vincent, 194 F.2d 834, 837-38 (1st Cir. 1952). *See generally* The Osceola, 189 U.S. 158 (1903). The duty is non-delegable and absolute; neither the owner's negligence nor his knowledge of the unseaworthy condition is required for the libellant to pursue his claim. Unseaworthiness is recognized as "essentially a species of liability without fault." Seas Shipping Co. v. Sieracki, 328 U.S. 85, 94 (1946). *See generally* Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960); Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944). The seaworthiness doctrine has been extended to libels in which persons other than the ship's crew have been injured as a result of the performance of a ship's service at the owner's consent. *See, e.g.*, Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953) (carpenter); Seas Shipping Co. v. Sieracki, *supra* (stevedore). For a general discussion of the seaworthiness doctrine see 2 M. NORRIS, LAW OF SEAMEN § 609 *et seq.* (2d ed. 1962).

Seaworthiness is to be distinguished from the seaman's ancient general maritime right to maintenance and cure. Under that doctrine, members of the ship's company who, as a result of their contractual relationship, become injured or ill while in the service of the vessel on land or aboard ship, are entitled to food, lodging, and medical care until the "maximum cure" possible is realized. A seaman's negligence will not bar recovery; however, a sailor's own gross or willful misconduct will preclude entitlement. 1 E. BENEDICT, THE LAW OF AMERICAN ADMIRALTY § 83 (6th ed. rev. 1940); 1 M. NORRIS, *supra* §§ 537, 543, 545, 549, 551.

3 Stein v. Sea-Land Servs., Inc., 440 F.2d 1181, 1181 (5th Cir. 1971). The award was reduced to $140,000 as a result of a finding of Gaudet's contributory negligence. *Id.* at 1181-82. Although under general maritime law, contributory negligence is neither a defense nor a bar to an action, damages are mitigated proportionately to the libellant's negligence. *See* Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 408-09 (1953); The Arizona v. Anelich, 298 U.S. 110, 122 (1936).

4 Stein v. Sea-Land Servs., Inc., 440 F.2d 1181, 1181 n.1 (5th Cir. 1971).

menced a wrongful death action in federal district court for her damages resulting from the loss of her husband.[5]

The district court concluded that the decedent's prior recovery precluded the plaintiff's wrongful death action and dismissed her suit based on both res judicata and failure to state a claim.[6] The Fifth Circuit reversed, holding that the plaintiff's cause of action was not extinguished by her husband's prior recovery for personal injuries because a clear distinction existed between actions for personal injury and wrongful death in admiralty.[7] The United States Supreme Court granted certiorari,[8] and in *Sea-Land Services, Inc. v. Gaudet*[9] affirmed the court of appeals by a narrow margin.[10] Acknowledging conflicting state and federal decisions on the question, the Court concluded that the policies underlying wrongful death actions and the tradition of humaneness and liberality implicit in admiralty proceedings permitted recovery by the libellant despite her husband's successful suit for his own personal injuries.[11]

Although currently permitted by statute, historically, recovery for wrongful death or the survival of a deceased's claims was precluded by judicial principles which originated in the English common law.[12] The refusal of the courts to recognize a cause of action based on wrongful death appears to have been founded upon a merger theory which evolved from the overlapping of criminal and civil remedies in early English law.[13] According to this theory, when the wrongful act which

5 Gaudet v. Sea-Land Servs., Inc., 463 F.2d 1331, 1332 (5th Cir. 1972).

6 *Id.* at 1332.

7 *Id.* at 1336.

8 Gaudet v. Sea-Land Servs., Inc., 411 U.S. 963 (1973).

9 94 S. Ct. 806 (1974).

10 Dissenting in the 5-4 decision was Justice Powell, joined by Chief Justice Burger and Justices Stewart and Rehnquist.

11 94 S. Ct. at 812, 814.

12 F. TIFFANY, DEATH BY WRONGFUL ACT § 1 (1893). For a comprehensive analysis of wrongful death recovery and a more recent survey of the development of statutory remedies see S. SPEISER, RECOVERY FOR WRONGFUL DEATH (1966).

13 According to Holdsworth, the roots of the merger doctrine can be traced to an early confusion in English law between the concepts of ownership and possession of chattels. Thus, when chattels were wrongfully taken, the thief was deemed to have "property" in the goods, and subject to a few narrow exceptions, the crown was entitled to the goods. Because a conviction for a felony was most advantageous for the king, in time the criminal indictment became preferred over the action for trespass as a remedy. Ultimately, this preference evolved into the more general proposition that any tortious conduct which amounted to a felony precluded an individual's civil right of action. 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 327-31 (4th ed. 1935). Somewhat later, the effect of the merger doctrine was modified by suspending the civil cause of action until the criminal prosecution for the public wrong had been completed. This qualification, however,

had little effect in the wrongful death cases because as long as the punish-

caused the death also constituted felonious activity, the civil action was barred by its merger into the criminal offense.[14] Thus, the individual's right of action was preempted by a superior governmental interest in punishing criminal activity.

Although the merger concept was initially articulated in a case involving a felonious assault,[15] the principle was also applied early in the nineteenth century to preclude recovery by a third person who had an interest in the deceased even though the death resulted from a non-criminal, negligent act.[16] Of less certain origin, a related common law

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ment for felonious homicide was both execution and forfeiture of property there would be no way to enforce any damages judgment obtained by pursuing the suspended civil cause of action after a successful criminal prosecution.

Smedley, *Wrongful Death—Bases of the Common Law Rules*, 13 VAND. L. REV. 605, 612 (1960). *See also* 3 W. HOLDSWORTH, *supra* at 333.

14 An early English court explained the merger concept, and the paramount governmental interest in punishing felonious activity which gave rise to the doctrine, by observing that

> if a man beats the servant of J. S. so that he dies of that battery, the master shall not have an action against the other for the battery and loss of the service, because the servant dying of the extremity of the battery, it is now become an offence to the Crown, being converted into felony, and *that drowns the particular offence*, and private wrong offer'd to the master before, and his action is thereby lost . . . .

Higgins v. Butcher, 80 Eng. Rep. 61, 61 (K.B. 1607) (emphasis added).

15 *Id. See also* Smith v. Sykes, 89 Eng. Rep. 160 (K.B. 1677).

16 In Baker v. Bolton, 170 Eng. Rep. 1033 (K.B. 1808), a suit involving a husband's claim for the loss of his deceased wife's society after she died from injuries sustained in a stagecoach accident, Lord Ellenborough, sitting *nisi prius*, held that "[i]n a civil Court, the death of a human being could not be complained of as an injury." *Id.* The opinion reflects neither sound reasoning nor an authoritative basis, and it has been variously criticized. Holdsworth has characterized the rule as "obviously unjust . . . technically unsound," while Prosser has depicted Lord Ellenborough as one "whose forte was never common sense." *Compare* 3 W. HOLDSWORTH, *supra* note 13, at 336 (footnote omitted) *with* W. PROSSER, THE LAW OF TORTS § 127, at 901 (4th ed. 1971). Lord Ellenborough's failure to distinguish felonious and tortious activities has also been critically received. One commentator, emphasizing the important distinctions between *Higgins* and *Baker*, has noted that

> the denial of [a] remedy [in *Higgins*] was predicated on the wrongdoing being "an offense of the Crown," a "felony," a "criminal" act. Without such a wrongdoing, the doctrine of merger would obviously not operate . . . . In the *Baker* case, the wife's death resulted from the negligent driving of a stagecoach . . . . Furthermore, it is doubtful whether the merger doctrine was still in effect [in 1808] . . . . The opinion in the *Baker* case contains no reference to either of these factors, and the suspicion is . . . the rule recited was a mistaken application of the narrower rule adopted in the *Higgins* case on different facts and under different conditions.

Smedley, *supra* note 13, at 615-16 (footnotes omitted). *See generally* Note, *Judicial Expansion of Remedies for Wrongful Death in Admiralty: A Proposal*, 49 B.U.L. REV. 114, 117 (1969). For a comprehensive analysis of the early development of English and American wrongful death concepts see Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043 (1965).

principle evolved which precluded the survival of any right of action which the decedent had at the time of his death.[17] Consequently, in other than exceptional circumstances based on special relationships between the claimant and the decedent, such as husband-wife or master-servant,[18] no right of action inured to the decedent's survivors or to his estate.[19]

Despite an occasional rejection of the English cases which prohibited wrongful death recovery,[20] American courts have generally followed the English view in denying recovery.[21] Mindful of the unique English precepts which have been advanced to explain the common law view,[22] American courts often had difficulty justifying the continu-

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17 The basis for prohibiting survival actions was expressed in the common law maxim *actio personalis moritur cum persona* (personal actions die with the person). This concept was applicable to all tort actions and affected only the damages suffered by the deceased and his estate. *See generally* Malone, *supra* note 16, at 1045-52; Smedley, *supra* note 13, at 606-09. Thus, termination of an action is distinguishable from the preclusions of *Higgins* and *Bolton*, in which recovery was sought for loss to the survivors. The termination rule, however, did not preclude a suit against an executor on an action of debt or covenant arising out of a contract under seal entered into by the testator, or on an action to recover for unjust enrichment to the estate. 3 W. HOLDSWORTH, *supra* note 13, at 578-79.

18 At common law, a husband was entitled to the services of his wife and children, and a master was entitled to the services of his servant. Any interference with this proprietary right, whether intentional or negligent, constituted an actionable wrong from which damages would flow for lost services and medical expenses incurred prior to recovery or death. F. TIFFANY, *supra* note 12, § 1; Malone, *supra* note 16, at 1052; Smedley, *supra* note 13, at 620-21; *cf.* Holbrook, *Change in the Meaning of Consortium*, 22 MICH. L. REV. 1, 2 (1923).

19 A situation was thus created which made it more profitable to kill rather than injure another party. W. PROSSER, *supra* note 16, § 127, at 902. Prosser amusingly mentions the unfounded legend that

> this was the original reason that passengers in Pullman car berths rode with their heads to the front. Also that the fire axes in railroad coaches were provided to enable the conductor to deal efficiently with those who were merely injured.

Id. n.43.

20 Sullivan v. Union Pac. R.R., 23 F. Cas. 368, 371 (No. 13,599) (C.C.D. Neb. 1874); Plummer v. Webb, 19 F. Cas. 894, 895-96 (No. 11,234) (D.C.D. Me. 1825); Ford v. Monroe, 20 Wend. 210 (N.Y. Sup. Ct. 1838), *overruled by*, Green v. Hudson River R.R., 28 Barb. 9, 21 (N.Y. Sup. Ct. 1859), *aff'd*, 2 Abb. App. Dec. 277 (N.Y. 1866). *Cf.* Shields v. Yonge, 15 Ga. 349, 355-56 (1854).

21 The acceptance of the rule espoused in Baker v. Bolton, 170 Eng. Rep. 1033 (K.B. 1808), was first pronounced in Carey v. Berkshire R.R., 55 Mass. (1 Cush.) 475 (Sup. Jud. Ct. 1848), and has been accepted in America ever since. However, prior to 1848, a few American jurisdictions had permitted death claims. *See* Malone, *supra* note 16, at 1066-67.

22 While the practice of merging the private wrong into the felony had been accepted to a limited extent, the subsequent forfeiture of the felon's property to the government had not been adopted in America. *See, e.g.*, Plummer v. Webb, 19 F. Cas. 894, 895-96 (No. 11,234) (D.C.D. Me. 1825); Hyatt v. Adams, 16 Mich. 180, 185-88 (1867).

ation of the no recovery principle.[23] A number of courts justified the rule simply on the basis of its firm entrenchment in the common law.[24] Other courts, however, predicated their refusal to permit recovery on the basis of an inability to calculate the pecuniary value of life, or upon an unwillingness to allow "the value of [a] human life to become the subject of judicial computation."[25] Finally, many courts feared that potentially unlimited recoveries would work substantial injustice upon merely negligent tortfeasors.[26] Thus, whatever the theoretical justification for the no recovery rule, the courts remained insensitive to the plight of the decedent's survivors who were irreparably harmed by the wrongdoer. Ultimately, this remedial vacuum was filled by the legislatures which adjusted the balance in favor of designated survivors of those who died as a result of wrongful acts.[27]

The prototype legislative response was Lord Campbell's Act of 1846.[28] This Act created an action for damages resulting from death

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23 *See generally* Smedley, *supra* note 13, at 616-19.

24 Carey v. Berkshire R.R., 55 Mass. (1 Cush.) 475, 478 (Sup. Jud. Ct. 1848); Grosso v. Delaware, L. & W.R.R., 50 N.J.L. 317, 323, 13 A. 233, 236 (Sup. Ct. 1888); Green v. Hudson River R.R., 28 Barb. 9, 15 (N.Y. Sup. Ct. 1859), *aff'd*, 2 Abb. App. Dec. 277 (N.Y. 1866).

25 Grosso v. Delaware, L. & W.R.R., 50 N.J.L. 317, 320, 13 A. 233, 235 (Sup. Ct. 1888). *See also* Van Amburg v. Vicksburg, S. & Pac. R.R., 37 La. Ann. 650, 651 (1885); Green v. Hudson River R.R., 28 Barb. 9, 17-18 (N.Y. Sup. Ct. 1859), *aff'd*, 2 Abb. App. Dec. 277 (N.Y. 1866).

26 Connecticut Mut. Life Ins. Co. v. New York & N.H.R.R., 25 Conn. 265, 272-73 (1856); *see* Hyatt v. Adams, 16 Mich. 180, 196-97 (1867).

27 It is significant that most of the American cases which were decided after Baker v. Bolton, 170 Eng. Rep. 1033 (K.B. 1808), was first applied in the United States were considered in the wake of the enactment of limited wrongful death or survival statutes. *See* Malone, *supra* note 16, at 1073. The same author has attributed the unwillingness of the courts to fashion a common law death remedy independent of the statutory scheme to a judicial reluctance to "compete" with the fledgling legislation and suggested that

> [h]ad the several state legislatures remained insensitive to the death problem, thus obliging the courts to face it in an open field, it can be surmised that a common-law death action of some kind would have unfolded on the American scene.

Id.

28 An Act for compensating the Families of Persons killed by Accidents, 9 & 10 Vict., c. 93 (1846). The Act provides in pertinent part:

> [I.] [W]hensoever the Death of a Person shall be caused by wrongful Act, Neglect, or Default, [of another] and the Act, Neglect, or Default is such as would (if Death had not ensued) have entitled the Party injured to maintain an Action and recover 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 amount in Law to Felony.
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> II. And be it enacted, That every such Action shall be for the Benefit of the Wife, Husband, Parent, and Child of the Person whose Death shall have been so caused, and shall be brought by and in the Name of the Executor or Administrator of the Person deceased; and in every such Action the Jury may give such Damages as they may think proportioned to the Injury resulting from such Death

"caused by wrongful Act, Neglect, or Default."[29] The action could be brought by the executor or administrator of the estate for the benefit of a class of designated beneficiaries.[30] In creating the wrongful death remedy, Lord Campbell's Act specifically abrogated the historical preclusion of recovery where the circumstances of death amounted to a felony.[31] Judicially construed in England, the statute was held to create an action which was "new in its species, new in its quality, [and] new in its principle, in every way new,"[32] as opposed to simply continuing the deceased's actionable complaints. Since the enactment of the Act, American legislatures have provided similar recovery for wrongful death.[33] In substance, the majority of the statutes closely parallel Lord Campbell's Act by providing an action for losses suffered by prescribed beneficiaries.[34] Following their English counterparts, American courts have construed the action as an independent right accruing at the death of the decedent.[35] Additionally, some of the American statutes have supplemented the basic wrongful death action by permitting the survival of whatever claims a deceased might have asserted, had he lived.[36] Thus, in jurisdictions where both wrongful death and survival statutes have been enacted, full reparation for wrongs to the deceased and his survivors is possible.

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to the Parties respectively for whom and for whose Benefit such Action shall be brought . . . .

29 *Id.* § I.

30 *Id.* § II.

31 *Id.* § I.

32 Seward v. The "Vera Cruz," 10 App. Cas. 59, 70-71 (P.C. 1884). *See also* Nunan v. Southern Ry., [1924] 1 K.B. 223, 227, 229 (C.A. 1923).

33 All states have statutorily abrogated the common law prohibitions on recovery for death damages, and have provided remedies that vary considerably from exclusive wrongful death actions to combinations of both wrongful death and survival remedies. *See* 2 F. HARPER & F. JAMES, THE LAW OF TORTS §§ 24.1-24.2 (1956). *See generally* Duffey, *The Maldistribution of Damages in Wrongful Death*, 19 OHIO S.L.J. 264 (1958). For a complete listing of federal, state, and English wrongful death statutes see S. SPEISER, *supra* note 12, at Appendix A; Comment, *Wrongful Death Damages in North Carolina*, 44 N.C.L. REV. 402, 437-39 (1966).

Survival statutes preserve for the estate the rights of action possessed by the injured party at his death, thus supplanting the common law maxim *actio personalis moritur cum persona*. Typically, the deceased's pain and suffering, lost wages, and medical expenses are compensable under a survival statute, as contrasted with recoveries under wrongful death statutes which compensate the beneficiary for his losses. D. DOBBS, LAW OF REMEDIES § 8.2, at 553 (1973); Duffey, *supra* at 264, 266-67. *See also* 2 F. HARPER & F. JAMES, *supra*, § 24.2, at 1284 & n.2.

34 W. PROSSER, *supra* note 16, § 127, at 902; F. TIFFANY, *supra* note 12, § 24.

35 *See, e.g.*, Garrett v. Louisville & N.R.R., 235 U.S. 308, 312 (1914); Michigan Cent. R.R. v. Vreeland, 227 U.S. 59, 69 (1913). *See also* Schumacher, *Rights of Action Under Death and Survival Statutes*, 23 MICH. L. REV. 114, 116 (1924).

36 Comment, *supra* note 33, at 404. *See also* D. DOBBS, *supra* note 33, § 8.2, at 552-54.

Included in the damages under wrongful death statutes have been recoveries measured predominantly against either the losses suffered by the deceased's beneficiaries or against those suffered by the estate as a result of the death.[37] Historically, in either application, damages have been confined to pecuniary losses;[38] however, this limitation has not been applied literally by the courts. The early relaxation of the strict pecuniary damage requirement in wrongful death recoveries is illustrated by *Tilley v. Hudson River R.R.*,[39] in which the court recognized that the concept of pecuniary damage should not be so

> limited as to confine it to the immediate loss of money or property; for if that were so, there is scarcely a case where any amount of damages could be recovered. It looks to prospective advantages of a pecuniary nature, which have been cut off by the premature death of the person from whom they would have proceeded; and the word *pecuniary* was used [in the statute] in distinction to those injuries to the affections and sentiments which arise from the death of relatives . . . .[40]

Thus, besides the normal award for the value of lost services and financial contributions, recovery has been frequently permitted for children's loss of parental care, guidance and control,[41] and occasionally for the survivor's mental anguish.[42] Moreover, one commentator has identified a trend in recent years to further relax the restrictive interpretation of pecuniary loss and to permit damages for the loss of society, companionship and other intangible injuries.[43]

While not derived from the common law, admiralty law has as-

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37 D. DOBBS, *supra* note 33, § 8.3, at 556-57. Alabama and Massachusetts, however, are exceptions to these standards, measuring damages by the degree of the wrongdoer's culpability. ALA. CODE tit. 7, § 123 (1960); MASS. ANN. LAWS ch. 229, § 2 (Cum. Supp. 1973). For a case interpreting the Alabama statute as providing damages that are basically punitive in nature see Bonner v. Williams, 370 F.2d 301 (5th Cir. 1966).

38 *See* W. PROSSER, *supra* note 16, § 127, at 907-08; 2 F. HARPER & F. JAMES, *supra* note 33, § 25.14-15, at 1329, 1332-33; F. TIFFANY, *supra* note 12, §§ 153-54.

39 24 N.Y. 471 (Sup. Ct. 1862), *aff'd*, 29 N.Y. 252 (Ct. App. 1864).

40 24 N.Y. at 475-76 (emphasis by the court). In order to determine pecuniary loss, courts have generally measured the survivors' reasonable expectation of material assistance. *See, e.g.*, Michigan Cent. R.R. v. Vreeland, 227 U.S. 59, 70-73 (1913). *See also* F. TIFFANY, *supra* note 12, § 158.

41 *E.g.*, Norfolk & W. Ry. v. Holbrook, 235 U.S. 625 (1915); Mascuilli v. United States, 343 F. Supp. 439, 442 (E.D. Pa. 1972), *rev'd on other grounds*, 483 F.2d 81 (3d Cir. 1973).

42 *E.g.*, Guarniere v. Henderson, 171 So. 2d 617 (Fla. Dist. Ct. App. 1965) (mental pain and suffering); Palmer v. American Gen. Ins. Co., 126 So. 2d 777 (La. Ct. App. 1960) (shock, grief and mental pain).

43 Page, *Damages for Wrongful Death Under FELA—Deprivation of Parent's Intellectual, Moral and Physical Training as "Pecuniary" Loss to Children*, 30 NACCA L.J. 271, 281-82 (1964).

similated the original common law preclusion of recovery for wrongful death. Admiralty or general maritime law, greatly influenced by the Roman civil law, is a composite of the ancient and international codes and customs of the sea.[44] Although in the United States the Constitution commits "all Cases of admiralty and maritime Jurisdiction" to the federal courts,[45] admiralty does not provide the sole relief available for an injured party. In personam common law remedies available under state law were preserved by the Judiciary Act of 1789.[46] Thus, where an appropriate common law in personam claim attached, there was concurrent jurisdiction in admiralty.[47] Although traditionally cognizant of all maritime contracts, torts and injuries,[48] admiralty jurisdiction was originally restricted to the English limitation of the "ebb and flow of the tide."[49] Today, however, admiralty jurisdiction has expanded to encompass most actions which occur on navigable waters.[50] In exercising their judicial powers under the admiralty

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44 *See* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY §§ 1-1, 1-3 (1957); 1 M. NORRIS, *supra* note 2, § 20; G. ROBINSON, ADMIRALTY LAW § 1, at 1-4 (1939).

45 U.S. CONST. art. III, § 2.

46 Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 76. Section 9 provides in pertinent part that the district courts shall have

> exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it . . . .

1 Stat. at 77. The present statutory provisions have codified the original Act in slightly different language, 28 U.S.C. § 1333 (1970).

47 However, when a libellant pursues an in rem action, jurisdiction is restricted exclusively to admiralty. 1 M. NORRIS, *supra* note 2, § 23, at 35-36; G. ROBINSON, *supra* note 44, § 4, at 23-24. Such actions are predicated upon a maritime lien, which is an interest in the property involved, usually the ship itself, which accrues to the libellant after "the occurrence of certain mishaps or the non-fulfillment of certain obligations arising out of contract or status." G. GILMORE & C. BLACK, *supra* note 44, § 1-12, at 31.

48 *See* De Lovio v. Boit, 7 F. Cas. 418, 444 (No. 3776) (C.C.D. Mass. 1815). *See generally* G. GILMORE & C. BLACK, *supra* note 44, § 1-10, at 20-28.

49 The Thomas Jefferson, 23 U.S. (10 Wheat.) 428, 429 (1825).

50 Admiralty jurisdiction extends to all public navigable rivers, lakes and connecting waterways. The Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 457 (1851). Even a natural or artificial navigable waterway which is wholly within state boundaries will fall within admiralty's jurisdiction where "they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried." The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870). *See also In re* Garnett, 141 U.S. 1 (1890); *Ex parte* Boyer, 109 U.S. 629 (1884). Traditionally, the locality test has been followed in order to invoke admiralty jurisdiction in a tortious situation. Therefore, any tort which has been committed on the high seas or navigable waters will come under admiralty jurisdiction. The Plymouth, 70 U.S. (3 Wall.) 20, 35 (1865). However, this concept has been modified in recent years whereby jurisdiction is invoked only if the wrong bears a "significant relationship to traditional maritime activity." Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 268 (1972) (jurisdiction denied for property damage where plane crashed into Lake Erie); *accord*, Kelly v. Smith, 485 F.2d 520 (5th

clause, the federal courts have generally not hesitated to either expand the concept of navigability in order to invoke their maritime jurisdiction, or to create new remedies where circumstances required judicial innovation.[51] Until relatively recently, however, a similar spirit of flexibility has not been evident in the context of maritime wrongful death.

Prior to the late nineteenth century, the cases were in conflict on the question of wrongful death recovery in admiralty,[52] but in 1886 the Supreme Court resolved the issue in an historic decision which shaped maritime law for nearly a century. In *The Harrisburg*,[53] an action by a deceased first officer's widow to recover for his death which was occasioned by the negligent collision between two vessels, the Supreme Court reversed a decision of the circuit court which had permitted recovery.[54] In reaching its conclusion, the Court reasoned that wrongful death, even in the admiralty context, could not be maintained in the absence of statutory authorization:

> Since, however, it is now established that in the courts of the United States no action at law can be maintained for such a wrong in the absence of a statute giving the right, and it has not been shown that the maritime law . . . has established a different rule . . . we are forced to the conclusion that no such action will lie in the courts of the United States under the general maritime law. The rights of persons in this particular under the maritime law of

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Cir. 1973) (shooting of deer poacher piloting outboard boat was sufficient for court to assume jurisdiction); Jiles v. Federal Barge Lines, Inc., 365 F. Supp. 1225 (E.D. La. 1973) (painter fell off ladder on stripped ship—jurisdiction denied).

51 Justice Brennan indicated the expansiveness of the judiciary's role in admiralty when he said:

> . Admiralty law is primarily judge-made law. The federal courts have a most extensive responsibility of fashioning rules of substantive law in maritime cases.

The Tungus v. Skovgaard, 358 U.S. 588, 611 (1959) (Brennan, J., concurring in part and dissenting in part). For specific examples of judicially-fashioned remedies in admiralty see Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) (maritime wrongful death remedy); The Osceola, 189 U.S. 158 (1903) (unseaworthiness).

52 A substantial number of lower courts had permitted a death action in admiralty. The Columbia, 27 F. 704 (S.D.N.Y. 1886); The Garland, 5 F. 924 (E.D. Mich. 1881); Holliday v. The David Reeves, 12 F. Cas. 386 (No. 6625) (D.C.D. Md. 1879); The Towanda, 24 F. Cas. 74 (No. 14,109) (C.C.E.D. Pa. 1877); The Sea Gull, 21 F. Cas. 909 (No. 12,578) (C.C.D. Md. 1865); Plummer v. Webb, 19 F. Cas. 894 (No. 11,234) (D.C.D. Me. 1825).

53 119 U.S. 199 (1886).

54 Although recognizing decisions which have permitted maritime death recovery, the Court stated:

> [W]e know of no country that has adopted a different rule on this subject for the sea from that which it maintains on the land, and the maritime law, as accepted and received by maritime nations generally, leaves the matter untouched.

Id. at 213.

> this country are not different from those under the common law . . . .[55]

Although the *Harrisburg* Court expressed no opinion on the question of whether the action could be brought under state wrongful death statutes,[56] subsequent cases have permitted reliance on state statutes to provide a wrongful death remedy under appropriate circumstances.[57] Thus, until Congress responded with appropriate measures, local statutes provided the sole remedy for maritime wrongful death.[58]

Because the application of state statutes projected a diversity of remedies and qualifications into maritime law, the uniformity desired in admiralty[59] was illusory. Consequently, the extension of state remedies was ultimately confined to basic wrongful death and survival actions. In *Southern Pacific Co. v. Jensen*,[60] an action under the state's

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55 *Id.* at 213-14.

56 *Id.* at 214.

57 *See, e.g.*, The Hamilton, 207 U.S. 398 (1907); The City of Norwalk, 55 F. 98 (S.D.N.Y. 1893). Some pre-*Harrisburg* decisions had adopted the same method of recovery. Sherlock v. Alling, 93 U.S. 99 (1876); Steamboat Co. v. Chase, 83 U.S. (16 Wall.) 522 (1872).

State wrongful death statutes have been applied by admiralty courts where the incident occurred in state navigable waters or, in some instances, on the high seas where the ship was owned by a corporation chartered under state law. *Compare* Western Fuel Co. v. Garcia, 257 U.S. 233, 242 (1921) *with* The Hamilton, *supra* at 405.

Despite the introduction of federal legislation, state actions are still cognizable in admiralty when the death or the injury occurs on state navigable waters. *See* Just v. Chambers, 312 U.S. 383, 388, *modified*, 312 U.S. 668 (1941); Western Fuel Co. v. Garcia, *supra* at 242. Significantly, when a state remedy is absorbed into the action, the admiralty court is required to implement "the right as an integrated whole, with whatever conditions and limitations the creating State has attached." The Tungus v. Skovgaard, 358 U.S. 588, 592 (1959). Thus, where the state statute does not embrace a claim for unseaworthiness, the claim will be denied. *See generally* H. BAER, ADMIRALTY LAW OF THE SUPREME COURT § 1-19, at 99-110 (1963); Magruder & Grout, *Wrongful Death Within the Admiralty Jurisdiction*, 35 YALE L.J. 395, 396-97 (1926).

58 *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 393 (1970).

59 The desirability of uniformity in maritime law can be gleaned not only from the constitutional provision which grants admiralty jurisdiction to the federal courts but also from the clause which confers the power to enact necessary and proper laws upon the Congress. The combined significance of these provisions is to implicitly remove maritime law from the province of the states and thereby avoid the diversity of law that would inevitably result. As Justice Bradley perceived when he was speaking for the Court,

> the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed . . . .

The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1874).

60 244 U.S. 205 (1917).

workmen's compensation act for the accidental death of a stevedore who was killed while unloading a vessel at pierside, the Supreme Court recognized that while the general maritime law had been modified by state death statutes, there were also limitations upon state power to affect the admiralty law.[61] In denying the compensation award, the Court declined to "define with exactness"[62] the powers of the states to modify admiralty principles, but suggested that

> no such legislation is valid 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.[63]

The Court in *Jensen*, however, did indicate by way of dictum that state legislation creating the right to recover for wrongful death would be a permissible modification of maritime law.[64] Subsequently, the Court not only reaffirmed the position it took in *Jensen*, but also extended the scope of the uniformity exception to include state survival actions as well.[65]

Recognizing the lack of uniformity in maritime wrongful death recovery, Congress enacted two comprehensive measures in 1920 to create federal causes of action for the survivors of deceased seamen. The Death on the High Seas Act (DOHSA)[66] allows recovery in admiralty by specified relatives[67] for the death of any person "caused by wrongful act, neglect, or default occurring on the high seas beyond a

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61 *Id.* at 216.

62 *Id.*

63 *Id.* The Court reiterated this rationale in Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 381-83 (1918), an action instituted in state court by an injured seaman. Seeking to recover full indemnity for his injury, the plaintiff proceeded on a negligence theory rather than on maintenance and cure, the applicable maritime remedy. In denying recovery, the Court emphasized that "no State has power to abolish the well recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law." *Id.* at 382.

The Court has explicitly recognized, however, that a state may regulate local matters if the controls do not substantially prejudice the operation of general maritime law. Thus, the Court has allowed recovery under the state's workmen's compensation statute when the injury arose on state navigable waters. Grant Smith-Porter Ship Co. v. Rhode, 257 U.S. 469, 477 (1922) (carpenter injured on partially completed vessel at dock).

64 244 U.S. at 216.

65 *See, e.g.*, Just v. Chambers, 312 U.S. 383, *modified*, 312 U.S. 668 (1941) (survival action); Western Fuel Co. v. Garcia, 257 U.S. 233 (1921) (wrongful death action).

66 46 U.S.C. § 761 *et seq.* (1970).

67 The deceased's personal representative is authorized to initiate suit "for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative." *Id.* § 761.

marine league from the shore of any State."[68] DOHSA does not apply to deaths occurring in state territorial waters;[69] however, it has been interpreted as preempting state wrongful death actions beyond state waters.[70] DOHSA further provides a remedy under the seaworthiness doctrine since it allows a libellant to recover without proof of negligence or culpability.[71] DOHSA, moreover, is a pure wrongful death statute and does not contain survival benefits. Some courts, however, have borrowed state statutes to achieve this purpose.[72]

Almost simultaneously with DOHSA, Congress enacted the Merchant Marine Act of 1920.[73] In contrast to DOHSA, section 33, commonly known as the Jones Act, is dependent upon an employment relationship between the deceased seaman and the libellee, and allows recovery by the deceased's personal representative when death results from injuries sustained during maritime employment.[74] There are no territorial limitations as in DOHSA, but because the Federal Employers' Liability Act (FELA)[75] is incorporated by reference, death or survival actions can only be maintained under a negligence theory.[76]

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68 *Id.*

69 *Id.* § 767.

70 *See, e.g.*, Wilson v. Transocean Airlines, 121 F. Supp. 85, 90-91 (N.D. Cal. 1954).

71 Chermesino v. Vessel Judith Lee Rose, Inc., 211 F. Supp. 36 (D. Mass. 1962), *aff'd*, 317 F.2d 927 (1st Cir.), *cert. denied*, 375 U.S. 931 (1963).

72 Comment, *Maritime Wrongful Death after Moragne: The Seaman's Legal Lifeboat*, 59 GEO. L.J. 1411, 1427 & n.123 (1971); *see, e.g.*, Dugas v. National Aircraft Corp., 438 F.2d 1386 (3d Cir. 1971). Some courts have improvised other means for awarding survival benefits, for example, by joining a count under DOHSA with a count under the Jones Act which allows survival of the claim. G. GILMORE & C. BLACK, *supra* note 44, at 308.

73 46 U.S.C. § 861 *et seq.* (1970). Section 33 of the original act amended the Seaman's Welfare Act of Mar. 4, 1915, ch. 153, § 20, 38 Stat. 1185 (codified at 46 U.S.C. § 688 (1970)).

74 46 U.S.C. § 688 (1970). The term seaman is not defined in the Jones Act, but several criteria have been fashioned by the courts to aid in determining the individuals who are seamen for purposes of the Act:

(1) [T]hat the vessel be in navigation,
(2) that there be more or less permanent connection with the vessel, and
(3) that the worker be aboard primarily to aid in navigation.

Nelson v. Greene Line Steamers, Inc., 255 F.2d 31, 33-34 (6th Cir.), *cert. denied*, 358 U.S. 867 (1958). Application of these guidelines will generally include all the vessel's crew members. Additionally, as long as the crew members are " 'engaged in the course of [their] employment,' " they are still considered seamen while ashore. Senko v. LaCrosse Dredging Corp., 352 U.S. 370, 373 (1957) (quoting from Swanson v. Marra Bros., 328 U.S. 1, 4 (1946)). Harbor workers, which include longshoremen, however, are not considered seamen under the Act. G. GILMORE & C. BLACK, *supra* note 44, at 282. *See generally* 1 M. NORRIS, *supra* note 2, §§ 1-19.

75 45 U.S.C. §§ 51-60 (1970).

76 FELA states in pertinent part that the beneficiaries of the deceased shall have an action

The general maritime action of unseaworthiness, therefore, is not technically maintainable.[77]

Although DOHSA and the Jones Act greatly aided the survivors of the deceased, the legislation left serious gaps in the federal remedial scheme. For example, when death resulted from an incident occurring in state territorial waters which was attributable to the unseaworthy condition of a vessel, rather than to negligence, neither statute was operable. Unless the state act recognized unseaworthiness as a basis for recovery, the deceased's survivors were without a remedy.[78]

The anomalies which existed in maritime wrongful death law were explicitly recognized in *Moragne v. State Marine Lines, Inc.*[79] The deceased in *Moragne* was killed while working on board a vessel in Florida's navigable waters and an action predicated upon unseaworthiness was commenced under the state statute.[80] Because prior cases had established that state remedies must be adopted as an "integrated whole" in admiralty,[81] the lower courts accepted the state court's determination that an action based upon unseaworthiness was not maintainable under the state wrongful death statute and consequently denied recovery.[82]

Cognizant of both the legislative intent exhibited in the federal statutes and the development of unseaworthiness as a theory of recovery for maritime injuries,[83] the Supreme Court overruled *The Harrisburg*

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for such injury or death resulting in whole or in part from *the negligence* of any of the officers, agents, or employees of such carrier . . . .

Id. § 51 (emphasis added).

The quest for uniformity in maritime law has resulted in the application of the Jones Act in instances in which a seaman is injured or killed on state navigable waters from non-negligent causes. In such circumstances, the Act has been held to be "paramount and exclusive, and supersedes the operation of all state statutes." Lindgren v. United States, 281 U.S. 38, 47 (1930), *reaff'd in*, Gillespie v. United States Steel Corp., 379 U.S. 148, 154-55 (1964). Consequently, even if the state statute recognized seaworthiness as a basis of liability, no remedy would be available for the survivors of a seaman who was killed in state waters. Perhaps as a means of ameliorating this harsh rule, maritime case law has taken a liberal view toward allowing recovery. *See, e.g.*, Kernan v. American Dredging Co., 355 U.S. 426 (1958) (recovery permitted, without a showing of negligence, when death resulted from a violation of a Coast Guard regulation). *See also* 1 P. EDELMAN, MARITIME INJURY AND DEATH 64-65 (1960); 2 M. NORRIS, *supra* note 2, § 658.

77 Lee v. Pure Oil Co., 218 F.2d 711 (6th Cir. 1955); McLaughlin v. Blidberg Rothchild Co., 167 F. Supp. 714 (S.D.N.Y. 1958); Carstens v. Great Lakes Towing Co., 71 F. Supp. 394 (N.D. Ohio 1945); 1 P. EDELMAN, *supra* note 76, at 137-38.

78 *See, e.g.*, The Tungus v. Skovgaard, 358 U.S. 588, 592, 594-96 (1959).

79 398 U.S. 375, 395-96 (1970).

80 *Id.* at 376.

81 The Tungus v. Skovgaard, 358 U.S. 588, 592 (1959).

82 398 U.S. at 377.

83 The purpose of DOHSA was to provide a maritime remedy for deaths at sea; it was not intended that the Act abrogate existing state remedies for death in state terri-

and created an action under general maritime law for "death caused by violation of maritime duties."[84] Speaking for the Court, Justice Harlan, in a lengthy, deliberate opinion, concluded that *The Harrisburg* rule was not regarded as a

> closely arguable proposition—it rested on a most dubious foundation when announced, has become an increasingly unjustifiable anomaly as the law over the years has left it behind, and, in conjunction with its corollary, *The Tungus*, has produced litigation-spawning confusion . . . .[85]

Additionally, in the Court's view, uniformity in admiralty law, an objective required by both statutory and constitutional considerations, would be advanced by the creation of a federal wrongful death remedy to supplement existing statutes.[86] After creating the new right, however, the Court declined to define the subsidiary issues, such as beneficiary classifications or the proper measure of damages, which were certain to arise in future litigation. The Court reasoned that lower courts would not be "without persuasive analogy for guidance"[87] in DOHSA and state wrongful death act decisions when entertaining suits under the new cause of action.[88]

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torial waters. S. REP. No. 216, 66th Cong., 1st Sess. 3, 4 (1919); H.R. REP. No. 674, 66th Cong., 2d Sess. 3, 4 (1920). In *Moragne*, the Court observed that the failure of Congress to extend the Act to cover death in state waters as well was due to a "lack of necessity" for the extension since the states historically provided their own remedies under such circumstances. 398 U.S. at 397-98. As a result, the Court rejected the contention that DOHSA's failure to include state territorial waters within its coverage amounted to a congressional desire to "insulate such deaths from the benefits of any federal remedy that might be available independently of the Act." *Id.* at 398. As the concept of seaworthiness evolved into a type of absolute duty under maritime law, however, the need for a federal remedy independent of DOHSA became apparent. Consequently, the Court concluded:

> Congress merely declined to disturb state remedies at a time when they appeared adequate . . . . That action [DOHSA] cannot be read . . . that deaths in territorial waters, caused by breaches of the evolving duty of seaworthiness, must be *damnum absque injuria* unless the States expand their remedies to match the scope of the federal duty.

Id. at 399-400.

84 398 U.S. at 409.

85 *Id.* at 404.

86 In the Court's view, the uniformity desired in admiralty would be frustrated as long as the states gave varying effect to the duty to provide a seaworthy vessel. The Court concluded that

> a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts.

Id. at 401.

87 *Id.* at 408.

88 *Id.* at 406-08. With respect to the designation of beneficiaries, the Court conceded that different dependents are specified in three different statutory schemes, DOHSA, the

Not considered in *Moragne*, however, were the problems associated with judgment, compromise or settlement of a deceased's claim prior to death. Under federal and state wrongful death statutes, recovery by the deceased's survivors after settlement or judgment prior to the victim's death has generally been prohibited.[89] Reflecting what is perhaps the majority view on the question, the Supreme Court in *Mellon v. Goodyear*[90] held that a settlement under FELA barred a later suit by the deceased's representative based upon his death.[91] Acknowledging that the representative's right of action was independent of any which the deceased may have possessed,[92] the Court nonetheless concluded that it was dependent "upon the existence in the decedent at the time of his death of a right of action to recover for such injury."[93] Since even

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Jones Act, and the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (1970), which deal with the problem. The Court, however, declined to decide which schedule of beneficiaries governed the new remedy, reasoning that "its final resolution should await further sifting through the lower courts in future litigation." 398 U.S. at 408.

On the issue of the proper measure of damages, however, the Court specifically referred to DOHSA and state wrongful death statutes as guidelines for future litigation. *Id.* Unfortunately, the Court's suggested models failed to resolve all the ambiguities in the calculation of damages largely because the lower federal courts were often uncertain whether to invoke DOHSA or the appropriate state statute. The choice of models to guide the damage computation is particularly significant since the elements of damages under state statutes are often more extensive than under DOHSA. *See, e.g., In re* American Commercial Lines, Inc., 366 F. Supp. 134 (E.D. Ky. 1973); *In re* Sincere Navigation Corp., 329 F. Supp. 652 (E.D. La. 1971). *See also* Dennis v. Central Gulf S.S. Corp., 323 F. Supp. 943 (E.D. La. 1971), in which the district court recognized that, in the wake of *Moragne*, damages for maritime wrongful death must be computed by the lower federal courts on a case by case basis. The court then suggested the shortcomings of this approach:

> [I]t is obvious that, unless a single national rule of damages is evolved, potential inequities, coupled with problems of fine distinctions will persist.

Id. at 948.

89 In effect, any occurrence which successfully terminated the injured party's cause of action barred subsequent wrongful death recovery. Flynn v. New York, N.H. & H.R.R., 283 U.S. 53 (1931) (statute of limitations running on an injured party); Mellon v. Goodyear, 277 U.S. 335 (1928) (settlement or release); Walrod v. Southern Pac. Co., 447 F.2d 930 (9th Cir. 1971) (judgment); 2 F. HARPER & F. JAMES, *supra* note 33, § 24.6, at 1291-95; W. PROSSER, *supra* note 16, § 127, at 911-13; F. TIFFANY, *supra* note 12, § 124.

90 277 U.S. 335 (1928).

91 *Id.* at 343.

92 In conceding that the representative's cause of action was distinct from the rights of the decedent, the Court referred to a prior case which had interpreted the original Federal Employer's Liability Act as creating an action which was

> "independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived."

Id. at 340 (quoting from Michigan Cent. R.R. v. Vreeland, 227 U.S. 59, 68 (1913)). This reasoning was consistent with other interpretations of statutes similar to Lord Campbell's Act. W. PROSSER, *supra* note 16, § 127, at 902; Schumacher, *supra* note 35, at 115-16.

93 277 U.S. at 344.

the beneficiary's rights, though distinct, arose out of the original wrongful act, there could only be one recovery.[94] Thus a successful suit or settlement during the deceased's life extinguished the survivor's contingent cause of action.[95]

The minority view is founded upon a different conception of the nature of the survivor's rights. According to advocates of this theory, the rights of the decedent's beneficiary accrue only at the death of the victim.[96] Consequently, since the beneficiaries' rights are separate and distinguishable, compromise of these claims during the deceased's life is a legal impossibility. The damages sought to be recovered, moreover, were not those derived from the deceased's suffering and injuries but, rather, were damages the survivor "sustained by reason of the decedent's death."[97] A state court in *Johnson v. Sundbery*[98] articulated the minority's sentiments when it could not comprehend

> the reasoning which enables an injured person to release a cause of action which has not accrued, and cannot accrue until his death, and which then accrues to third persons.[99]

According to this view double recovery was either ignored as a legal impossibility or was accounted for in the damage calculation by a deduction of prior awards for prospective earnings.[100]

The question of the ability of beneficiaries to maintain a maritime death action despite the deceased's prior recovery was directly before the Court in *Gaudet*. The defendant, Sea-Land, argued that the plaintiff's claim could be asserted only if " 'Gaudet failed to prosecute [his own claim] during his lifetime,' "[101] and if the decedent's widow were allowed to recover, Sea-Land would be subjected to double liability. Drawing upon *Moragne's* extension of the "special solicitude" for sea-

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94 *See id. See also* Michigan Cent. R.R. v. Vreeland, 227 U.S. 59, 68 (1913).

95 Judicial concern for double recovery had apparently prompted this determination, since damages in either the injured party's or the survivor's suit would be measured in some degree by the injured party's loss of prospective earnings. 2 F. HARPER & F. JAMES, *supra* note 33, § 24.6, at 1292-93; W. PROSSER, *supra* note 16, § 127, at 911-12; Fleming, *The Lost Years: A Problem in the Computation and Distribution of Damages*, 50 CALIF. L. REV. 598, 609-10 (1962). For a thorough survey of wrongful death damages and their persisting problems see Duffey, *supra* note 33.

96 *See, e.g.*, Rowe v. Richards, 35 S.D. 201, 216, 151 N.W. 1001, 1006 (1915); Duffey, *supra* note 33, at 273. *See also* Gilmore v. Southern Ry., 229 F. Supp. 198 (E.D. La. 1964); Goodyear v. Davis, 114 Kan. 557, 220 P. 282 (1923).

97 Blackwell v. American Film Co., 189 Cal. 689, 694, 209 P. 999, 1001 (1922).

98 150 So. 299 (La. Ct. App. 1933).

99 *Id.* at 301.

100 W. PROSSER, *supra* note 16, § 127, at 912.

101 94 S. Ct. at 811 (quoting from Brief for Petitioner at 6).

men to the dependents of deceased seafarers as a foundation, the Court rejected Sea-Land's contentions and sanctioned Mrs. Gaudet's recovery.[102]

Speaking for the Court, Justice Brennan emphasized that *Moragne* had created a pure wrongful death action predicated "upon the death itself and independent of any action the decedent may have had for his own personal injuries."[103] Since there were two distinct harms actionable in separate claims, res judicata would not preclude a survivor's action.[104] The Court conceded, however, that a majority of courts, interpreting both state and federal wrongful death statutes, have held that a dependent's action is barred by a decedent's recovery. Nevertheless, the Court concluded that such results were based on limitations found in the particular statutes, rather than upon broader policy considerations or principles of res judicata.[105] Since the general maritime wrongful death remedy was judicially-fashioned, however, it was not confined by prior statutory restrictions, and the Court could respond with more flexibility.

> [G]uided by the principle of maritime law that "certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy,"[106]

the Court sustained the plaintiff's cause of action.[107]

Since the libellant's claims for loss of services, society, and funeral expenses did not accrue until the decedent's death, the Court did not consider them in response to the respondent's double recovery argument.[108] The possibility of a double recovery is relevant, however, when a decedent has been compensated in his own right for lost wages, and his dependents subsequently claim lost support[109] in a death action. The majority, however, foreclosed this possibility by relying upon the

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102 94 S. Ct. at 811, 814.

103 *Id.* at 811 (footnote omitted).

104 *Id.* at 811-12.

105 *Id.* at 812.

106 *Id.* at 814 (quoting from The Sea Gull, 21 F. Cas. 909, 910 (No. 12,578) (C.C.D. Md. 1865)).

107 94 S. Ct. at 814. The Court determined that the underlying consideration of the wrongful death remedy was to compensate

> the dependents for *their* losses resulting from the decedent's death, [and] the remedy should not be precluded merely because the decedent, during his lifetime, is able to obtain a judgment for his own personal injuries.

Id. (emphasis by the Court).

108 *Id.* at 818.

109 *Id.* Support as defined by the Court includes "all the financial contributions that the decedent would have made to his dependents had he lived." *Id.* at 814.

doctrine of collateral estoppel. Reasoning that a decedent acts in a fiduciary capacity when he brings his own action, and represents his dependents' interest in his support when he recovers for his lost wages, Justice Brennan felt that "familiar principles"[110] of collateral estoppel would preclude the dependents from re-litigating the support issue, at least to the extent of that portion of the dependent's expected support represented by the earlier award.[111]

Although not a subject of the double liability problem, society and funeral expenses were recoveries not uniformly accepted in either federal or state jurisdictions prior to *Gaudet*. Nevertheless, in sustaining Mrs. Gaudet's cause of action, the Court allowed both as elements of damages. Traditionally the fear of excessive verdicts and the inability to reasonably estimate non-pecuinary losses had limited statutory wrongful death recovery, either explicitly or by judicial construction, to damages representing pecuniary losses suffered by the beneficiary or the estate.[112] Recovery under DOHSA, the statute *Moragne* suggested as guidance for the courts, has been confined to "fair and just compensation for the pecuniary loss sustained."[113] Sentimental damages, such as grief, society, and companionship, therefore, have been excluded.[114] Similar results have been reached under FELA, which does not specifically limit damages.[115] The Court recognized, however, that a majority of states viewed loss of society as a compensable injury and identified a discernable trend toward liberalizing recovery.[116] Although the Court

110 *Id.* at 818.

111 *Id.* at 818-20. The application of collateral estoppel by judgment is limited to parties and their privies. A non-party, however, whose interests are represented by an authorized party, is bound to the extent the determination affects his interests. 1B J. MOORE, FEDERAL PRACTICE ¶ 0.411[1], at 1253 (2d ed. 1974). Since the decedent in his own damage suit had tacitly represented his dependents for their lost support, collateral estoppel would apply in subsequent litigation by the survivors to that portion of the damages collected for it. 94 S. Ct. at 819 & n.30.

112 *See* notes 37-42 *supra* and accompanying text. The difficulty in ascribing a monetary value to loss of society can be appreciated by the Court's use of the term. The Court said the term embraced "love, affection, care, attention, companionship, comfort and protection" but not "mental anguish or grief." 94 S. Ct. at 815 & n.17.

113 46 U.S.C. § 762 (1970).

114 *See, e.g.*, Igneri v. Cie. de Transports Oceaniques, 323 F.2d 257, 266 (2d Cir. 1963), *cert. denied*, 376 U.S. 949 (1964) (recovery for loss of consortium denied); Middleton v. Luckenbach S.S. Co., 70 F.2d 326, 330 (2d Cir.), *cert. denied*, 293 U.S. 577 (1934) (recovery for loss of society and companionship denied).

115 45 U.S.C. § 51 (1970). *See* Michigan Cent. R.R. v. Vreeland, 227 U.S. 59, 68, 70-71 (1913); G. GILMORE & C. BLACK, *supra* note 44, § 6-31, at 306.

116 94 S. Ct. at 816. Although the decisions are not uniform, the trend in federal courts since *Moragne* has been to allow nonpecuniary recovery. *See, e.g., In re* Farrell Lines, Inc., 339 F. Supp. 91 (E.D. La. 1971) (loss of son's love and affection); *In re* Sincere Navigation Corp., 329 F. Supp. 652 (E.D. La. 1971) (emotional distress allowed). *But see*

felt justified in aligning admiralty law with current state determinations, it concluded that a like result was compelled

> to shape the remedy to comport with the humanitarian policy of the maritime law to show "special solicitude" for those who are injured within its jurisdiction.[117]

Thus, since DOHSA did not foreclose non-statutory federal remedies, the traditional obligation of the judiciary in fashioning admiralty principles permitted the Court to extend admiralty recovery.[118] Finally, in the Court's view speculative and excessive verdicts for the loss of society would be controlled by measuring damages with " 'good sense and deliberate judgment' " and by appellate review.[119]

Condoning only the majority's position allowing damages for lost services and funeral expenses,[120] Justice Powell dissented. In his opinion, the extensions of admiralty law authorized by the majority were

> unsound as a matter of principle, will create difficulty and confusion in the litigation of admiralty cases, and are very likely to result in duplicative recoveries.[121]

Justice Powell observed that for over half a century the majority of state jurisdictions and decisions under FELA and the Jones Act have held that a termination of the decedent's claims foreclosed a subsequent wrongful death action.[122] In Justice Powell's view, when *Moragne* sug-

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Canal Barge Co., 323 F. Supp. 805 (N.D. Miss. 1971), *modified sub nom.* M/V Elaine Jones, 480 F.2d 11 (5th Cir. 1973) (society and companionship denied).

117 94 S. Ct. at 816 (footnote omitted).

118 *Id.* at 816 n.22. *See also* note 53 *supra* and accompanying text.

119 *Id.* at 817 (quoting from The City of Panama, 101 U.S. 453, 464 (1879)).

Funeral expenses had not been considered a pecuniary loss to dependents because they had been viewed as an expense of the estate. The Culberson, 61 F.2d 194, 195 (3d Cir. 1932). In conformity with the majority of states, the Court allowed funeral expenses as a compensable damage where there was an obligation for such payments. 94 S. Ct. at 818.

120 94 S. Ct. at 825 & n.14 (Powell, J., dissenting).

121 *Id.* at 820.

122 *Id.* at 821. To further substantiate his view, Justice Powell relied upon comment *a* to section 925 of the *Restatement of Torts* which deals with the proper measure of damages for causing the death of another:

> "Although the death statutes create a new cause of action, both they and the survival statutes are dependent upon the rights of the deceased. Hence where no action could have been brought by the deceased had he not been killed, no right of action exists. Likewise, a release by the deceased or a judgment either in his favor or, if won on the merits, in favor of the defendant, bars an action after his death."

94 S. Ct. at 824 (Powell, J., dissenting) (quoting from RESTATEMENT OF TORTS, Explanatory Notes § 925, comment *a* at 639 (1939)).

It should be noted, however, that the *Restatement* is addressed to the interpretation

gested a process of accommodation of the newly created maritime wrongful death remedy with the existing statutes, it did not contemplate "their abrupt and near-total forced absolescence [*sic*]."[123] In this respect, the dissent suggested that the judiciary was now in the dubious position of "analogizing to statutes under which the very claim before them would be blocked."[124]

Additionally, the dissent viewed the adoption of society as an element of compensable harm by the majority as contradictory to the existing federal admiralty statutes and a line of admiralty cases decided since *Moragne*.[125] Justice Powell was also skeptical of the practical application of the collateral estoppel theory to minimize prospective double recoveries. In his view this "novel" approach would be difficult to administer and would pose questions which have not been answered by the Court.[126] Finally, the dissent concluded that by allowing a second recovery based upon the same wrong, the majority had ignored the limitation of damages common in absolute liability situations, such as unseaworthiness, as well as judicial aversion to duplicate litigation.[127]

By allowing a survivor's recovery despite a successful suit by the decedent, the Court has clearly departed from the mainstream of prior law. Yet the distinctions made in earlier death cases which precluded the survivor's cause of action, seem to be artificial in light of the spirit of the wrongful death remedy which evolved to fill a universally recognized remedial void by compensating the survivors of those whose death was caused by wrongful act. The fundamental premise in most of the statutory expressions of the wrongful death remedy is that the survivor's rights do not accrue until death. Thus in theory as well as in practice, an award during the decedent's lifetime cannot possibly encompass the unique injury to the survivors. This is particularly true in view of the recent trend in death cases to free damage awards from strict loss of support or pecuniary formulas.

The result reached by the Court comports with the spirit of flexibility and compassion which has traditionally been the hallmark of maritime law. The decision, however, is not without its shortcomings. As suggested by Justice Powell, *Gaudet* has discarded the limitations in both the Jones Act and DOHSA in expanding the general maritime

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of wrongful death statutes for measuring damages, whereas the majority's position is founded upon a general maritime remedy for wrongful death.

123 94 S. Ct. at 823 (Powell, J., dissenting).

124 *Id.*

125 *Id.* at 825-26 & n.18.

126 *Id.* at 826-27 & n.21.

127 *Id.* at 827-28.

wrongful death remedy. Consequently, litigants whose claims entitle them to proceed either under general maritime law, or pursuant to one of the statutory schemes can be expected to rely primarily upon the more generous possibilities offered by the general maritime remedy.[128] In this respect, the remedy engendered by *Moragne*, which was originally fashioned to supplement the existing statutory remedial framework, may well eclipse the remedies it was intended to complement. The limitations found in the admiralty wrongful death statutes, however, were judicially engrafted,[129] and there appears to be no fundamental reason why these restrictions cannot be relaxed indirectly by expanding the scope of recovery under the general maritime law which is the product of the judicial process. In any event, *Gaudet* represents a significant step in the evolution of the general maritime wrongful death remedy.

William R. Barker

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128 In summarizing the effect of the majority's decision, Justice Powell in his dissent emphasized:

> Given the sweep of the majority's approach, the upshot in many areas will be a nearly total nullification of the congressional enactments previously governing maritime wrongful death. Except for a technical joinder of counts to obtain a jury and thus to maximize the benefits promised by the Court's opinion, no one entitled to rely on the admiralty doctrine of unseaworthiness will, after today, seek relief under the federal maritime wrongful death statutes. Several limitations built into those congressional enactments have been swept aside by the majority's decision.

Id. at 820.

129 The Jones Act created a federal wrongful death remedy for seamen by applying the FELA to those within the purview of the Act. *See* note 75 *supra* and accompanying text. Since the Jones Act expressly incorporated the FELA, the judicial principles which evolved under the FELA are also applicable to Jones Act cases. Thus, in Kernan v. American Dredging Co., 355 U.S. 426 (1958), a case arising under the Jones Act, the Court had no difficulty applying judicial principles developed under the FELA to the case at bar:

> We find no difficulty in applying these principles, developed under the FELA, to the present action under the Jones Act, for the latter Act expressly provides for seamen the cause of action—and consequently the entire judicially developed doctrine of liability—granted to railroad workers by the FELA. The deceased seaman here was in a position perfectly analogous to that of the railroad workers allowed recovery in the line of cases we have discussed, and the principles governing those cases clearly should apply here.

Id. at 439. Cases decided under the FELA, moreover, have consistently held that a settlement of a decedent's claim, or a judgment recovered during his lifetime, precludes a subsequent wrongful death action. *See, e.g.*, Mellon v. Goodyear, 277 U.S. 335 (1928). *See also* 94 S. Ct. at 821 (Powell, J., dissenting) and cases cited therein.

With respect to DOHSA, the majority of the Court in *Gaudet* concluded that the Act, unlike the FELA, has not been interpreted as barring a survivor's wrongful death action when the decedent has already recovered for personal injuries during his lifetime. *Id.* at 814 n.10. Justice Powell, however, in his dissent characterized this conclusion as "conjectural," and expressed the view that in enacting DOHSA, Congress contemplated only one recovery in this context. *Id.* at 822.