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### The Availability of State Causes of Action for the Wrongful Death of Nonseamen Killed in Territorial Waters: *Yamaha Motor Corp. v. Calhoun*

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## RECENT DEVELOPMENT

### THE AVAILABILITY OF STATE CAUSES OF ACTION FOR THE WRONGFUL DEATH OF NONSEAMEN KILLED IN TERRITORIAL WATERS: *YAMAHA MOTOR CORP. V. CALHOUN*

At one point in our culture, most accidents and deaths in state territorial waters<sup>1</sup> involved people that made their living working on the seas.<sup>2</sup> As our society has developed and become more mobile, however, coastal areas and their territorial waters have become “hotspots” for vacationers looking for sun, sand, and surf. With the drastic increase in the number of people who play in and on our nation’s territorial waters, the number of nonseamen killed has risen dramatically. Until recently, however, the legal status of state and federal wrongful death and survival actions<sup>3</sup> in such situations remained uncertain.<sup>4</sup>

In these situations, courts have struggled to balance the competing

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1. “‘State territorial waters’ refers to waters within the territorial limits of a state, as well as ‘the coastal waters less than three nautical miles from the shore of a state.’” *Calhoun v. Yamaha Motor Corp.*, 40 F.3d 622, 624 n.1 (3d Cir. 1994) (quoting William C. Brown III, *Problems Arising from the Intersection of Traditional Maritime Law and Aviation Death and Personal Injury*, 68 TUL. L. REV. 577, 581 (1994)), *aff’d*, 116 S. Ct. 619 (1996).

2. Most of these people receive protection for accidents that occur in territorial waters from federal statutes. Most seamen receive protection from the Jones Act, 46 U.S.C. app. § 688 (1994). The Jones Act, passed as the Merchant Marine Act of 1920, ch. 250, 41 Stat. 1007, extends to seamen the same protections as the Federal Employers’ Liability Act (FELA), 45 U.S.C. §§ 51-60 (1994), and grants to seamen a personal injury and wrongful death remedy for the negligence of their employers. The Jones Act limits recoverable damages to pecuniary losses. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990).

Most longshore workers are covered by the Longshore and Harbor Workers’ Compensation Act (LHWCA), 33 U.S.C. §§ 901-942 (1994), which gives them the right to receive workers’ compensation benefits from their employers for accidental death or injury arising out of employment. The LHWCA “preempted state compensation statutes and provided a uniform remedy to the land-based maritime employee.” Petitioner’s Brief at 20, *Calhoun*, 116 S. Ct. 619 (1996) (No. 94-1387), *available in* 1995 WL 451711.

3. Throughout this article, for economy, I use the term wrongful death to include survival actions and remedies.

4. “Prior to 1996, no Supreme Court case had confronted the issue before the *Choat* court: what damages are available, and under what law, where the deceased is not a maritime worker and where the death occurs in a state’s territorial waters?” David F. Walker, Recent Decision, *Choat v. Kawasaki Motors Corp.: The Alabama Supreme Court’s Journey Through the Murky Waters of Maritime Wrongful Death Remedies*, 47 ALA. L. REV. 929, 947 (1996).

interests of federal maritime law<sup>5</sup> and the law of the state where the accident occurred.<sup>6</sup> While state law generally governs lawsuits arising out of incidents occurring in that state and its territorial waters, the substantive law that governs maritime torts is the general maritime law.<sup>7</sup> The general maritime law is a form of federal common law that is independent of any state common law.<sup>8</sup> In the recent case of *Yamaha Motor Corp. v. Calhoun*,<sup>9</sup> however, the Supreme Court held that state law remedies remain applicable in wrongful death<sup>10</sup> and survival actions<sup>11</sup> arising from accidents to nonseamen<sup>12</sup> in

5. It may be helpful at this point to define some basic terms of maritime law. "The term 'maritime' refers to the sea and other navigable waters." Gary Mayes, *Maritime Torts*, in 1 MO. TORT LAW, § 15-2 (MoBar 2d ed. 1990) (citing 1 STEVEN F. FRIEDEL, BENEDICT ON ADMIRALTY § 103 (7th ed. 1988)). "'Maritime law' is the substantive law that defines and regulates maritime conduct." *Id.* (citing *Ira S. Bushey & Sons, Inc. v. United States*, 276 F. Supp. 518, 524 (E.D.N.Y. 1967)). "'Admiralty' refers to specialized tribunals and practice in litigation." *Id.* (citing 1 FRIEDEL, *supra*, § 102). "In short, the term 'admiralty' refers to special courts, their practice, procedure and jurisdiction while 'maritime law' refers to a body of substantive law applicable to maritime matters." *Id.*

6. Article III, section 2 of the United States Constitution provides that "[t]he judicial Power [of the United States] shall extend . . . to all Cases of admiralty and maritime jurisdiction." U.S. CONST. art. III, § 2, cl. 1. Further, the Judiciary Act of 1789 provided that federal district courts "shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction." Act of 1789, ch. 20, 1 Stat. 73, 76-77 (codified as amended at 28 U.S.C. § 1333 (1994)). However, the Act also contained the famous saving-to-suitors clause: "saving to suitors, in all cases, the right of common law remedy, where the common law is competent to give it." *Id.* Thus, "Congress vested the whole of original admiralty jurisdiction in the federal district courts, along with all of the procedures and remedies unique to that jurisdiction." Mayes, *supra* note 5, § 15-4. However, while state courts have no admiralty jurisdiction, they do have "concurrent jurisdiction over certain matters reserved to them by the 'saving-to-suitors' clause." *Id.*

7. Under the rule of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), state law applies to federal diversity suits. That is not the case with federal admiralty suits. Federal admiralty suits are governed by federal common law known as maritime law. *Sun World Lines, Ltd. v. March Shipping Corp.*, 801 F.2d 1066, 1068 (8th Cir. 1986); Mayes, *supra* note 5, § 15-8.

8. Generally, "state law may not be applied by a federal court if it would defeat or narrow any substantive admiralty rights of recovery created by federal statute or by case law." Mayes, *supra* note 5, § 15-11 (citing *Pope & Talbot, Inc. v. Hawk*, 346 U.S. 406 (1953)). However, see *Romero v. International Terminal Operating*, 358 U.S. 354 (1959), stating:

Although the corpus of admiralty law is federal in the sense that it derives from the implications of Article III evolved by the courts, to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the States and the National Government.

*Id.* at 373-75; see also *American Dredging Co. v. Miller*, 510 U.S. 443, 452 (1994) (reaffirming the above-stated principle from *Romero*).

9. 116 S. Ct. 619 (1996).

10. In *Calhoun*, the Third Circuit described wrongful death actions:

A wrongful death cause of action belongs to the decedent's dependents (or, in the case of the death of a minor, to the decedent's closest kin). It allows the beneficiaries to recover for harm that *they* personally suffered as a result of the death, and it is totally independent of any cause of action the decedent may have had for his or her own personal injuries. Damages are determined by what

territorial waters, despite an earlier recognition of a federal maritime wrongful death cause of action.<sup>13</sup>

Part I of this Recent Development briefly canvasses the development of maritime law as it relates to this controversy. It looks at more recent maritime cases that give context to this controversy and provide arguments both for and against the availability of state law causes of action for federal maritime cases. Part II describes the facts and procedural background of *Yamaha Motor Corp. v. Calhoun*, which provides a classic opportunity for discussion of this controversy. Part III discusses the Supreme Court's analysis in *Yamaha Motor Corp. v. Calhoun*. Finally, Part IV discusses the future implications of the decision.

### I. OVERVIEW OF RELEVANT MARITIME LAW

In *The Harrisburg*<sup>14</sup> the Supreme Court held that the general maritime law, in the absence of any applicable statute, did not include a cause of action for wrongful death.<sup>15</sup> In that case, the Court concluded that the common law did not recognize a cause of action for wrongful death and wrongful death actions could only be created by statute.<sup>16</sup> Despite the obvious shortcomings

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beneficiaries would have "received" from decedent, and can include recovery for pecuniary losses like most monetary support, and for non-pecuniary losses like loss of society.

*Calhoun v. Yamaha Motor Corp.*, 40 F.3d 622, 637 (3d Cir. 1994), *aff'd*, 116 S. Ct. 619 (1996).

11. Even though a survival action is normally brought by the deceased's survivors acting in a representative capacity, a survival action belongs to the deceased's estate and permits recovery for injuries suffered by the deceased that caused death. "Under a survival action, the decedent's representative recovers for the decedent's pain and suffering, medical expenses, lost earnings (both past and future), and funeral expenses." *Id.*

12. "Nonseamen" refers to "persons who are neither seamen covered by the Jones Act, . . . nor longshore workers covered by the Longshore and Harbor Workers' Compensation Act." *Calhoun*, 116 S. Ct. at 623 n.2.

13. *Moragne v. States Marine Lines*, 398 U.S. 375 (1970); *see infra* notes 25-31 and accompanying text.

14. 119 U.S. 199 (1886).

15. *Id.* at 213.

16. The Supreme Court reasoned:

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, as accepted and received by maritime nations generally, has established a different rule for the government of the courts of admiralty from those which govern courts of law in matters of this kind, we are forced to the conclusion that no such action will lie in the courts of the United States under the general maritime law.

*Id.*

of this decision,<sup>17</sup> it remained the law for nearly a century.

Spurred on by the inequities caused by the decision, both Congress and the lower courts reacted in a way that mitigated the harshness of the Supreme Court's holding in *The Harrisburg*. Congress reacted by implementing two statutes, the Death on the High Seas Act (DOHSA) and the Jones Act, which were designed to protect groups of people likely to be injured on the sea. DOHSA created a wrongful death cause of action for the beneficiaries of all persons, seamen, and nonseamen, killed on the high seas.<sup>18</sup> The Jones Act created a wrongful death cause of action for the beneficiaries of seamen who were killed in the course of employment, whether they were killed on the high seas or in territorial waters.<sup>19</sup>

Although these statutes provided a remedy for many situations, they did not create a wrongful death cause of action for nonseamen killed in territorial waters.<sup>20</sup> Lower courts dealt with this lack of protection by allowing recovery for deaths within state territorial waters where the state had an applicable wrongful death statute.<sup>21</sup> Thus, through a patchwork of separate federal statutes and a willingness to use state law<sup>22</sup> to supplement the general federal maritime law in situations involving deaths of nonseamen in territorial waters,

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17. This decision was criticized heavily both before and after it was overruled in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). Criticism was focused on both the fact that “[t]he Court did not question the soundness of this view [that wrongful death actions could only be created by statute], or examine the historical justifications that account for it,” *Calhoun*, 116 S. Ct. at 624, and for the lack of uniformity it eventually produced by providing an inconsistent patchwork of wrongful death recovery. See Thomas Pollard Diaz, Comment, *Maritime Wrongful Death: A Riptide Develops off the United States Coast*, 62 TUL. L. REV. 597, 601 (1988).

18. The DOHSA “provided a remedy to the beneficiaries of any person killed as a result of ‘wrongful act, neglect, or default occurring on the high seas beyond a marine league [three nautical miles] from shore of any State.’” Diaz, *supra* note 17, at 597-98 (quoting 46 U.S.C. app. § 761 (1994)). Recovery under the DOHSA can be predicated on the doctrine of unseaworthiness, which has become a form of strict liability, but damages are limited to pecuniary losses. See *Calhoun*, 116 S. Ct. at 625.

19. “The Jones Act, which incorporates the provisions of the Federal Employer’s Liability Act (FELA), confers to the personal representatives of a deceased seaman a wrongful death and survival action predicated on an employer’s negligence.” Diaz, *supra* note 17, at 599-600 (internal citations omitted).

20. See *id.* at 600.

21. See *Calhoun*, 116 S. Ct. at 624; *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 212 (1986); *Western Fuel Co. v. Garcia*, 257 U.S. 233, 242 (1921); see also Diaz, *supra* note 17, at 600 (“Under these circumstances, the general maritime law ‘borrowed’ state wrongful death and survival statutes, allowing state law ‘to determine when recovery shall be permitted and when it shall not.’” (quoting *The Tungus v. Skougaard*, 358 U.S. 588, 594 (1959))).

22. All fifty states have wrongful death statutes. See generally 22A AM. JUR. 2d *Death* § 7 (1988).

most people were ensured of a wrongful death remedy for maritime accidents.<sup>23</sup>

Although most people were ensured of some sort of a wrongful death remedy, this system of recovery was not viewed as entirely acceptable due to the inconsistencies that had developed as a result of the three different avenues of recovery.<sup>24</sup> Therefore, in *Moragne v. States Marine Lines*<sup>25</sup> the Supreme Court overruled *The Harrisburg* and held that the general maritime law provided a wrongful death cause of action.<sup>26</sup> The Supreme Court's decision in *Moragne* was driven by an attempt to correct the inequities that had resulted from the inconsistent framework of wrongful death recovery.<sup>27</sup> Of paramount importance was the disparity created when the doctrine of

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23. See *Calhoun v. Yamaha Motor Corp.*, 40 F.3d 622 (3d Cir. 1994), *aff'd*, 116 S. Ct. 619 (1996), stating:

These developments, particularly the enactment of DOHSA and the Jones Act, ensured that a wrongful death remedy would be available for most people killed in maritime accidents. Thus, between 1920 and 1970, deaths on the high seas were remedied by DOHSA, deaths in territorial waters were remedied by state wrongful death statutes, and deaths of seamen (whether on the high seas or in territorial waters) were remedied by the Jones Act.

*Id.* at 631.

24. See, for example, *Calhoun*, 40 F.3d at 631, stating that "*The Harrisburg*, however, remained troublesome. Part of the trouble stemmed from the development of different theories of recovery for maritime deaths." See also *Diaz*, *supra* note 17, at 601 ("In effect, the legislative and judicial attempts to ameliorate the impact of *The Harrisburg* . . . wove a tapestry of recovery that contained three discernable anomalies.").

25. 398 U.S. 375 (1970). *Moragne* involved a wrongful death and survival lawsuit brought by the widow of a longshore worker who was killed in Florida's territorial waters. *Id.* at 376. Mrs. Moragne alleged both unseaworthiness and negligence, but the district court dismissed the claim for unseaworthiness because Florida's wrongful death statute did not include unseaworthiness as a basis of liability. *Id.* After the court of appeals affirmed the dismissal of the unseaworthiness claim, the Supreme Court overruled *The Harrisburg*, stating that *The Harrisburg's* holding, "somewhat dubious even when rendered, is such an unjustifiable anomaly in the present maritime law that it should no longer be followed." *Id.* at 378.

26. *Id.* at 409 (stating that "[w]e accordingly overrule *The Harrisburg*, and hold that an action does lie under general maritime law for death caused by violation of maritime duties.>").

27. The *Moragne* Court agreed with the statement of the United States, participating as *amicus curiae*, that continuing to follow the existing framework "would perpetuate three anomalies of present law." *Id.* at 375. First, the Court pointed out that, as the law presently stood, "within territorial waters, identical conduct violating federal law (here the furnishing of an unseaworthy vessel) produces liability if the victim is merely injured, but frequently not if he is killed." *Id.* Second, the Court found that "identical breaches of the duty to provide a seaworthy ship, resulting in death, produce liability outside the three-mile limit . . . but not within the territorial waters of a State whose local statute excludes unseaworthiness claims." *Id.* The third "anomaly" that the Court noted was "that a true seaman [one who is covered by the Jones Act] . . . is provided no remedy for death caused by unseaworthiness within territorial waters, while a longshoreman, to whom the duty of seaworthiness was extended only because he performs work traditionally done by seamen, does have such a remedy when allowed by a state statute." *Id.* at 395-96.

unseaworthiness, which was available to plaintiffs in DOHSA cases but was generally not available to plaintiffs in state wrongful death cases,<sup>28</sup> was transformed into a species of strict liability.<sup>29</sup> As a result, plaintiffs who could allege the doctrine of unseaworthiness<sup>30</sup> were entitled to proceed under a strict liability theory, while those who could not allege the doctrine of unseaworthiness faced the much more burdensome task of having to prove negligence. By recognizing a wrongful death cause of action in the general maritime law, *Moragne* remedied this situation and signaled an attempt to provide more uniformity in the maritime law.<sup>31</sup>

Several other important cases followed *Moragne*.<sup>32</sup> In *Sea-Land Services, Inc. v. Gaudet*,<sup>33</sup> the Supreme Court held that the newly recognized general maritime wrongful death cause of action allowed for recovery of loss of society damages.<sup>34</sup> In *Mobil Oil Corp. v. Higginbotham*,<sup>35</sup> the Supreme Court held that survivors of a person killed on the high seas could not recover damages under the general maritime law in addition to the damages available

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28. Some state wrongful death statutes allowed a plaintiff to recover under the doctrine of unseaworthiness, while some did not. See *Calhoun*, 40 F.3d at 632 (citing *The Tungus v. Skovgaard*, 358 U.S. 588 (1959), for the proposition that New Jersey allows wrongful death actions based on the doctrine of unseaworthiness, and *Moragne v. State Marine Lines*, 211 So. 2d 161, 166 (Fla. 1968), for the proposition that Florida does not allow wrongful death actions based on the doctrine of unseaworthiness.)

29. See *Yamaha Motor Corp. v. Calhoun*, 116 S. Ct. 619, 624 (1996) (“State wrongful death statutes proved an adequate supplement to federal maritime law, until a series of this Court’s decisions transformed the maritime doctrine of unseaworthiness into a strict liability rule.”).

30. Either because of DOHSA or because the state wrongful death statute allowed recovery under the doctrine of unseaworthiness. See *supra* notes 27-29 and accompanying text.

31. The Court explained:

Our recognition of 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. Such uniformity not only will further the concerns of both of the 1920 Acts but also will give effect to the constitutionally based principle that federal admiralty law should be “a system of law coextensive with, and operating uniformly in, the whole country.”

*Moragne*, 398 U.S. at 401-02 (quoting *The Lottawanna*, 88 U.S.) (21 Wall.) 558, 575 (1875)) (citations and footnote omitted).

32. “Four Supreme Court cases following *Moragne* are generally cited as adding to the *Moragne* definition of the general maritime wrongful death cause of action.” Walker, *supra* note 4, at 946.

33. 414 U.S. 573 (1974).

34. *Gaudet* allowed the family members of a longshoreman who was killed in territorial waters to collect non-pecuniary loss of society damages, thus recognizing that the general maritime wrongful death cause of action allowed for this type of recovery despite the fact that the DOHSA wrongful death cause of action did not. *Id.*

35. 436 U.S. 618 (1978).

under DOHSA.<sup>36</sup> Similarly, in *Offshore Logistics, Inc. v. Tallentire*<sup>37</sup> the Supreme Court held that survivors of persons killed on the high seas could not recover damages under state law in addition to the damages available under DOHSA.<sup>38</sup> Finally, in *Miles v. Apex Marine Corp.*<sup>39</sup> the Supreme Court held that the damages provided for under the Jones Act<sup>40</sup> were the exclusive remedy available to a Jones Act seaman, and that those damages could not be supplemented by a claim based on the general maritime wrongful death action recognized in *Moragne*.<sup>41</sup> Along with *Moragne*, these decisions were often cited as giving considerable support to the view that uniformity had become a guiding principle in interpreting maritime law.<sup>42</sup>

Although these opinions began to outline the contours of the federal general maritime wrongful death cause of action, no Supreme Court case had determined whether state causes of action were still available for the deaths of nonseamen killed in state territorial waters following the holding in *Moragne*. Many courts interpreted the recognition of a federal general maritime wrongful death cause of action in *Moragne* as replacing the application of state law to these situations.<sup>43</sup> They argued that because federal general

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36. The Court found that Congress had expressly answered the question as to what kinds of damages were available for wrongful death on the high seas and that they were not free to supplement those damages. *Id.* at 626.

Although this decision was, at least on the surface, supported by the desire to make the general federal maritime law consistent with Congress's directives for federal maritime law under DOHSA, it is notable that it created an inconsistency. As the Third Circuit noted, "*Higginbotham*, for example, quite consciously created an anomaly (the unavailability of non-pecuniary damages for wrongful death at high sea where such damages were available to longshoremen killed in territorial waters), stating that 'a desire for uniformity cannot override the statute [DOHSA].'" *Calhoun v. Yamaha Motor Corp.*, 40 F.3d 622, 636 (3d Cir. 1994) (quoting *Higginbotham*, 436 U.S. at 624) (alteration by *Higginbotham* Court), *aff'd*, 116 S. Ct. 619 (1996).

37. 477 U.S. 207 (1986).

38. Not surprisingly, the Court's analysis in *Tallentire* differed little from its analysis in *Higginbotham*: Congress had expressly provided what damages were to be available for deaths on the high seas, and the Court did not feel free to supplement them. *Id.* 231-32.

39. 498 U.S. 19 (1990).

40. The damages available under the Jones Act for wrongful death are limited to damages for pecuniary loss. *See supra* note 2. Thus, there is no recovery for damages such as loss of society under the Jones Act. *See Miles*, 498 U.S. at 32.

41. The *Miles* Court viewed this decision as remedying "an anomaly we created in *Higginbotham*." 498 U.S. at 33. The Court stated that "[t]oday we restore a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law." *Id.*

42. *See Calhoun v. Yamaha Motor Corp.*, 40 F.3d 622, 636 (3d Cir. 1994) (stating that "the notion that *Moragne* initiated a trend in the case law to make recovery for maritime deaths more uniform . . . permeates the rhetoric of the case law"), *aff'd*, 116 S. Ct. 619 (1996).

43. In *Wahlstrom v. Kawasaki Heavy Industries*, 4 F.3d 1084 (2d Cir. 1993), the Second Circuit



maritime law now provided a remedy for the wrongful death of nonseamen in territorial waters, there no longer was a need for a state remedy. This conclusion was bolstered by an interpretation of *Moragne* and its progeny that treated uniformity as a guiding principle.<sup>44</sup> Clearly, uniformity would be served by making the federal remedy exclusive, and it would be hindered by supplementing the federal remedy with a state remedy that would vary depending on the wrongful death statutes of the particular state involved.

Despite the recognition of a federal remedy and the concern for uniformity, good arguments still existed for the application of state law.<sup>45</sup> Before *Moragne*, state wrongful death statutes routinely supplemented federal general maritime law in cases involving the death of nonseamen in territorial waters.<sup>46</sup> *Moragne* did not dictate that this change.<sup>47</sup> Since *Moragne*, the Supreme Court had consistently permitted state laws to supplement the federal general maritime law in other areas.<sup>48</sup> Additionally, Congress, through DOHSA, had expressly left deaths in territorial waters governed by the states.<sup>49</sup> Finally, there was a feeling that the Supreme Court's reliance on uniformity in the general maritime law was not nearly as important as the language in their decisions indicated.<sup>50</sup> Several courts recognized these and

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recognized the importance of uniformity in the maritime law and held that the recognition of a federal general maritime wrongful death cause of action in *Moragne* necessarily precluded the application of differing individual state wrongful death statutes to actions for wrongful death and survival occurring in territorial waters that fall under federal admiralty jurisdiction. *Id.* at 1089.

Also see, for example, Petitioner's Brief at 26, *Calhoun*, 116 S. Ct. 619 (1996) (No. 94-1387), available in 1995 WL 451711, stating that "[o]ther courts addressing the question of substantive law applicable to deaths involving recreational boats on state waters have uniformly applied the *Moragne* remedy." Yamaha's brief cited several cases for this proposition, including *Kelly v. Panama Canal Commission*, 26 F.3d 597 (5th Cir. 1994) (recreational boating accident on Panama Canal), and *Walker v. Braus*, 995 F.2d 77 (5th Cir. 1993) (recreational boating collision on state inland waterway).

44. See *supra* note 42 and accompanying text.

45. For a more detailed discussion of these arguments, see *Walker*, *supra* note 4, at 947-54.

46. See *supra* notes 20-21 and accompanying text.

47. At least one scholar has even suggested that "the language of *Moragne* indicates the Court's intent that state law continue to apply in territorial waters." *Walker*, *supra* note 4, at 950.

48. See *id.* at 947-48.

49. Section 1 of DOHSA provides that it only applies on the high seas more than three nautical miles, "a marine league," from shore. 46 U.S.C. app. § 761 (1994). Section 7 of DOHSA states that "[t]he provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State." *Id.* § 767; see also *Walker*, *supra* note 4, at 949 (stating that "[t]he legislative history of the DOHSA clearly indicates a congressional intent to defer to state law with regard to territorial waters").

50. See *Diaz*, *supra* note 17, at 605-11; see also *Calhoun v. Yamaha Motor Corp.*, 40 F.3d 622, 636 (3d Cir. 1994) (stating that "[a] second trend is the weakness with which the principle of uniformity, . . . has actually been applied in these cases. For, although the cases often mention

other factors as persuasive and held that, even after *Moragne*, state wrongful death statutes were available to supplement the federal general maritime law.<sup>51</sup> Until *Yamaha Motor Corp. v. Calhoun*, however, the Supreme Court had yet to decide this issue.

## II. BACKGROUND: *YAMAHA MOTOR CORP. V. CALHOUN*

While on vacation at a beach-front resort in Puerto Rico with family friends, twelve-year-old Nancy Calhoun was killed when the Yamaha jet ski she was riding<sup>52</sup> crashed into the side of a boat that was anchored off the coast.<sup>53</sup> Nancy Calhoun's parents, Lucien and Robin Calhoun, sued Yamaha<sup>54</sup> in the Federal District Court for the Eastern District of Pennsylvania<sup>55</sup> under Pennsylvania's wrongful death<sup>56</sup> and survival<sup>57</sup> statutes.<sup>58</sup> The suit sought damages for lost future earnings, loss of society, loss of support and services, funeral expenses, and punitive damages.<sup>59</sup>

Yamaha, however, moved for partial summary judgment, arguing that the federal general maritime wrongful death cause of action recognized in *Moragne* was the exclusive basis for recovery, precluding all state law remedies.<sup>60</sup> The only damages recoverable under the federal general maritime

uniformity as a guiding principle, the Court's actions belie its importance"), *aff'd*, 116 S. Ct. 619 (1996).

51. See *Calhoun*, 40 F.3d at 641 n.37, stating that "[a]lthough Yamaha has been able to muster considerable support in the case law for its position that *Moragne* displaces all state wrongful death statutes, the case law appears to be split on this issue." The Third Circuit cited to several cases for this proposition, including *Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270, 1280 n.12 (1st Cir. 1983) ("Even today, plaintiffs may invoke state wrongful death statutes under the saving clause insofar as they involve accidents in territorial waters and do not conflict with the substantive principles developed under the maritime wrongful death doctrine."), and *Lyon v. Ranger III*, 858 F.2d 22, 27 (1st Cir. 1988) (applying Massachusetts state law in a wrongful death action arising from a scuba diving accident in Massachusetts' territorial waters).

52. Nancy Calhoun was riding a rented "Wavejammer" jet ski. The "Wavejammer" was manufactured by Yamaha Motor Corp., U.S.A. and its parent company, Yamaha Motor Company, Ltd. *Calhoun*, 116 S. Ct. at 622.

53. *Id.*

54. Lucien and Robin Calhoun sued both individually and in their representative capacities as administrators for the estate of their deceased daughter. *Calhoun*, 40 F.3d at 625.

55. "Their complaint invoked federal jurisdiction both on the basis of diversity of citizenship . . . and admiralty." *Id.* (citations omitted).

56. 42 PA. CONS. STAT. ANN. § 8301 (1982 & Supp. 1996).

57. 42 PA. CONS. STAT. ANN. § 8302 (1982).

58. "The theories of recovery alleged in the complaint included negligence, strict liability, and breach of the implied warranties of merchantability and fitness for purpose." *Calhoun*, 40 F.3d at 625.

59. *Id.*

60. *Calhoun*, 116 S. Ct. at 622.

cause of action, Yamaha argued, were funeral expenses.<sup>61</sup> The district court agreed with Yamaha and found that the federal general maritime wrongful death action recognized in *Moragne* precluded the application of state wrongful death statutes.<sup>62</sup> The court, however, found that both loss of society and loss of support and services were compensable under the *Moragne* cause of action.<sup>63</sup> Both sides appealed.<sup>64</sup>

The Third Circuit Court, however, did not reach the issues certified for appeal.<sup>65</sup> Instead, the court of appeals “determined that an anterior issue was pivotal”<sup>66</sup> and focused on whether the district court’s finding that the federal general maritime wrongful death action precluded application of state wrongful death statutes was correct.<sup>67</sup>

The Third Circuit first determined that admiralty jurisdiction was appropriate and, therefore, that the proper law to govern the dispute was the substantive admiralty law.<sup>68</sup> The court then noted that although most of the substantive admiralty law is federal, it is often supplemented by state law.<sup>69</sup> After determining that state law may supplement federal maritime law if it does not conflict with the substantive principles of federal maritime law,<sup>70</sup> the court admitted that the question whether federal maritime law conflicts with state law is “extremely tricky.”<sup>71</sup> Noting that there is a presumption against preemption in admiralty cases,<sup>72</sup> the court proceeded to determine the issue<sup>73</sup>

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61. *Id.*

62. *Id.*

63. *Id.*

64. The questions certified for appeal were “whether, pursuant to such a maritime cause of action [(*Moragne* wrongful death)], plaintiffs may seek to recover (1) damages for the loss of the society of their deceased minor child, (2) damages for the loss of their child’s future earnings, and (3) punitive damages.” *Id.* (quoting district court’s certification order).

65. The Third Circuit found that “the answer to the certified question depends in large part on the resolution of the displacement question. . . . The displacement question, which, in our view, is the critical question raised by this appeal, is therefore appropriately before use, and we turn immediately to it.” *Calhoun*, 40 F.3d at 626.

66. *Calhoun*, 116 S. Ct. at 622.

67. *Id.* at 623.

68. “The Supreme Court has instructed us that ‘[w]ith admiralty jurisdiction comes the application of substantive admiralty law.’” *Calhoun*, 40 F.3d at 626-27 (quoting *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 864 (1986)).

69. *Id.* at 627 (“Although the corpus of admiralty law is federal’ . . . state law can, and often does, provide the relevant rule of decision in admiralty cases.”) (quoting *Romero v. International Terminal Operating*, 358 U.S. 354, 373-74 (1959)).

70. “Whether a state law may provide a rule of decision in an admiralty case depends on whether the state rule ‘conflicts’ with the substantive principles of admiralty law.” *Id.*

71. *Id.* at 628.

72. “[N]on-maritime cases employ a presumption against preemption. . . . In admiralty law a

through a review of the development of the relevant maritime law. The court noted two trends in maritime law: (1) a reduction in the rights of plaintiffs<sup>74</sup> and (2) the “weakness with which the principle of uniformity” was followed.<sup>75</sup> After minimizing the importance of uniformity concerns, the court then distinguished the uniformity concerns in *Tallentire*, *Higginbotham*, and *Miles* as different from those in the present case.<sup>76</sup> Taking all these considerations into account, the Third Circuit held that the “general maritime law does not preempt state law wrongful death acts in actions based on the death of a nonseaman in territorial waters.”<sup>77</sup>

### III. THE SUPREME COURT’S ANALYSIS

The Supreme Court first established that maritime jurisdiction was proper in this case,<sup>78</sup> but noted that “prior to *Moragne*, federal admiralty courts routinely applied state wrongful death and survival statutes in maritime accident cases.”<sup>79</sup> The Supreme Court then stated the issue in this case as “whether *Moragne* should be read to stop that practice.”<sup>80</sup>

The Supreme Court next proceeded to review the history of the relevant

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similar presumption is incorporated in the case law by the requirement that there be a ‘clear conflict’ before state laws are preempted.” *Id.* at 630. For a more detailed discussion of the presumption against preemption in the *Calhoun* case, see Peter Thompson, *State Courts and State Law: A New Force in Admiralty?*, 8 U.S.F. MAR. L.J. 223, 237-39 (1996).

73. At this point in its analysis, the court framed the issue as follows: “whether state statutory remedies can provide the rule of decision when a recreational boater is killed in territorial waters largely reduces to an inquiry into whether the different substantive admiralty rules articulated in federal statutes and at common law would be frustrated by the application of state law.” *Calhoun*, 40 F.3d at 630.

74. “One trend that cannot be ignored is that the Court seems to be cutting back on plaintiffs’ rights in maritime actions.” *Id.* at 636.

75. “A second trend is the weakness with which the principle of uniformity—which permeates the rhetoric of the case law—has actually been applied in these cases.” *Id.*

76. The court stated that unlike the situations in those cases, “each of which implicated clearly articulated federal statutory schemes, the *Moragne* cause of action in this context reflects anything but a clearly articulated scheme. Not only has Congress said nothing about the applicability of particular remedies, but the Court’s common law has not either.” *Id.* at 641.

77. *Id.* at 644.

78. *Yamaha Motor Corp. v. Calhoun*, 116 S. Ct. 619, 623 (1996) (“‘With admiralty jurisdiction,’ we have often said, ‘comes the application of substantive admiralty law.’ The exercise of admiralty jurisdiction, however, ‘does not result in automatic displacement of state law.’” (quoting *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 864 (1986), and *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock*, 115 S. Ct. 1043, 1046 (1995))).

79. *Id.* at 623-24.

80. *Id.* at 624.

maritime law.<sup>81</sup> The Court focused on the rule of *The Harrisburg*,<sup>82</sup> the three anomalies it produced in the maritime law,<sup>83</sup> and the reasons for its reversal in *Moragne*.<sup>84</sup> The Court then considered Yamaha's argument that the federal general maritime wrongful death cause of action recognized in *Moragne* preempted the application of state remedies<sup>85</sup> and undertook a three-step analysis of the dispute in this case.<sup>86</sup>

First, the Court distinguished between uniformity concerns dealing with liability issues and uniformity concerns dealing with remedial issues.<sup>87</sup> The Court stressed that the three anomalies created by *The Harrisburg* that could no longer be tolerated in *Moragne* all involved differing standards of liability.<sup>88</sup> The most important of these was the difference in liability created by the disparity between the standard of liability for unseaworthiness and negligence.<sup>89</sup> Unlike the anomalies that led to the decision in *Moragne*, however, this case only involved uniformity concerns dealing with remedial issues.<sup>90</sup>

Second, the Court distinguished between applications of maritime law that would expand, as opposed to retract, the rights of plaintiffs.<sup>91</sup> The Court argued that permitting state causes of action for wrongful death to supplement the federal general maritime law was not inconsistent with *Moragne* at all, because both decisions would extend relief to plaintiffs.<sup>92</sup> This aspect of the

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81. *See id.* at 624-25.

82. *See supra* notes 14-17 and accompanying text.

83. *See supra* note 27 and accompanying text.

84. *See supra* notes 25-29 and accompanying text.

85. *Calhoun*, 116 S. Ct. at 625-26; *see also* Petitioner's Brief *passim*, *Yamaha Motor Corp. v. Calhoun*, 116 S. Ct. 619 (1996) (No. 94-1387), available in 1995 WL 451711.

86. *Calhoun*, 116 S. Ct. at 625-28.

87. *Id.* at 626-27.

88. *See supra* note 27.

89. "[A] series of this Court's decisions transformed the maritime doctrine of unseaworthiness into a strict liability rule." *Calhoun*, 116 S. Ct. at 624; *see supra* notes 27-29 and accompanying text.

90. *Calhoun*, 116 S. Ct. at 626 (stating that "[t]he uniformity concerns that prompted us to overrule *The Harrisburg*, however, were of a different order than those invoked by Yamaha").

91. *Id.* at 627-28.

92. *Id.* at 627 (stating that "*Moragne*, in sum, centered on the extension of relief, not on the contraction of remedies"). The Court also noted that although the discussion in *Moragne* centered on the extension of a federal right of action for wrongful death, the Court "notably left in place the negligence claim she had stated under Florida's law." *Id.* at 627-28. Further, the Supreme Court incorporated the following part of the Third Circuit's decision into their own opinion:

*Moragne* . . . showed no hostility to concurrent application of state wrongful death statutes. Indeed, to read into *Moragne* the idea that it was placing a ceiling on recovery for wrongful death, rather than a floor, is somewhat ahistorical. The *Moragne* cause of action was in many respects a gap-filling measure to ensure that seamen (and their survivors) would be treated alike. The "humane

Court's holding placed renewed emphasis on the idea that "it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy."<sup>93</sup>

Third, the Court distinguished *Tallentire*, *Higginbotham*, and *Miles*.<sup>94</sup> The Court did so by limiting them to situations where "Congress has prescribed a comprehensive tort recovery regime to be uniformly applied."<sup>95</sup> Thus, the Court effectively read out of these opinions the concerns for uniformity they had expressed.<sup>96</sup>

#### IV. FUTURE IMPLICATIONS

Whether or not the Supreme Court's analysis in *Yamaha Motor Corp. v. Calhoun* is correct, it is likely to have a profound impact on admiralty law.<sup>97</sup> Two principles likely to be derived from this case are the demise of the uniformity doctrine and the expansion of plaintiffs' rights in maritime disputes.

The Supreme Court has seemingly dealt a death blow to the uniformity doctrine.<sup>98</sup> First the Court made an unexplained distinction between uniformity concerns dealing with liability and uniformity concerns dealing

and liberal" purpose underlying the general maritime remedy of *Moragne* was driven by the idea that survivors of seamen killed in state territorial waters should not have been barred from recovery simply because the tort system of the particular state in which a seamen died did not incorporate special maritime doctrines. It is difficult to see how this purpose can be taken as an intent to preclude the operation of state laws that do supply a remedy.

*Id.* at 627 (quoting *Calhoun*, 40 F.3d at 641-42) (omission by the Court).

93. *Id.* (citing *Moragne v. State Marine Lines, Inc.*, 398 U.S. at 375, 375 (1970) (quoting *The Sea Gull*, 21 F. Cas. 909, 910 (C.C. D. Md. 1865) (No. 12578A)).

94. These cases came after *Moragne* and provided guidance as to the contours of the federal general maritime wrongful death cause of action. *See supra* notes 35-42 and accompanying text.

95. *Calhoun*, 116 S. Ct. at 628.

96. *See supra* notes 35-44 and accompanying text.

97. At least one scholar has already referred to the case as a "landmark decision." *See Walker, supra* note 4, at 958.

98. This decision has already been criticized by several commentators on this ground. *See, e.g.*, Randell E. Treadaway & Jean Paul P. Overton, *Recoverable Damages in Maritime Personal Injury and Death Cases: The Aftermath of Miles v. Apex Marine Corp.*, 8 U.S.F. MAR. L.J. 91, 105-07 (1995) (stating that *Yamaha Motor Corp. v. Calhoun* "sacrificed the *Miles* goal of uniformity"); Otway B. Denny Jr. & David J. Levy, *What's Happening in . . . Advocacy, Practice and Procedure*, 63 DEF. COUNS. J. 401, 402 (1996) ("In light of *Yamaha*, defendants must look beyond the traditional arguments of uniformity and federal preemption to limit the relief available."). For a more thorough discussion of the effect of the *Yamaha Motor Corp. v. Calhoun* decision on the continuing validity of the uniformity principle, *see Thompson, supra* note 72, at 227-39.

with remedies.<sup>99</sup> The Court proclaimed simply that those involving liability were “intolerable,” while those involving remedies were acceptable.<sup>100</sup> One can only wonder if the Calhouns would have understood this distinction had their damages been limited, as Yamaha argued they should have been,<sup>101</sup> to merely the cost of funeral expenses. Second, the Court completely ignored the uniformity concerns at work in *Tallentire*, *Higginbotham*, and *Miles*<sup>102</sup> and characterized these decisions as cases where Congress had “prescribed a comprehensive tort recovery regime to be uniformly applied.”<sup>103</sup> If these cases truly were that simple, there was no need for the uniformity discussions that permeated them.<sup>104</sup> Instead, these cases could have been more simply decided on the grounds of standard preemption analysis.<sup>105</sup>

Additionally, the Supreme Court has signaled a return to the “liberal character of proceedings in admiralty”<sup>106</sup> by expressing a preference for plaintiffs’ rights. This portion of the decision is against the emerging trend spotted by the Third Circuit “that the Court seems to be cutting back on plaintiffs’ rights in maritime actions.”<sup>107</sup> It is, however, in accordance with the previous preferences of maritime law.<sup>108</sup> Thus, the Supreme Court’s opinion in *Yamaha Motor Corp. v. Calhoun* represents a denial of the importance of uniformity concerns in maritime law and represents a shift away from the trend the Third Circuit called a “cutting back on plaintiffs’ rights in maritime actions.” In maritime law proceedings, counsel should now be wary of relying on uniformity concerns in making their arguments and instead should focus on the Third Circuit’s explanation of preemption analysis.

### CONCLUSION

In *Yamaha Motor Corp. v. Calhoun*, the Supreme Court held that general maritime law does not preempt state law wrongful death actions based on the

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99. *Calhoun*, 116 S. Ct. at 625-28; see *supra* notes 87-90 and accompanying text.

100. *Calhoun*, 116 S. Ct. at 627-28.

101. Yamaha contended that “the Calhouns could recover as damages only Natalie’s funeral expenses.” *Id.* at 622.

102. See *supra* notes 35-42 and accompanying text.

103. *Calhoun*, 116 S. Ct. at 628; see also *supra* notes 94-96 and accompanying text.

104. See *supra* notes 42, 50 and accompanying text.

105. See *infra* note 111 and accompanying text.

106. See *supra* note 93 and accompanying text.

107. *Calhoun v. Yamaha Motor Corp.*, 40 F.3d 622, 636 (3d Cir. 1994), *aff’d*, 116 S. Ct. 619 (1996).

108. See *Calhoun*, 116 S. Ct. at 627.

death of a nonseaman in territorial waters.<sup>109</sup> The Court refused to endorse the argument that *Moragne* had launched a uniform federal maritime remedy for all deaths occurring in state waters, thereby precluding all previously available state remedies.<sup>110</sup> In so doing, the Court has seemingly abandoned its emphasis on the concerns of uniformity, which had appeared to have developed into a guiding principle in the interpretation of maritime law. Additionally, the Court's limitation of its previous holdings in *Tallentire*, *Higginbotham*, and *Miles* seems to impliedly embrace the Third Circuit's standard preemption analysis as the proper replacement for the concerns of uniformity.<sup>111</sup> Finally, the Court announced a preference for the expansion of plaintiffs' rights.<sup>112</sup> Thus, the probable result of the Supreme Court's decision in *Yamaha Motor Corp. v. Calhoun* is the encouragement of litigation by (1) creating more uncertainty in the maritime law by retreating from the concerns of uniformity as a guiding principle and (2) indicating a preference for the expansion of plaintiffs' rights.<sup>113</sup>

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109. *Id.* at 629.

110. *See id.* at 625 ("Yamaha argues that *Moragne*—despite its focus on 'maritime duties' owed to maritime workers—covers the waters, creating a uniform federal maritime remedy for all deaths occurring in state territorial waters, and ousting all previously available state remedies.").

111. In the Third Circuit's opinion, they framed the issue as a preemption one and stated that "the maritime preemption doctrine is not significantly different from the preemption doctrine applicable to non-maritime contexts." *Calhoun*, 40 F.3d at 629. The court went on to use a standard preemption analysis to guide it to its decision. Although the Supreme Court's opinion talks more in terms of uniformity, the underlying theme is one of the Third Circuit's preemption analysis. *But see* Thompson, *supra* note 72, at 239 (emphasizing that the Supreme Court did not explicitly embrace the Third Circuit's analysis and stating, "The Supreme Court completely avoided the preemption issues and simply performed an historical analysis of its maritime wrongful death jurisprudence.").

112. *See supra* notes 91-93 and accompanying text.

113. *See* Thompson, *supra* note 72, at 236 (discussing the Supreme Court's decision in *Yamaha Motor Corp. v. Calhoun* and stating that the Court's refusal to reconcile and synthesize its decisions "leaves those handling maritime litigation to the task, which undoubtedly will result in more litigation"); *see also* Denny & Levy, *supra* note 98, at 402 (stating that "[u]nder *Yamaha*, plaintiffs probably will attempt to seek the application of the most generous state law remedies available to non-seafarers. . . . *Yamaha* probably will be used by plaintiffs to argue that state law bases for liability should supplement federal bases for injuries and deaths of non-seafarers in U.S. territorial waters."); Paul S. Edelman, *Guevara v. Maritime Overseas Corp.: Opposing the Decision*, 20 TUL. MAR. L.J. 349, 355 (1996) (stating that *Yamaha* "also philosophically would support punitive damages in a general maritime law case").



