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Jurisdictional Problems of Maritime Tort Actions: Application of State and Federal Remedies

Judith N. Keep

JURISDICTIONAL PROBLEMS OF MARITIME TORT ACTIONS: APPLICATION OF STATE AND FEDERAL REMEDIES

At common law, death terminated all causes of action for personal injuries, and gave rise to no causes of action for compensation of the decedent's estate or family.[1] Admiralty, which adopted the common law, therefore provided neither a remedy for wrongful death nor for survival of causes of action. To correct this, there have been a number of Congressional enactments and judicially created remedies which, however, are complicated by inconsistencies and vagaries. If death results from an injury occurring on navigable waters,[2] recovery may be sought under the Death on the High Seas Act,[3] the Jones Act,[4] the Longshoremen's and Harbor Workers' Compensation Act,[5] state statutes, or foreign law.[6]

The purpose of this article is two-fold. First, some of the jurisdictional problems of the Death on the High Seas Act, the Longshoremen's and Harbor Workers' Compensation Act, and the Jones Act will be examined with special emphasis upon the question of when a state remedy will be applied in death actions falling under these particular acts. Second, many difficulties in the application of these enactments will be traced to the inconsistent recovery and uniformity principles in an attempt to point out the need for establishing an over-riding policy as to the applicability of state remedies in connection with these acts.

I. The Recovery and Uniformity Theories

In *The Hamilton*,[7] two ships collided on the high seas; recovery was sought in admiralty under a Delaware wrongful

1. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 920 (3d ed. 1964).

2. As used in this paper, *high seas* means water more than a marine league from the shore of a state or territory of the United States; *territorial waters* refers to the waters beginning at the low water mark and extending seaward three miles; *internal waters* refers to bays and inlets which are considered part of the state under the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone as well as to inland navigable rivers and streams.

3. 46 U.S.C. §§ 761-67 (1964).

4. 46 U.S.C. § 688 (1964).

5. 33 U.S.C. §§ 902-50 (1964).

6. Comment, *The Application of State Survival Statutes in Maritime Causes*, 60 COLUM. L. REV. 534-35 (1960).

7. 207 U.S. 398 (1907).

death statute as there was no applicable federal legislation. The Supreme Court approved the application of the state statute, holding that under the Saving to Suitors Clause,[8] both state courts and state legislators had authority to make law where Congress had not acted, and it rejected the notion that such application of state law would produce a "lamentable lack of uniformity" in admiralty.[9] In essence, this case illustrates the recovery principle, that is, the theory that in admiralty, recovery is more important than uniformity; and to provide full compensation, admiralty will look to state law to provide the remedy where there is no adequate federal remedy.

In 1917, ten years after the *Hamilton* decision, the Supreme Court decided *Southern Pacific Company v. Jensen*.[10] A stevedore engaged in unloading a ship in the navigable waters of New York was accidently killed. The New York Workmen's Compensation Commission gave an award to the widow and children. In reversing, the Court conceded that state legislation could to some degree modify or affect maritime law, but added:

> [N]o such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or 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.[11]

Jensen illustrates the uniformity theory, the view that admiralty courts should rarely and cautiously apply state law because of the resulting inconsistencies and lack of uniformity.

Many of the present anomalies in admiralty law can be traced to the two principles previously discussed. The lower federal courts differ as to when the recovery principle or the uniformity principle should be applied in determining the

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8. 28 U.S.C. § 1333 (1964) provides that:

> The district courts shall have original jurisdiction exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled* (emphasis added).

9. 207 U.S. at 406.

10. 244 U.S. 205 (1917).

11. *Id.* at 216 (emphasis added). The Court did not overrule *The Hamilton*; it conceded that states had the right to grant recovery in death cases. *Id.* Therefore, it appears *Jensen* was aimed at restricting and limiting the applicability of state statutes in death actions, but not at precluding their application.

applicability of state statutes, and the Supreme Court has given them little guidance. As a result, the use and non-use of state remedies in admiralty is producing a greater lack of uniformity than the Supreme Court in *Jensen* envisioned, and is thwarting recovery which the *Hamilton* Court sought to foster.

A. The Death on the High Seas Act.

The Death on the High Seas Act[12] provides a remedy for death caused by a wrongful act, neglect, or default occurring on the high seas more than a marine league from the shore of any state, the District of Columbia, or the territories or dependencies of the United States.[13] It is a wrongful death statute allowing the decedent's representative to sue in admiralty for the benefit of the decedent's spouse, child, or dependent relative against the vessel, person, or corporation which would have been liable had death not resulted.[14] Contributory negligence of the decedent is not a defense, but it will reduce the amount of his recovery proportionally.[15]

A question on which the lower federal courts disagree is whether this act is meant to provide the exclusive remedy for deaths occurring more than a marine league from shore, or whether state statutes can be used for survival of causes of action or for supplemental damages. The court in *Wilson v. Transocean Airlines*[16] mentions that the Death on the High Seas Act was enacted to terminate the uncertainty and confusion resulting from extraterritorial application of state wrongful death statutes. Thus, one could deduce that the remedy was meant to be exclusive. However, it is suggested in one student comment that the legislators did not consider the question of whether state survival statutes could be applied to deaths resulting from injuries occurring on the high seas and were concerned only with

12. 46 U.S.C. §§ 761-67 (1964) [hereinafter cited as DHSA].

13. *Id.* at § 761.

14. *Id.*

15. *Id.* at § 766.

16. 121 F. Supp. 85 (N.D. Cal. 1954) contains an excellent synopsis of the legislative history. The court in *Wilson* mentions that there were two theories of jurisdiction allowing a state to impose liability for a wrongful act on the high seas: 1) The vessel upon which the wrongful act occurred was constructively a part of the state's territory; 2) The wrongdoer was a vessel or citizen of the state and subject to its extra-territorial jurisdiction. *Id.* at 88. With both theories, there was the inherent difficulty of determining to which state a vessel belonged, for example, its home port, or the residency of its owners. *Id.*

establishing an exclusive remedy for wrongful death.[17] The Act itself provides that whenever death occurs more than a marine league from shore, "the personal representative of the decedent *may* maintain a suit . . . ."[18] The Fifth Circuit has held that the legislative history of the enactment indicates that it was meant to be the exclusive remedy for death more than a marine league from shore, and therefore, it refused to allow a plaintiff to file suit based on the Louisiana death statute for supplemental damages.[19] The district courts of New York, however, reason that the Death on the High Seas Act preempted only actions for wrongful death, and the theory of liability based upon survival of causes of action which the injured person himself had prior to death is not excluded by the Act. They therefore allow a cause of action based on the survival statute of the tortfeasor's state.[20] In essence, the controversy in the lower federal courts is between the uniformity and recovery theories of admiralty jurisdiction in death cases.

The Supreme Court may soon settle the controversy. Arguments have been heard for the joined cases of *Rodrigue v. Aetna Casualty and Surety Co.*[21] and *Dore v. Link Belt Co.*[22] In *Rodrigue*, the decedent was killed in an accident on the derrick of a fixed drilling rig located on the Outer Continental Shelf, twenty-eight miles south of Louisiana. Petitioner argued that in addition to bringing a cause of action for pecuniary losses under the Death on the High Seas Act, she had the right under the Outer Continental Shelf Lands Act[23] to sue for supplemental damages for loss of love, society, affection, and companionship under the Louisiana Death Statute.[24] The Outer Continental Shelf Lands Act provides in part that the laws of the adjacent

17. Comment, *supra* note 6, at 535.

18. DHSA, 46 U.S.C. § 761 (1964) (emphasis added).

19. Dore v. Link Belt Co., 391 F.2d 671 (5th Cir. 1968).

20. Montgomery v. Goodyear Tire and Rubber Co., 231 F. Supp. 447 (S.D.N.Y. 1964). *See also* Safir v. Compagnie Generale Transatlantique, 241 F. Supp. 501 (E.D. N.Y. 1965) in which the court recognized New York's authority to apply its wrongful death statute to deaths occurring on the high seas by reason of the fact that the statute incorporated admiralty law.

21. 395 F.2d 216 (5th Cir. 1968), *cert. granted*, 393 U.S. 932 (1968).

22. 391 F.2d 671 (5th Cir. 1968), *cert. granted*, 393 U.S. 932 (1968).

23. 43 U.S.C. §§ 1331-43 (1964) [hereinafter cited as OCSLA].

24. Petitioner's Brief at 11-13, Rodrigue and Dore v. Aetna Casualty and Surety Co. and Link Belt Co., No. 436, 1969 Term (U.S. Sup. Ct.) (argued March 4, 1969).

state, to the extent that they are not inconsistent with applicable federal law, attach to the area of the Outer Continental Shelf.[25]

The Fifth Circuit rejected this contention by relying on its decision in *Dore v. Link Belt*.[26] The court in *Dore* pointed out that there were inconsistencies between the Louisiana death statute and the Death on the High Seas Act which would thus preclude the application of the state law. However, the primary reason asserted for its refusal to apply the state act was because it believed that since the locale and hazards of the work were maritime in nature, admiralty and not state statutes should apply.[27] In addition, the court determined that Congress intended to make the Death on the High Seas Act the exclusive remedy for deaths resulting from torts occurring more than a marine league from shore.[28]

Rodrigue thus presents for determination the question of the exclusivity of the Death on the High Seas Act, at least as far as deaths resulting from injuries occurring on the Outer Continental Shelf are concerned. The following are the most likely solutions. First, the Supreme Court could deny recovery and determine that the Death on the High Seas Act is meant to be an exclusive remedy; this would terminate application of state survival statutes and death statutes providing for supplemental damages (love, affection, companionship, society) in death actions arising on the high seas, but it would achieve uniformity in such cases. Second, the Court could allow recovery, but base its decision on the specific provisions of the Outer Continental Shelf Lands Act providing for application of state laws to the Outer Continental Shelf to the extent that they are not inconsistent with applicable federal law: This reasoning would provide limited support for the recovery principle but would leave in doubt the validity of applying state remedies to accidents occurring more than a marine league from shore and not on the Outer Continental Shelf. Third, the Supreme Court could determine that the Death on the High Seas Act is exclusive only insofar as pecuniary loss for death is concerned, but it allows application of state remedies to provide full compensation for supplemental damages and

25. *Id.* at § 1333(a)(2). The OCSLA applies to the subsoil and seabed of the Outer Continental Shelf, including the artificial islands and fixed structures erected thereon.

26. 391 F.2d 671 (5th Cir. 1968).

27. *Id.* at 674.

28. *Id.* at 675.

survival of causes of action. The latter reasoning would be illustrative of the recovery principle.

Although the Supreme Court prefers to decide each case on the narrow issue presented to it, it is necessary for it to give some broad policy statements on the issue of the exclusivity of the Death on the High Seas Act to guide the lower federal courts and terminate the present inconsistent decisions.

B. The Longshoremen's and Harbor Workers' Compensation Act

The Longshoremen and Harbor Workers' Compensation Act,[29] which was passed in 1927, contains an elaborate scheme for compensating disabilities or death resulting from injury occurring on the navigable waters of the United States, including any drydock, *"if recovery . . . through workmens' compensation proceedings may not validly be provided by state law."*[30] Generally, an employer, any of whose employees are engaged in maritime work, in whole or in part on the navigable waters of the United States, is subject to the Act's compensation provisions.[31] There are certain employees exempted from the Act's coverage; the most significant are masters or members of a crew or vessel.[32]

The Act provides that the liability of the employer shall be *exclusive* and in place of all other liability to named beneficiaries unless the employer has failed to secure payment as required.[33] In that event, the personal representative may elect to sue under the Longshoremen's Act or to maintain an action at law or admiralty for damages.

Two major problems in this Act are: 1) is the claim one which validly might be provided for by state law; 2) if so, does this preclude the application of the Longshoremen's and Harbor

29. 33 U.S.C. §§ 901-50 (1964) [hereinafter cited as LHWCA].

30. *Id.* at § 903 (emphasis added). In 1953, Congress extended the coverage of the LHWCA by making it applicable to the Outer Continental Shelf. OCSLA, 43 U.S.C. § 1333(c) (1964).

31. LHWCA, 33 U.S.C. § 902(1) (1964).

32. *Id.* at § 903(1). Also exempted are persons engaged by a master to load, unload, or repair a vessel under 18 tons net weight. *Id.* Officers or employees of the United States or its agencies, or of any state, foreign government or political subdivision are also not covered. *Id.* at § 903(a)(2).

33. *Id.* at § 905.

Workers' Compensation Act. In order to appreciate these problems, it is necessary to examine briefly the cases *Southern Pacific Company v. Jensen*[34] and *Western Fuel Co. v. Garcia*[35] which preceded and influenced the Act.

Prior to the enactment of the Longshoremen's Act, states began extending their compensation laws to borderline maritime cases. The Supreme Court terminated this in *Southern Pacific Company v. Jensen*.[36] *Jensen* held unconstitutional a New York workmen's compensation law applying to longshore workers on the ground that the injury was maritime, employment was maritime, and the act interfered with the uniformity of the maritime law.[37] Twice thereafter Congress tried to circumvent *Jensen* by preserving claimant's rights and remedies under states' workmen's compensation laws, but both attempts were held unconstitutional.[38]

In *Western Fuel Co. v. Garcia*,[39] the Supreme Court attempted to mitigate the harshness of *Jensen*. A stevedore was killed while working on a vessel anchored in San Francisco Bay. The Court held that when death results from a maritime tort committed on the navigable waters within a state whose statutes provide a cause of action for wrongful death, the admiralty courts will entertain a libel applying state law. The reasoning was that the subject matter was *maritime but local*, and it was felt that in such cases, application of state law would not unduly interfere with the proper harmony and uniformity of admiralty law.[40]

When Congress passed the Longshoremen's and Harbor Workers' Compensation Act, the provision that the Act would apply to injuries or death occurring on navigable waters "if recovery . . . through workmen's compensation proceedings may

34. 244 U.S. 205 (1917).

35. 257 U.S. 233 (1921).

36. 244 U.S. 205 (1917).

37. *Id.* at 217.

38. Act of Oct. 6, 1917, ch. 97, 40 Stat. 395; held unconstitutional in Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920). Act of June 10, 1922, ch. 216, 42 Stat. 634; rendered unconstitutional by State of Washington v. W.C. Dawson and Co., 264 U.S. 219 (1924).

39. 257 U.S. 233 (1921).

40. *Id.* at 242. *See also* The Tungus v. Skovgaard, 358 U.S. 588 (1959) wherein the Court applied the maritime but local exception to the death of a ship repairman occurring in the territorial waters of New Jersey.

not validly be provided by State law"[41] was meant to apply to workers not covered by the "maritime but local" exception and who were excluded from state coverage by the *Jensen* rule.[42] However, trying to define this category of waterfront workers led to even greater confusion and lengthy litigation. In recognition of this fact, in 1942 the Court announced the "twilight zone" exception in *Davis v. Dept. of Labor and Industries of the State of Washington*.[43] Petitioner's husband, a structural steelworker, was working on a barge in the Snohomish River; he fell or was knocked from the barge and drowned. His employer was required to make contributions to the state's workmen's compensation fund, and a Washington statute provided for compensation for dependents of workmen engaged in maritime occupations with no right of recovery under the maritime law. The Supreme Court recognized that the deceased did come under the Longshoremen's Act since he was employed on navigable waters; however, it felt that Congress desired state compensation provisions to apply whenever possible.[44] This dilemma was resolved by the Court concluding that in "twilight zone" cases,[45] where the decedent is in fact protected under a state compensation act, presumptive weight will be given to the constitutionality of state statutes.[46] Since in this case the federal authorities had taken no action and a state statute did apply, the Court concluded that there was no constitutional obstacle to petitioner recovering under state law.

Davis is an illustration of the conflict of the uniformity and recovery principles. In light of the fact that Congress passed the Longshoremen's Act to compensate those waterfront workers which *Jensen* excluded from state compensation acts, the Supreme Court felt powerless to overrule *Jensen*. However, the Court felt constrained to end the hardships of litigation over which remedy, state or federal, was to be applied in questionable

41. LHWCA, 33 U.S.C. § 903(a) (1964).

42. Gisevius & Leppert, *Maritime Injury Problems: Admiralty v. State Jurisdiction*, 12 LOYOLA L. REV. 57, 59-62 (1965).

43. 317 U.S. 249 (1942).

44. *Id.* at 252-53.

45. *Id.* at 256.

46. *Id.* at 258. The Court also stressed that there were no conflicting administrative processes; the employer had not made the specified payments required nor controverted payment prescribed in LHWCA, 33 U.S.C. § 914(b), (d) (1964). Also, there had been no federal administrative hearing. 317 U.S. at 257.

cases. As a result, a petitioner could seek state remedies if the case was "maritime but local," or if it was within the "twilight zone." Ostensibly, the area of applicable state remedies had expanded, but the problem of proving when they applied was still as ill-defined as it previously had been.

Since state law could validly be applied in "maritime but local" and "twilight zone" cases, the problem arose as to whether the Longshoremen's Act was excluded from application in these areas. In *Calbreck v. Traveler's Insurance Co.*,[47] decided in 1962, the Court concluded that it was not. An employee injured while working on construction of a new vessel sought compensation under the Longshoremen's Act although he could have recovered under an applicable state statute. The Court repudiated the interpretation of Congressional intent which *Davis* presented[48] by stating that the legislative history of the act precludes the theory that Congress intended to exempt injuries occurring on navigable waters from the coverage of the Longshoremen's and Harbor Worker's Compensation Act if state law also provided compensation.[49] In denying that "twilight zone" cases were exclusively within the states' jurisdiction, the Court suggested that both state and federal remedies were applicable:

> Our conclusion is that Congress invoked its Constitutional power so as to provide compensation for all injuries sustained by employees on navigable waters whether or not a particular injury might also have been within the Constitutional reach of a state's workmen's compensation law.[50]

The qualifying phrase, "if recovery through workmen's compensation proceedings may not validly be provided by state law," is now held to be no restriction upon the application of the Longshoremens' and Harbor Worker's Compensation Act. Yet,

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47. 370 U.S. 114 (1962).

48. 317 U.S. 249, 252-53 (1942). The Court states the following:

> March 4, 1927, came the Federal Longshoremen's and Harbor Workers' Compensation Act . . . . Here again, however, Congress made clear its purpose to permit state compensation protection whenever possible by making the federal law applicable only 'if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law.'

Id.

49. 370 U.S. at 130-31.

50. *Id.* at 117 (footnote omitted).

the question remains: What does it mean? Since *Jensen, Garcia,* and *Davis* have not been expressly overruled, the following appears to be the state of the law. The injured person has an election to sue under a state's workmen's compensation law or the Longshoremen's Act if he is a harbor worker or longshoreman injured on the navigable waters of a state. The state can exercise jurisdiction if he is within the somewhat weakened "maritime but local" exception or if he can prove that he is within the category of persons in the "twilight zone." However, despite the fact that state compensation acts cover him, he can sue in admiralty under the Longshoremen's and Harbor Worker's Compensation Act.

In the last forty years, the Court has tried to fill the void between state and federal compensation law applicable to waterfront workers injured on navigable waters: Its solution has been to create an overlap which is especially harsh on the employer. If his employees appear subject to the "twilight zone" exception, an employer may now find it necessary to contribute not only to the state's workmen's compensation fund, but also to the fund required under the Longshoremen's Act. If not, he may be subject to a suit at law for damages, fine or imprisonment.[51]

It should be noted that the purported exclusivity of employer's liability, provided for under the Longshoremen's and Harbor Worker's Compensation Act, has been weakened in other areas also. The Longshoremen's Act expressly excludes from its coverage masters or members of a crew[52] as they are governed by the Jones Act.[53] However, as has been pointed out in

51. LHWCA, 33 U.S.C. § 938(a) (1964). This was a determining factor in the *Davis* case where the Court observed:

> The employer's contribution to the state insurance fund may therefore wholly fail to protect him against the liability for which it was specifically planned. If this very case is affirmed, for example, the employer will not only lose the benefit of the state insurance to which he has been compelled to contribute and by which he has thought himself secured against loss for accidents to his employees; he must also, by virtue of the conclusion the employee was subject to the federal act at the time of the accident, become liable for substantial additional payments. He will also be subject to fine and imprisonment for the misdemeanor of having failed, as is apparently the case, to secure payment for the employee under the act. 33 U.S.C. §§ 938, 932.

317 U.S. at 255.

52. LHWCA, 33 U.S.C. § 903(a)(1) (1964).

53. 46 U.S.C. § 688 (1964).

a student note,[54] because of the federal courts' liberal interpretation of the word seamen[55] it is not uncommon for maritime workers to receive benefits under the Longshoremen's Act and thereafter proceed as a seaman under the Jones Act. Also, an employer who has full possession and control of a vessel (as in the case of a bareboat charterer) may be liable not only as an employer under the Longshoremen's and Harbor Worker's Compensation Act, but also for breach of the warranty of seaworthiness.[56]

C. *The Jones Act*

The Jones Act[57] provides that in the case of injury or death of a seaman, suit may be brought for damages under the Federal Employer's Liability Act.[58] This latter Act provides a cause of action against the employer for injuries or death resulting from *negligence* of officers, agents or employees, or the negligent defect or insufficiency of equipment.[59] In the case of death, a suit for wrongful death based on negligence may be brought for the benefit of specified survivors;[60] any cause of action for negligence which the decedent may have had prior to his death survives to the same group.[61] Hence, pain and suffering which the decedent may have suffered prior to his death is compensable.[62]

Contributory negligence is not a bar under the Jones Act although the amount of damages is reduced proportionally.[63] The Act also eliminates the defense of assumption of risk if the injuries resulted, in whole or in part, from the negligence of an officer, agent, or employee, or from the violation of a safety statute.[64]

To be compensable under the Jones Act, the injury need not have occurred on navigable waters as it must under the

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54. Comment, *Exclusivity of Liability Under the United States' Longshoremen's and Harbor Workers' Act*, 13 LOYOLA L. REV. 119, 120 (1966-67).

55. *See* material accompanying note 68 *infra*.

56. Reed v. The Yaka, 373 U.S. 410 (1963); Jackson v. Lykes Bros., 386 U.S. 731 (1967). *See generally* text accompanying notes 71-73 *infra*.

57. 46 U.S.C. § 688 (1964).

58. 45 U.S.C. §§ 51-60 (1964) [hereinafter cited as FELA].

59. *Id.* at § 51.

60. *Id.*

61. *Id.* at § 59.

62. *Id. See e.g.*, Cleveland Tankers v. Tierney, 169 F.2d 622 (6th Cir. 1948).

63. FELA, 45 U.S.C. § 53 (1964).

64. *Id.* at § 54.

Longshoremen's Act. The Supreme Court stated in *O'Connell v. Great Lakes Co.*[65] that

> the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters.[66]

As previously indicated, the concept of what constitutes a seaman is liberally construed by the courts. Generally, the standard is whether the injured or deceased was doing the type of work traditionally done by seamen[67] and this is often a question of fact for the jury.[68] There are advantages to bringing suit under the Jones Act rather than under the Longshoremen's Act. The right to trial by jury is preserved in the Jones Act,[69] and the amount of compensation is not subject to a statutory schedule as it is under the Longshoremen's Act.[70]

Since recovery under the Act is limited to negligence cases, the most frequent use of state death statutes has been in trying to bring or preserve a cause of action for death based on the theory of the warranty of seaworthiness. At common law, a seaman had the right to sue for injuries which resulted from the unseaworthiness of the vessel.[71] This was not a cause of action predicated upon negligence, but rather imposed liability without fault upon the owner of a vessel which was not reasonably fit to do the work at hand.[72] The Supreme Court has held that the duty to furnish a seaworthy ship is independent of the duty under the Jones Act to exercise reasonable care.[73] Thus, for personal

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65. 318 U.S. 36 (1943).

66. *Id.* at 42-43.

67. Skibinski v. Waterman Steamship Corp., 360 F.2d 539 (2d Cir. 1966).

68. Producers Drilling Co. v. Gray, 361 F.2d 432, 435-36 (5th Cir. 1966). *See e.g.*, Offshore Co. v. Robinson, 266 F.2d 769 (5th Cir. 1959) (held jury question whether or not roughneck working on drilling platform resting on Gulf of Mexico was a seaman).

69. Jones Act, 46 U.S.C. § 688 (1964).

70. LHWCA, 33 U.S.C. §§ 907-09 (1964).

71. *See* Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 543-50 (1960) for the historical background of this type of suit.

72. Walker v. Harris, 335 F.2d 185, 191 (1964). The court states the following:

> The subsidiary questions leading to the ultimate conclusion of seaworthiness are therefore: what is the vessel to do? What are the hazards, the perils, the forces likely to be incurred? Is the vessel or the particular fitting under scrutiny sufficient to withstand those anticipated forces? If the answer is in the affirmative, the vessel (or the fitting) is seaworthy.

73. Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 549 (1960).

injuries, the seaman can sue under two theories of recovery: negligence based on the Jones Act and the common law warranty of seaworthiness.

Since there was no recovery for death at common law, a death suit predicated upon unseaworthiness could not be brought. If the death occurred within the territorial waters of the state, the question which arose was whether the states' survival and wrongful death statutes could be used to give to the heirs the right to bring suit for the death of a seaman based on unseaworthiness of the vessel. In *Gillespie v. United States Steel Corp.*,[74] the administratrix sued for the death of a seaman which occurred while the ship was docked in Ohio. She sued under the following theories: (1) for wrongful death by negligence under the Jones Act; (2) for death caused by the unseaworthiness of the vessel based on Ohio's wrongful death statute; (3) for pain and suffering due to negligence under the Jones Act; (4) for pain and suffering due to unseaworthiness based on Ohio's survival statute.

In a prior case, *Lindgren v. United States*,[75] the Court held that a Virginia wrongful death statute could not be applied to a case falling within the Jones Act. The Supreme Court in *Gillespie* approved this decision, and said that in an action for death of a seaman killed in the course of his employment, Congress had intended to exclude the application of state wrongful death statutes in order to provide a uniform remedy. Therefore, there could be no recovery for wrongful death caused by unseaworthiness by the application of a state statute.[76] However, the Court said that a state's survival statute could be used to preserve the cause of action for pain and suffering based upon the injuries resulting from the unseaworthiness of the vessel:

> And we may assume, as we have in the past, that after death of an injured person a state survival statute can preserve the cause of action for unseaworthiness which would not survive under the general maritime law.[77]

In *Gillespie,* the Court is straddling the fence between the

74. 379 U.S. 148 (1964).
75. 281 U.S. 38 (1929).
76. 379 U.S. at 154-55.
77. *Id.* at 157 (footnotes omitted).

uniformity and recovery principles. It did not believe that it should overrule *Lindgren,* which is based upon the uniformity principle,[78] so the Court narrowly construed it as only precluding the application of state wrongful death statutes and not state survival statutes. It seems incongruous that Congress would have desired that the remedy which it provided for death under the Jones Act was to be exclusive whereas the remedy established for the survival of causes of action was not to be. If the Congressional goal was to provide uniformity by covering the entire field of liability, as *Lindgren* states,[79] then Congress did not intend to have the uniformity broken by application of state survival statutes to preserve the unseaworthiness cause of action. If, on the other hand, Congress merely intended to assure that seamen had some cause of action when injuries or death resulted during the course of employment, then surely both a state's wrongful death and survival statutes should be applied to provide the alternative remedy for suits based upon unseaworthiness.

If the death of a seaman occurs more than a marine league from shore, the question also arises as to whether the Death on the High Seas Act can be used as the basis for a suit for wrongful death based on unseaworthiness. The *Lindgren* Court left that question open, as it was concerned only with the application of a state's wrongful death statute,[80] and predictably, the lower federal courts have taken advantage of that fact. Although the Supreme Court has not yet decided the question, it is generally agreed among the lower federal courts that the personal representative of a seaman may pursue a remedy for wrongful death occurring more than a marine league from shore either under the Jones Act or under the Death on the High Seas Act.[81] The reasoning is that the Death on the High Seas Act refers to the death of a *person* on the high seas, and there is no indication in the legislative history of the Jones Act that Congress intended that Act to supersede the Death on the High Seas Act with respect

78. 281 U.S. 38, 44 (1929). The *Lindgren* Court makes the following comment:

> It is plain that the Merchant Marine Act is one of general application intended to bring about the uniformity in the exercise of admiralty jurisdiction by the Constitution, and necessarily supersedes the death statutes of the several states.

79. 281 U.S. at 45-46.

80. *Id.* at 48.

81. *See, e.g.,* Doyle v. Albatross Tanker Corp., 367 F.2d 465 (2d Cir. 1966) and cases cited therein.

to authorizing death actions.[82] Given the fact that several district courts allow the state survival statute to apply to deaths on the high seas[83] the cause of action for pain and suffering based on unseaworthiness is also often preserved. The result is the anomalous rule that the decedent seaman's representative is precluded from suing for death under the doctrine of unseaworthiness only if the death occurs in the territorial or inland waters of a state, the areas in which seabound traffic must of necessity traverse. The state's survival statute can be applied to *preserve* a cause of action for unseaworthiness if the tort occurs in the navigable or territorial waters of a state or even, in many districts, on the high seas. The Death on the High Seas Act can be used to bring suit for death caused by unseaworthiness.

II. Conclusion

Many of the difficulties in applying state remedies to injuries covered by the Death on the High Seas Act, the Longshoremen's and Harbor Workers' Compensation Act, and the Jones Act can be traced to a failure by the courts and Congress to decide whether the uniformity or recovery principles govern the jurisdictional scope of these Acts.

Congress must decide which principle it desires to govern when passing acts giving admiralty causes of action to torts occurring on navigable waters. And this determination must be carefully explained in each act. With the three acts discussed in this Comment, there is a need for Congressional action. For example, since it is generally conceded that the Death on the High Seas Act provides the exclusive remedy for wrongful death, it is suggested that Congress amend this Act to indicate when, if ever, state law may be applied to provide supplemental damages. This amendment would be particularly desirable if Congress disagrees with the Supreme Court's decision in the pending *Rodrigue* case, or if that case leaves uncertain the application of state remedies in cases arising other than on the Outer Continental Shelf.

As previously illustrated, an employer of a longshoreman or harbor worker has a potential double liability if he is covered by

82. *Id.* at 466-67.

83. *See* text accompanying note 20 *supra.*

the Longshoremen's and Harbor Workers' Compensation Act because of the Court's interpretation of the statement "if recovery . . . through workmen's compensation proceedings may not validly be provided by State law." Since it appears that the aim of this Act was to insure that such workers had a remedy, and not to create a dual remedy, Congress should amend its jurisdictional declaration by clarifying the extent to which it desires state remedies to be applied in light of the *Davis* decision, and thus eliminate the duality which *Calbreck* fostered. This would assure the exclusivity of liability which was the professed aim of the Act.

Currently, the seaman is precluded from suing for wrongful death under the common law warranty of seaworthiness only if the injury occurs in the waters of a state. The warranty can be used to recover for pain and suffering if the death occurs in state waters, and as the basis for a cause of action for pain and suffering and wrongful death if the injury occurs on the high seas. This exception is the result of the Supreme Court's attempt to ascertain Congressional intent under the Jones Act. It is suggested that there is no logical basis for such a distinction, and that Congress could eliminate this by an amendment to the Jones Act.

As the Supreme Court has stated, courts with admiralty jurisdiction exercise more freedom in fashioning rules than other courts;[84] although this seems to have been true of the district and circuit courts, the Supreme Court has hesitated to exercise this freedom. With each act discussed in this note, there is a need for the Court to declare which principle, uniformity or recovery, should govern the determination of when state law may be the basis for supplemental or alternative remedies. The Supreme Court now has an opportunity to do so in *Rodrigue*. If, instead of deciding the case on the narrow issues presented for determination, the Court clearly indicates when state survival actions and actions for supplemental damages may be brought in death cases arising on the high seas, then some degree of

84. Halcyon Lines v. Haenn Shipping Corp., 342 U.S. 282, 285 (1952).

certainty, at least as to the application of state remedies under the Death on the High Seas Act, will be assured.[85]

JUDITH N. KEEP

85. *Addendum.* On June 9, 1969, the Supreme Court handed down its decision in *Rodrigue v. Aetna Casualty and Surety Co.*, 37 U.S.L.W. 4505 (U.S. June 9, 1969). Writing for a unanimous court, Justice White declared that the Death on the High Seas Act did not apply to artificial structures on the Continental Shelf; rather, recovery for death is under Louisiana law as incorporated by the Outer Continental Shelf Lands Act. Two reasons for this were given: (1) The artificial structure was not maritime in nature and accidents arising thereon "had no . . . connection with the ordinary stuff of admiralty . . . ." (*Id.* at 4507); (2) Congress did not intend admiralty law to apply to such structures.

The second ground of the decision is questionable; the first is highly suspect. However, the least satisfying and most confusing aspect of the decision is the failure of the Court to clearly define "the stuff" from which admiralty *is* made.