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General Maritime Law and the Wrongful Death Dilemma

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General Maritime Law and the Wrongful Death Dilemma

"No area of federal law is judge-made at its source to such an extent as is the law of admiralty."

Felix Frankfurter

from *Mitchell v. Trawler Racer*, 362
U.S. 539, 550 (1960) (dissenting opinion).

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I. INTRODUCTION

On June 15, 1970, the Supreme Court decided *Moragne v. States Marine Lines*,¹ which has been referred to as "probably the most important wrongful death case holding in the entire history of American jurisprudence—perhaps, in all Anglo-American jurisprudence."² This comment will briefly explore the decision itself. More importantly, it will explore subsequent development of the law through the numerous decisions of the lower courts, to whom the Supreme Court entrusted a

1. *Moragne v. States Marine Lines*, 398 U.S. 375 (1970).

2. S. SPEISER, RECOVERY FOR WRONGFUL DEATH 6 (Supp. 1972). As used in this comment, a wrongful death action refers to a cause of action which arises in favor of a person for the damages he suffers due to the death of another. A survival action is an action brought by a third person for those damages the decedent suffered prior to his death and for which the decedent would have been able to have sued had he survived. See S. SPEISER, RECOVERY FOR WRONGFUL DEATH §§ 1.1, 14.1 (1966) [hereinafter cited as SPEISER].

major role in the formulation of the elements comprising a new right of action for wrongful death under the general maritime law.

A full understanding of the events since the decision in *Moragne* is facilitated by occasional reference to historical precedent. The historical perspective has been narrowed as much as possible, however, allowing more detailed treatment of the decisions since *Moragne*.

II. HISTORICAL PERSPECTIVE

A. *Wrongful Death Actions*

Traditionally, the common law did not recognize an action for wrongful death and, as a result such action was not recognized in courts of the United States in the absence of a statutorily created cause of action.³ Under the common law rules the defendant was financially better off killing a person rather than injuring him.⁴

The first statutorily created cause of action came with the passage in England of the Fatal Accidents Act of 1846.⁵ The result has been the passage of a statutory remedy for wrongful death in every American state.⁶

Prior to the Supreme Court's decision in *The Harrisburg*⁷ in 1886, American courts were split on whether a cause of action for wrongful death existed under the general maritime law.

The Harrisburg, however, settled the controversy wherein the Court held that no right of action existed in the general maritime law. *The Harrisburg* involved a death which occurred within state territorial waters and not on the high seas. The Court quickly augmented this decision with *The Alaska*,⁸ a decision handed down three years later which applied *The Harrisburg* rule to deaths occurring on the high seas.

In response to the effect of these holdings, Congress eventually enacted two statutes in 1920 which established a statutory right of recovery for wrongful death. The first of the two was the Death on the High

3. See *Cutting v. Seabury*, 6 F. Cas. 1083 (No. 3521) (D.C.D. Mass. 1860), for historical background.

4. See the discussion of survival actions in this comment.

5. 9 & 10 Vict. c. 93, §§ 1-6 (1846) (commonly known as Lord Campbell's Act).

6. See Smith, *Wrongful Death Damages in North Carolina*, 44 N.C.L. Rev. 437 (1966) (Appendix A). See generally SPEISER, *supra* note 2.

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

8. 130 U.S. 201 (1889).

Comments

Seas Act⁹ (DOHSA) which provided a remedy for death resulting from a wrongful act, neglect, or default occurring "beyond a marine league."¹⁰ The second was the Jones Act¹¹ which was available only to seamen in an action against their employers.

DOHSA specifically provided that it would not preclude the application of state statutes to deaths occurring within state territorial waters.¹² This provision merely continued a policy which had been recognized even prior to the decision in *The Harrisburg*. However, it was not until the Supreme Court's decision in *Western Fuel Co. v. Garcia*,¹³ that the Court conclusively established the right to bring an in personam action in admiralty for wrongful death within the territorial waters of a state based on that state's wrongful death statute.¹⁴ In addition, the Court held that in bringing a suit based on a state statute the admiralty doctrine of laches would not apply to determine the timeliness of the suit, preferring instead to apply the applicable state statute of limitations.¹⁵ The Court reasoned that "[t]he liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right."¹⁶

A number of cases which followed *Garcia* only served to further confuse the issue as to what extent state law would be applicable to creating the liability and limiting the remedy for wrongful death actions.¹⁷ One example is the decision in *Gillespie v. United States Steel Corp.*¹⁸ The plaintiff, as administratrix of her son's estate, brought an action under the Jones Act for his wrongful death. In addition to alleging negligence under the Jones Act, the plaintiff also alleged unseaworthiness under the general maritime law together with the Ohio wrongful death statute.¹⁹ The Court, relying on the 1930 decision in *Lindgren v.*

9. 46 U.S.C. §§ 761-68 (1970). The high seas are generally considered to be the waters outside the three mile limit.

10. *Id.* § 761.

11. 46 U.S.C. § 688 (1970).

12. *Id.* § 767.

13. 257 U.S. 233 (1921).

14. *Id.* at 242.

15. *Id.* at 243.

16. *Id.*

17. *See, e.g., Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964); *Hess v. United States*, 361 U.S. 314 (1960) (allowing court to impose a higher standard of conduct than that imposed by the admiralty in accordance with state law); *The Tungus v. Skovaard*, 358 U.S. 588 (1959) (The state's laws would be determinative as to the kind of conduct which would give rise to an action for wrongful death); *Leverson v. Deupree*, 345 U.S. 648 (1953) (although bound to apply state law as found, federal courts are not bound by state procedural law which was not an "integral part" of the state created right).

18. 379 U.S. 148 (1964).

19. *Id.* at 150. The Court cited OHIO REV. CODE ANN. § 2125.01 (Anderson 1967).

United States,²⁰ held that the Jones Act provided an exclusive right of action for the death of seamen killed in the course of their employment, superseding the state wrongful death statute which might otherwise apply to a maritime death.²¹ Recovery for unseaworthiness was precluded because the Jones Act only applies to an action based on negligence.²²

B. *Survival Actions*

The Jones Act represented the first federal statute which provided for a survival action.²³ The Death on the High Seas Act²⁴ has generally been construed as not providing for the recovery of the decedent's pain and suffering prior to death;²⁵ allowing recovery for pecuniary loss only.²⁶ While preempting the wrongful death field, DOHSA has not precluded courts from applying state survival statutes to deaths occurring beyond a marine league.²⁷

III. *Moragne v. States Marine Lines*

A. *Facts*

In *Moragne v. States Marine Lines*,²⁸ the Supreme Court unanimously overruled *The Harrisburg* and held that an action for wrongful death does exist under general maritime law.²⁹ *Moragne* involved a longshoreman who was killed while working aboard defendant's vessel within the territorial waters of Florida. The decedent's widow sued under Florida's wrongful death statute³⁰ in a state court alleging negligence and unseaworthiness. After the action was removed to federal court by defendant,³¹ the count based on unseaworthiness was dismissed on the grounds that the applicable Florida wrongful death act did not encompass any liability based on unseaworthiness. In an unusual inter-

20. 281 U.S. 38 (1930).

21. 379 U.S. at 154-55.

22. *Id.* at 154.

23. *Petition of United States Steel Corp.*, 436 F.2d 1256 (6th Cir. 1970).

24. 46 U.S.C. § 761 (1970).

25. *Dugas v. National Aircraft Corp.*, 438 F.2d 1386, 1388 (3d Cir. 1971).

26. 46 U.S.C. § 762 (1970).

27. *Dugas v. National Aircraft Corp.*, 438 F.2d 1386, 1389 (3d Cir. 1971).

28. 398 U.S. 375 (1970).

29. *Id.* at 409.

30. FLA. STAT. § 768.01 (1971).

31. *See* 28 U.S.C. §§ 1332, 1441 (1970) (removal).

locutory appeal³²—based in part on a procedure permitted under Florida law which allowed the Fifth Circuit to refer the question to the Florida Supreme Court for a decision on the Florida statute's coverage³³—the court of appeals affirmed³⁴ the district court's conclusion based on the Florida Supreme Court's answer to the question certified.³⁵ Before ruling on dismissal, the court heard appellant's argument that recovery under the warranty of seaworthiness could be allowed under the general maritime law, the rule of *The Tungus v. Skovgaard*³⁶ notwithstanding. The court of appeals found this argument to be unpersuasive.³⁷ The Supreme Court granted certiorari,³⁸ and invited the United States to participate as amicus curiae³⁹ "to reconsider the important question of remedies under federal maritime law for tortious deaths on state territorial waters."⁴⁰ Taking advantage of the opportunity to participate as amicus curiae the United States, in their oral argument, pointed out three anomalies⁴¹ which would have been perpetuated had

32. See 28 U.S.C. § 1292(b) (1970).

33. FLA. STAT. § 25.031 (1971).

34. 409 F.2d 32 (5th Cir. 1969).

35. 211 So. 2d 161 (Fla. 1968).

36. 358 U.S. 588 (1959). The Court held, with four members dissenting, that state wrongful death statutes cannot be supplemented by admiralty principles but must be implemented as interpreted by state courts as an integrated whole with whatever conditions and limitations the creating state has attached. *Id.* at 592.

37. 409 F.2d 32 (5th Cir. 1969).

38. 396 U.S. 900 (1969).

39. *Id.* at 952.

40. 398 U.S. 375, 377 (1970).

41. *Id.* at 395.

The first of these is simply the discrepancy produced whenever the rule of *The Harrisburg* holds sway: 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.

The second incongruity is that identical breaches of the duty to provide a seaworthy ship, resulting in death, produce liability outside the three-mile limit—since a claim under the Death on the High Seas Act may be founded on unseaworthiness . . . —but not within the territorial waters of a state whose local statute excludes unseaworthiness claims. The United States argues that since the substantive duty is federal, and federal maritime jurisdiction covers navigable waters within and without the three-mile limit, no national policy supports this distinction in the availability of a remedy.

The third . . . anomaly is that a true seaman . . . —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 seaman, does have such a remedy when allowed by a state statute.

Id. (citations omitted).

The Court cited *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964), as a joint contributor to the third anomaly in conjunction with the rule of *The Harrisburg*. In *Gillespie*, the Court held that the Jones Act, by providing a claim for wrongful death based on negligence, precluded any state remedy for wrongful death of a seaman in territorial waters—whether based on negligence or unseaworthiness. The Court stated that the Jones Act necessarily superseded the application of the death statutes of the several states. *Id.* at 155.

the Court not recognized a general maritime remedy for wrongful death.⁴²

B. *Decision*

In the opinion, by Justice Harlan, the Court concluded that *The Harrisburg* was itself an "unjustifiable anomaly" in the present maritime law and overruled it.⁴³ In addition, the Court indicated that *The Harrisburg* was probably incorrect when decided; the rule denying the remedy having been based on early English principles which never were adopted by American courts and long since discarded by Great Britain.⁴⁴ The Court, however, found no necessity for overruling *The Harrisburg* on this basis. Instead, they reasoned that "the rule against recovery for wrongful death was sharply out of keeping with the policies of modern American maritime law" as evidenced by a "wholesale abandonment" of the common law rule by state⁴⁵ and federal⁴⁶ statutes.⁴⁷ From a review of these statutes the Court concluded that "there is no present public policy against allowing recovery for wrongful death."⁴⁸

C. *Left Unresolved*

Equally important to a consideration of what *Moragne* held is a discussion of what the decision specifically did not decide. The Court deliberately chose not to delimit the precise scope of the newly created cause of action for wrongful death. Specifically, the *Moragne* decision reserved judgment on the questions of who would qualify as a potential beneficiary,⁴⁹ what time limitations would be imposed on the right to

42. It must be noted here that the third anomaly, as it refers to longshoremen, has been drastically altered by recent amendments to the Longshoreman's and Harbor Worker's Compensation Act. 33 U.S.C. § 901 (1970).

43. 398 U.S. at 409.

44. *Id.* at 381.

45. See text corresponding to note 6 *supra*.

46. Federal Employer's Liability Act, 45 U.S.C. §§ 51-59 (1970) (pertaining to railroad employees); Jones Act, 46 U.S.C. § 688 (1970) (merchant seamen); Death on the High Seas Act, 46 U.S.C. §§ 761-62 (1970) (any person on the high seas). *Cf.* National Parks Act, 16 U.S.C. § 457 (1970); Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-43 (1970) (making state wrongful death statutes applicable to particular areas within federal jurisdiction).

47. 398 U.S. at 388.

48. *Id.* at 390.

49. "We do not determine this issue now, for we think its final resolution should await further sifting through the lower courts in future litigation." *Id.* at 408.

bring suit,⁵⁰ and what constitutes the proper measure of damage in a federal maritime action for wrongful death.⁵¹ The Court declined to restrict the elements of the cause of action to the provisions of the Jones Act, DOHSA, or any other wrongful death statute, instead directing the lower courts to consider both federal and state acts for guidance in fashioning the particulars of the new remedy.⁵² The remainder of this comment will be devoted to a consideration of events which have further developed the general maritime remedy for wrongful death first established in *Moragne*.

IV. POST-*Moragne* DEVELOPMENT

A. *Defenses-generally*

Prior to *Moragne*, when a death occurred within the territorial waters of a state—so that the state right of action for wrongful death might be applicable in admiralty—any defenses which were available under the state statute were equally available in the admiralty.⁵³ Among these defenses was included the appropriate state limitations period.⁵⁴

Moragne has altered this situation to the extent that the Court created a right of action not dependent upon adjacent state law. Therefore, only those defenses available in admiralty may now be properly asserted.⁵⁵ Where, for example, contributory negligence might have been a valid defense under state law prior to *Moragne*, the traditional admiralty comparative negligence doctrine would now be applicable.⁵⁶

50. "We need not decide this question now, because the present case was brought within a few months of the accident and no question of timeliness has been raised." *Id.* at 406.

51. "If still other subsidiary issues should require resolution, such as particular questions of the measure of damages, the courts will not be without persuasive analogy for guidance. Both the Death on the High Seas Act and the numerous state wrongful-death acts have been implemented with success for decades." *Id.* at 408.

52. *Id.* at 405-08.

53. *Goett v. Union Carbide Co.*, 361 U.S. 340 (1960); *Hess v. United States*, 361 U.S. 314 (1960); *The Tungus v. Skovgaard*, 358 U.S. 588 (1959).

54. *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921); *Emerson v. Holloway Concrete Prods. Co.*, 282 F.2d 271 (5th Cir. 1960).

55. *Hornsby v. Fish Meal Co.*, 431 F.2d 865 (5th Cir. 1970).

56. *Simpson v. Knutsen*, 444 F.2d 523 (9th Cir. 1971); *Hornsby v. Fish Meal Co.*, 431 F.2d 865 (5th Cir. 1970); *Green v. Ross*, 338 F. Supp. 365 (S.D. Fla. 1972).

B. *Laches*

Although the Supreme Court avoided a decision on the applicable limitations period for a *Moragne*-type action,⁵⁷ the opinion did comment favorably on the argument advanced by the United States.⁵⁸ It was argued that since the Court was only removing a barrier to general maritime actions for fatal injuries, there seemed to be no reason why the admiralty doctrine of laches should not apply.⁵⁹ By applying this doctrine, consideration could be given to the two year statute of limitations in DOHSA.⁶⁰ Such consideration is consistent with the past practices of federal courts to look for analogy to appropriate state or foreign statutes of limitations absent a provision in federal law.⁶¹ Blind acceptance, however, of a two year statute of limitations in all situations is not the best possible resolution of this issue. The Second Circuit, for example, in *Fitzgerald v. A.L. Burbank & Co.*,⁶² has interpreted *Moragne* to indicate that the two year limitation period of DOHSA would be applicable, by analogy, even though the general maritime claim was joined with a Jones Act cause of action, which generally allows a plaintiff three years in which to bring an action.⁶³ The result reached by the Second Circuit was exactly opposite the decision reached by the district court of Maryland in *Thomas v. C.J. Langenfelder & Son, Inc.*⁶⁴ The Maryland court refused to adopt the two year limitation of DOHSA for an action based on unseaworthiness which had been joined with a Jones Act claim, applying instead the three year limitation period of the Jones Act.⁶⁵ The court relied on *McAllister v. Magnolia Petroleum Co.*⁶⁶ In *McAllister*, the Supreme Court held⁶⁷ that when a Jones Act claim is joined with an action based on unseaworthiness the court is precluded from applying a shorter period of limitation than was allowable by Congress.⁶⁸ *McAllister* was distin-

57. See quote at note 50 *supra*.

58. 398 U.S. at 406.

59. *Id.*

60. 46 U.S.C. § 763 (1970).

61. *Kenny v. Trinidad Corp.*, 349 F.2d 832 (5th Cir. 1965); *Pure Oil Co. v. Snipes*, 293 F.2d 60 (5th Cir. 1961).

62. 451 F.2d 670, 683 (2d Cir. 1971). See also *Raskin v. P.D. Marchissini, Inc.*, 437 F.2d 563, 566 (2d Cir. 1971); *McGlenon v. Boeing Co.*, 437 F.2d 433, 435 (9th Cir. 1971).

63. 46 U.S.C. § 688 (1970). The Jones Act incorporates by reference the provisions of the Federal Employer's Liability Act, 45 U.S.C. § 56 (1970).

64. 324 F. Supp. 325 (D. Md. 1971).

65. *Id.* at 327.

66. 357 U.S. 221 (1958).

67. *Id.* at 224.

68. *Id.*

guished by the Second Circuit in *Fitzgerald*⁶⁹ on the ground that as the decision was rendered prior to *Moragne*, it merely held that "a state court could not use its own statute of limitations on an unseaworthiness claim to force a plaintiff to bring his action before the three years allowed by Congress for a Jones Act complaint."⁷⁰ The court in *Fitzgerald* reasoned that since they were applying by analogy a limitation period based on a federal statute, rather than a state statute, no relevance attached to the traditional argument that Congress would be ousted from its "paramount position in the admiralty field."⁷¹ At present, the courts which have considered the issue of the timeliness of suit are far from reaching the *uniformity* required of the admiralty.⁷²

C. Beneficiaries

As with the statute of limitations issue, the Court in *Moragne* specifically reserved judgment on the question of who the appropriate beneficiaries are under a general maritime cause of action for wrongful death,⁷³ but the Court did note the argument advanced by the United States as *amicus curiae* stating that the Court should look for guidance to those wrongful death acts passed by Congress.⁷⁴ Before the decision

69. 451 F.2d at 683 n.12.

70. *Id.*

71. *Id.*

72. *Moragne v. States Marine Lines*, 398 U.S. 375 (1970). The Court stated federal admiralty law should be "a system of law coextensive with, and operating uniformly in, the whole country." *Id.* at 402. The *Lottawanna*, 88 U.S. (21 Wall.) 654, 661 (1875). *Compare, e.g.,* the decision in *Thomas v. C.J. Langenfelder*, 324 F. Supp. 325 (D. Md. 1971) with *Epling v. M.T. Epling Co.*, 435 F.2d 732 (6th Cir. 1970) (petitioner not allowed to amend his complaint subsequent to *Moragne* decision so as to include a *Moragne*-type allegation); *Mascuilli v. United States*, 343 F. Supp. 439 (E.D. Pa. 1972) (remanded for reconsideration of damages in light of *Moragne* decision after seven previous adjudications first commencing in 1959). See also *United States Steel v. Lamp*, 436 F.2d 1256 (6th Cir. 1970); *In re Cambria S.S. Co.*, 353 F. Supp. 691, 692 (N.D. Ohio 1973).

73. See text corresponding to note 49 *supra*.

74. 398 U.S. at 406-07. Specific reference was actually made to the Longshoreman's and Harbor-Worker's Compensation Act, 33 U.S.C. § 909 (1970); the Jones Act, 46 U.S.C. § 688 (1970) (incorporating provisions of the FELA, 45 U.S.C. § 51 (1970)); and the Death on the High Seas Act, 46 U.S.C. §§ 761-62 (1970). Of these statutes, it was argued by the United States that DOHSA should be applied as it dealt exclusively with actions for wrongful death for breaches of a maritime duty. In contrast, the Jones Act was only applicable to a specific class of actions, *i.e.*, a seaman against his employer, and based on a standard of negligence under the Federal Employers' Liability Act. The Longshoreman's and Harbor-Workers' Compensation Act was seen to rest on principles of recovery foreign to the general maritime law. The United States argued, therefore, that the borrowing of the schedule of beneficiaries from DOHSA could "not only effectuate the expressed congressional preferences in this area, but will also promote uniformity by ensuring that the beneficiaries will be the same for identical torts, rather than varying with the employment status of the decedent. There is no occasion . . . to borrow from the law of the relevant coastal State since the underlying duties to be effectuated are entirely federal and Congress has expressed its preference of beneficiaries for violation of maritime law." 398 U.S. at 406-08.

in *The Harrisburg*, some courts had allowed a recovery for wrongful death under general maritime law. It was frequently concluded that there existed a "natural right" to bring suit.⁷⁵ In *The Manhasset*, for example, the court rejected as "unknown to the maritime law," the right of an administrator to bring suit in admiralty for wrongful death.⁷⁶ What the court did decide, however, was that a father or mother had a "natural right" to bring suit, in their own name and for their own benefit, for damages arising out of the death of a son. Additionally, a wife could recover for her husband's death; minor children for their father's death.⁷⁷ In effect, the right of action attached to only a limited number of persons. Neither the Jones Act nor DOHSA picked up this "natural right" concept, preferring instead that an action for wrongful death be brought by the personal representative of the deceased for the benefit of named beneficiaries in the respective statutes. Under the Jones Act, the classes of beneficiaries are mutually exclusive so that if one class of beneficiaries is in existence it will receive the benefits to the exclusion of all other classes of beneficiaries in existence. In addition, the priority of taking is listed.⁷⁸ The provisions of DOHSA are far less restrictive than the Jones Act, providing that an action can be brought "for the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative . . ." regardless of whether or not one of the other named beneficiaries has asserted a right to damages.⁷⁹

Only a few cases since *Moragne* have faced the issue of how to decide who are the appropriate beneficiaries in a general maritime claim for wrongful death. However, from among these decisions it is apparent that there is a clearly discernible trend to adopt the schedule of bene-

75. For a complete discussion of prior cases see the court's opinion in *The Manhasset*, 18 F. 918 (E.D. Va. 1884).

76. *Id.* at 920.

77. *Id.*

78. Actually, the Federal Employers' Liability Act, 45 U.S.C. § 51 (1970), is incorporated by reference into the Jones Act awarding damages "in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband or husband and children of such employee; and, if none, then of the next of kin dependent on such employee . . ." *Id.*

79. 46 U.S.C. § 761 (1970), provides:

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

ficiaries from DOHSA.⁸⁰ Most of the responsibility for the instigation of this trend is attributable to the Supreme Court's apparent approval in *Moragne* of the DOHSA schedule of beneficiaries.⁸¹ Illustrative of this attitude is a Delaware court's opinion in *Smith v. Allstate Yacht Rentals, Ltd.*,⁸² wherein they stated:

While the Supreme Court did not have occasion to finally determine the beneficiaries who were entitled to recover from the wrongful death action in *Moragne*, the logic of the arguments presented by the United States, their lengthy discussion by the Supreme Court and the fact that it is the standard already being applied in other state court maritime actions⁸³ are convincing that the beneficiary schedule in the Death on the High Seas Act is to be applied in this case.⁸⁴

Interestingly, one court at least has decided on a contrary course of action and has referred to a state statute for guidance where the deaths occurred within state inland waters. In *Spiller v. Thomas M. Lowe, Jr. & Associates*,⁸⁵ the court, in applying Arkansas law, relied on the

80. The DOHSA schedule of beneficiaries has been expressly adopted by at least four courts with the most recent opinion being the best reasoned of the four. See *In re Cambria S.S. Co.*, 353 F. Supp. 691 (N.D. Ohio 1973) (thorough analysis given to federal and all state schemes for qualification as a beneficiary although DOHSA schedule was ultimately applied). See also *Green v. Ross*, 338 F. Supp. 365 (S.D. Fla. 1972). "It is appropriate, however, for the claims to be brought by the personal representative for the exclusive benefit of the eligible beneficiaries, as is done under the DOHSA." *Id.* at 366. *Smith v. Allstate Yacht Rentals, Ltd.*, 293 A.2d 805 (Del. 1972) (see text corresponding to note 84 *infra*); *Guilbeau v. Calzada*, 240 So. 2d 104 (La. 1970). "Uniformity has always been of paramount importance in admiralty matters. Borrowing the schedule of beneficiaries provided in DOHSA for wrongful death actions under general maritime law will in our opinion more nearly accomplish this objective. We, therefore, conclude that it should be applied in this instance." *Id.* at 110.

Two other courts have followed the general reasoning advanced by the United States in support of its argument favoring application of the beneficiaries enumerated in DOHSA. See *In re Sincere Navigation Corp.*, 329 F. Supp. 652 (E.D. La. 1971); *Smith v. Olsen and Ugelstad*, 324 F. Supp. 578 (E.D. Mich. 1971).

Finally, in two other decisions the court in each apparently sidestepped the issue where both factual situations involved both Jones Act and DOHSA claims and where analogy to state statutes were not pursued. Implicit in both opinions were determinations that no conflict existed between the Jones Act and DOHSA schedules of beneficiaries. In *Mungin v. Calmar S.S. Corp.*, 342 F. Supp. 479, 481 (D. Md. 1972), the court held that the illegitimate children of the deceased were proper beneficiaries and recognized as such under either statute. However, in *McPherson v. Steamship S. African Pioneer*, 321 F. Supp. 42, (E.D. Va. 1971), the court concluded that a woman who the deceased seaman was living with, but not married to, at the time of his death, had had no right to participate as a beneficiary with respect to any recovery under either statute, her dependency on the decedent notwithstanding. The court felt that the proper beneficiaries were those persons contained in both statutes. *Id.* at 48-49.

81. See discussion at note 74 *supra*.

82. 293 A.2d 805 (Del. 1972).

83. The court cited *Guilbeau v. Calzada*, 240 So. 2d 104 (La. 1970).

84. 293 A.2d at 810.

85. 328 F. Supp. 54 (W.D. Ark. 1971), *aff'd*, 466 F.2d 903 (8th Cir. 1972).

facts that the work of the decedents and defendant occurred in Arkansas, the deaths occurred in Arkansas, and the suit was maintained in Arkansas.⁸⁶ The court rejected an argument by the defendant that if state rather than federal law, is applicable, then the appropriate state law would be that of Texas, the decedent's domicile at death.⁸⁷ Presently, this decision stands by itself in applying state law based solely on what appears to be the mechanical "place-of-the-wrong" conflict of laws rule.⁸⁸ While this writer does not agree that *Spiller* is subject to so simple an interpretation at least one court apparently disagrees, rejecting *Spiller* on this basis.⁸⁹

Arguments advocating application of DOHSA by analogy to the general maritime law to determine the proper beneficiaries certainly appear quite sound. As a result, it seems unlikely that there will be any substantial development of a line of cases adopting the *Spiller* rationale. For the reasons advanced by the Supreme Court in *Moragne*, and in the interests of uniformity of the law in admiralty, wide acceptance of the DOHSA schedule of beneficiaries by courts appears certain.

D. Damages

The appropriate elements of damage that should be recoverable for a death action under general maritime law has been the issue most frequently litigated since *Moragne*. As previously stated, *Moragne* left this question unresolved but suggested that the long experience of the lower courts in dealing with compensable death damage issues indicated that little trouble would be encountered. The Supreme Court stated additionally that the courts will not be without persuasive analogy for guidance. In the very next sentence reference was made to the long standing success of both DOHSA and the numerous state wrongful death acts.⁹⁰ Had the Supreme Court simply stated that the damage issue would be left to the lower courts for resolution, I suggest that the Court would have advanced the desired goal of uniformity. In referring to the success of DOHSA and existence of some persuasive

86. Cf. *Petition of Canal Barge Co.*, 323 F. Supp. 805 (N.D. Miss. 1971).

87. 466 F.2d at 905.

88. See R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 210-18 (1971).

89. *In re Cambria S.S. Co.*, 353 F. Supp. 691, 694 (N.D. Ohio 1973).

90. "If still other subsidiary issues should require resolution, such as particular questions of the measure of damages, the courts will not be without persuasive analogy for guidance. Both the Death on the High Seas Act and the numerous state wrongful-death acts have been implemented with success for decades. 398 U.S. at 408.

analogy for guidance in the same breath it was reasonable for the lower courts to have relied on the belief that the application of the DOHSA standard of compensable damages to a general maritime action would be treated favorably by the Supreme Court. The Court, however, totally confused the situation by also making reference to the continued success of state death acts. This confusion stems from the inconsistency in allowing reference to both DOHSA and state death acts. The fact that not all states employ the same pecuniary loss language as does DOHSA in limiting damages is only one source of this inconsistency. An additional problem was encountered upon the realization that even among those states utilizing the pecuniary loss language, the definition of what constituted a pecuniary loss often varied. *Moragne*, therefore, was useless to the lower courts in their determination of what damages might be compensable under maritime law. It was only authority for the proposition that the lower courts were free to make completely independent determinations regarding the elements of damage that should comprise a wrongful death recovery.

Almost immediately after *Moragne* a divergence of authority existed as to the appropriate damage elements. The clearest division of cases that was made on this issue generally separated those cases which had applied the Jones Act and DOHSA standard for awarding damages⁹¹—usually on the rationale of preserving uniformity—from a growing number of cases deviating from the confines of these statutes by allowing for a broader and more comprehensive recovery.⁹²

In January 1974, the Supreme Court endeavored to resolve the controversy surrounding the damage issue with their decision in *Sea-Land Services v. Gaudet*.⁹³ This is the only Supreme Court decision handed down since the creation of the maritime wrongful death remedy addressing itself to the problems *Moragne* left unresolved. If *Sea-Land* is any indication of what can be expected from the Court in attempting

91. See, e.g., *United States Steel Corporation v. Lamp*, 436 F.2d 1256 (6th Cir. 1970), cert. denied, 402 U.S. 987 (1971); *Kaiser v. Traveler's Ins. Co.*, 359 F. Supp. 90 (E.D. La. 1973), aff'd, 487 F.2d 1300 (5th Cir. 1974); *Mascuilli v. United States*, 343 F. Supp. 439 (E.D. Pa. 1972); *Mungin v. Calmar S.S. Corp.*, 342 F. Supp. 479 (D. Md. 1972); *Petition of Canal Barge Co.*, 323 F. Supp. 805 (N.D. Miss. 1971), aff'd in part, 480 F.2d 11 (5th Cir. 1973). See in addition cases cited note 148 *infra*.

92. See, e.g., *Spiller v. Thomas M. Lowe, Jr. & Assoc.*, 466 F.2d 903 (8th Cir. 1972); *Gaudet v. Sea-Land Servs. Inc.*, 463 F.2d 1331 (5th Cir. 1972); *In re Farrell Lines, Inc.*, 339 F. Supp. 91 (E.D. La. 1971); *In re Sincere Navigation*, 329 F. Supp. 652 (E.D. La. 1971); *Dennis v. Central Gulf S.S. Corp.*, 323 F. Supp. 943 (E.D. La. 1971), rev'd in part, 453 F.2d 137 (5th Cir.), cert. denied, 409 U.S. 948 (1972); *Smith v. Allstate Yacht Rentals, Ltd.*, 293 A.2d 805 (Del. 1972).

93. 94 S. Ct. 806 (1974).

to resolve problems created by *Moragne* then the uniformity doctrine—so precious to admiralty—will continue to elude application in maritime wrongful death cases.

Before consideration of *Sea-Land*, a discussion of the development of the damage issue since *Moragne* will help to focus on the problems created and the problems resolved by *Sea-Land*.

1. Lower Court Development

The most common measure of damages utilized in the state statutes is the pecuniary loss standard.⁹⁴ This is also the measure of damages adopted by DOHSA⁹⁵ and the Jones Act.⁹⁶ Several elements have been interpreted as being encompassed within the pecuniary loss standard. Among them are: (1) the amount of support which it could be expected the decedent would have contributed during his lifetime to the beneficiary;⁹⁷ (2) loss of services the decedent would have rendered to the beneficiary;⁹⁸ (3) deprivation of the nurture, guidance and education a parent would have given to his minor child;⁹⁹ and loss of inheritable estate.¹⁰⁰ Similarly, damages for the death of a minor child

94. SPEISER, *supra* note 2, § 3.1. Speiser concludes that “. . . damages are awarded for the present value of probable contributions which the deceased would have made to the survivors had he lived, and for the pecuniary value of . . . a parent's training, guidance, nurture and education. In addition, a number of courts allow recovery of medical expenses, funeral expenses and the amount of the probable inheritance the deceased would have left to the survivors after living out his normal life span.” *Id.*

95. “The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought” 46 U.S.C. § 762 (1970).

96. 46 U.S.C. § 688 (1970). The Jones Act adopted the pecuniary loss standard from judicial construction of the Federal Employers' Liability Act. In *Michigan Cent. R.R. v. Vreeland*, 227 U.S. 59 (1913), the Court decided that damages recoverable under FELA are limited to injuries capable of pecuniary valuation.

97. *See, e.g.*, *Neal v. Saga Shipping Co.*, 407 F.2d 481 (5th Cir. 1969); *Noel v. United Aircraft Corp.*, 342 F.2d 232 (3d Cir. 1964); *National Airlines, Inc. v. Stiles*, 268 F.2d 400 (5th Cir. 1959) (DOHSA); *Cleveland Tankers, Inc. v. Tierney*, 169 F.2d 622 (6th Cir. 1948) (Jones Act); *Daughdrill v. Diamond “M” Drilling Co.*, 305 F. Supp. 836 (W.D. La. 1969); *Petition of Marina Mercante Nicaraguense*, 248 F. Supp. 15 (S.D.N.Y. 1965); *Orona v. Isbrandtsen Co.*, 204 F. Supp. 777 (S.D.N.Y. 1962), *aff'd*, 313 F.2d 241 (2d Cir. 1963).

98. *Michigan Cent. R.R. v. Vreeland*, 227 U.S. 59 (1913); *Sabine Towing v. Brennan*, 85 F.2d 478 (5th Cir. 1936), *rev'd on other grounds sub nom. Van Breeck v. Sabine Towing Co.*, 200 U.S. 342 (1937); *Petition of Marina Mercante Nicaraguense*, 248 F. Supp. 15 (S.D.N.Y. 1965).

99. *See, e.g.*, *Michigan Cent. R.R. v. Vreeland*, 227 U.S. 59 (1913); *Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583 (2d Cir. 1961); *Daughdrill v. Diamond “M” Drilling Co.*, 305 F. Supp. 836 (W.D. La. 1969); *Petition of Marina Mercante Nicaraguense*, 248 F. Supp. 15 (S.D.N.Y. 1965); *Orona v. Isbrandtsen*, 204 F. Supp. 777 (S.D.N.Y. 1962), *aff'd*, 313 F.2d 241 (2d Cir. 1963); *Petition of Midwest Towing Co.*, 203 F. Supp. 727 (E.D. Ill. 1962).

100. *See, e.g.*, *National Airlines, Inc. v. Stiles*, 268 F.2d 400 (5th Cir. 1959); *Daughdrill v. Diamond “M” Drilling Co.*, 305 F. Supp. 836 (W.D. La. 1969); *Petition of United States*, 303 F. Supp. 1282, 1306 (E.D.N.C. 1969).

have been allowed upon proof that future contributions to the beneficiaries were reasonably foreseeable.¹⁰¹

Neither DOHSA nor the Jones Act have been interpreted to include recovery for damages caused by loss of comfort, society, consortium,¹⁰² love, affection, grief, wounded feelings,¹⁰³ emotional distress or for the economic value of decedent's life to himself.¹⁰⁴ Conversely, many of the elements denied under a Jones Act or DOHSA action have been held to be compensable under various state statutes.¹⁰⁵

One principal distinction between the Jones Act and DOHSA should be mentioned. Under the Jones Act the personal representative of the decedent has been allowed to recover for the decedent's pain and suffering as well as the beneficiaries' pecuniary losses.¹⁰⁶ Recovery under DOHSA, however, is restricted to the beneficiaries' pecuniary losses only.¹⁰⁷

As with the other questions left unresolved by *Moragne*, the trend had been to apply the measure of damages traditionally allowable under DOHSA. The first case to adopt the pecuniary loss standard was *United States Steel Corp. v. Lamp*.¹⁰⁸ In *Lamp* the controversy arose from the collision of two vessels on the territorial waters of Michigan causing a number of injuries and deaths among the crew of the United

101. See, e.g., *Wade v. Rogala*, 270 F.2d 280 (3d Cir. 1959).

102. See *Igneri v. Cie. de Transports Oceaniques*, 323 F.2d 257 (2d Cir. 1963), cert. denied, 376 U.S. 949 (1964); *Dugas v. National Aircraft Corp.*, 310 F. Supp. 21 (E.D. Pa. 1970); *Savard v. Marine Contracting Inc.*, 296 F. Supp. 1171 (D. Conn. 1969); *Simpson v. Knutsen*, 296 F. Supp. 1308 (N.D. Cal. 1969), aff'd, 444 F.2d 523 (9th Cir. 1971); *Valitutto v. D/S I/D Garonne*, 295 F. Supp. 764 (S.D.N.Y. 1969); *Ridgedell v. Olympic Towing Corp.*, 205 F. Supp. 952 (E.D. La. 1962); *Gerado v. United States*, 101 F. Supp. 383 (N.D. Cal. 1951). Consortium has, at times, been referred to variously as "care, comfort, affection, companionship, society and counsel." *Simpson v. Knutsen*, 296 F. Supp. 1308, 1311 (N.D. Cal. 1969).

103. See, e.g., *Ridgedell v. Olympic Towing Corp.*, 205 F. Supp. 952 (E.D. La. 1962) (Jones Act).

104. *Hickman v. Taylor*, 170 F.2d 327 (3d Cir. 1948), cert. denied, 336 U.S. 906 (1949). In addition, funeral expenses are generally considered expenses of the estate and not a pecuniary loss to the beneficiaries under DOHSA or the Jones Act. See, e.g., *Cities Serv. Oil Co. v. Launey*, 403 F.2d 537 (5th Cir. 1968); *First Nat'l Bank v. National Airlines*, 171 F. Supp. 528 (S.D.N.Y. 1958); cf. *Heffner v. Pennsylvania R.R.*, 81 F.2d 28 (2d Cir. 1936); *The Culberson*, 61 F.2d 194 (3d Cir. 1932); *Moore v. The O/S Fram*, 226 F. Supp. 816 (S.D. Tex. 1963); *Farmer v. O/S Fluffy*, 220 F. Supp. 917 (S.D. Tex. 1963). *Contra*, *Greene v. Vantage S.S. Corp.*, 466 F.2d 159 (4th Cir. 1972); *Dennis v. Central Gulf S.S. Corp.*, 453 F.2d 137 (5th Cir. 1972).

105. At the time *Moragne* was decided nearly half the states recognized either loss of love and affection or survivors' grief and mental suffering as compensable injuries. See generally S. SPEISER, RECOVERY FOR WRONGFUL DEATH Appendix A. (Supp. 1972).

106. See, e.g., *St. Louis, I.M. & S. Ry. v. Craft*, 237 U.S. 648 (1915) (FELA); *Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583 (2d Cir.), cert. denied, 368 U.S. 989 (1962).

107. See, e.g., *Brown v. Anderson-Nichols & Co.*, 203 F. Supp. 489 (D. Mass. 1962).

108. 436 F.2d 1256 (6th Cir. 1970).

States Steel vessel. Both shipowners admitted liability to the seamen involved, leaving open a question of possible punitive damages against United States Steel and compensatory damages against both parties.¹⁰⁹ The lower court awarded punitive damages against United States Steel but this decision was reversed on appeal.¹¹⁰ On the second appeal to the Sixth Circuit the court upheld the lower court's awards for decedents' pain and suffering under the Jones Act, but reversed the awards for the widows' loss of consortium, counsel, and guidance, and for the adult children's loss of love, companionship, and guidance, which had been claimed pursuant to the Michigan statute¹¹¹ against the owner of the other vessel, a Norwegian corporation.¹¹² On the third appeal, the Sixth Circuit confirmed this earlier decision.¹¹³ In striking down these items, the court said the precise issue was whether the definition of pecuniary loss was to be governed by the principles of general maritime law or by the Michigan court's interpretation of the Michigan wrongful death statute.¹¹⁴ The court held that it was no longer bound to give effect to state law in light of the overriding federal policy in *Moragne*. The court finally reasoned that *Moragne* had exclusively adopted the pecuniary loss standard implemented under DOHSA and the Jones Act.¹¹⁵

Following the *Lamp* decision a number of courts had similarly adopted the pecuniary loss standard as outlined in DOHSA. In *Petition of Canal Barge*,¹¹⁶ the personal representative of decedent was allowed damages for the beneficiaries' actual pecuniary losses but recovery for survivors' grief damages were denied.¹¹⁷ The court cited *Lamp* for the proposition that *Moragne* did not require the adoption of "any different or greater measure of damages"¹¹⁸ than already existed in maritime law. The court stated that the "uniformity and supremacy of the maritime law dictate the need and desirability of a national rule for com-

109. 479 F.2d 489, 493 (6th Cir. 1973).

110. *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143 (6th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970).

111. MICH. STAT. ANN. tit. 22, § 27A.2922 (1962). The wrongful death statute had been interpreted to include the widow's loss of consortium. *See, e.g., Montgomery v. Stephan*, 359 Mich. 33, 101 N.W.2d 227 (1960). Awards to adult emancipated children have not been allowed under the Michigan statute. *See, e.g., Breckon v. Franklin Fuel Co.*, 383 Mich. 251, 174 N.W.2d 836 (1970).

112. 436 F.2d at 1277-78.

113. 479 F.2d at 498.

114. 436 F.2d at 1278.

115. *Id.*

116. 323 F. Supp. 805 (N.D. Miss. 1971), *aff'd in part*, 480 F.2d 11 (5th Cir. 1973).

117. 323 F. Supp. at 821.

118. *Id.*

puting damages."¹¹⁹ On appeal, the Fifth Circuit agreed with the lower court that survivors' grief damages were not recoverable in a general maritime action.¹²⁰ The court then announced the appropriate procedure for balancing state and federal law to arrive at a reasonable solution for recoverable damages as mandated by *Moragne*.¹²¹

Both *Lamp* and *Canal Barge* were cited with approval in *Mungin v. Calmar Steamship Corp.*¹²² The court applied the pecuniary loss standard reasoning that *Moragne* did not require the application of any other standard.¹²³

In another recent case, *Mascuilli v. United States*,¹²⁴ the pecuniary standard was again adopted as the appropriate measure of damages under *Moragne*. The decision is noteworthy because the court, in arriving at this conclusion, looked both to DOHSA and to the Pennsylvania wrongful death statute.¹²⁵ The court reasoned that since both statutes employed a pecuniary loss standard this would be the appropriate measure of damages to apply.¹²⁶ The court noted that the Third Circuit has held that funeral expenses are not available under DOHSA.¹²⁷ Instead of following this precedent, however, the court—applying the Pennsylvania precedent—included this item in its award to decedent's widow and children. The court stated that "in view of *Moragne* and the majority view of the states, a contrary result might well be reached today."¹²⁸

119. *Id.*

120. 480 F.2d 11, 29-30 (5th Cir. 1973).

121. *Id.* at 31.

The methodology for 'further sifting' contemplated by *Moragne* has thus been firmly established in this circuit. In shaping the new remedy we look first to existing maritime law, to which *Moragne* has allowed access in a death action. We next examine the remedial policies indicated by Congress in the federal maritime statutes. Heed to those statutes will assist in ensuring that 'uniform vindication of federal policies' mandated by the *Moragne* Court. Finally, we look for 'persuasive analogies' in the state wrongful death acts. The importance of the role of these state acts is accentuated by their long and successful contribution to the growth of federal maritime law, and in their assistance in influencing the direction of admiralty law toward solution of contemporary maritime problems. To the extent that policies developed under state death remedies are applicable in a maritime context, then, those policies should influence the content of the new maritime death remedy.

Id.

122. 342 F. Supp. 479 (D. Md. 1972).

123. "In the absence of any indication from the Supreme Court that *Moragne* damages should differ from those generally permissible under existing statutory authority, and in the interest of insuring uniformity in maritime law, the usual measure of damages, actual pecuniary loss, will be awarded." *Id.* at 482.

124. 343 F. Supp. 439 (E.D. Pa. 1972).

125. PA. STAT. ANN. tit. 12, § 1601 (1953).

126. 343 F. Supp. at 441.

127. The Culberson, 61 F.2d 194 (3d Cir. 1932).

128. 343 F. Supp. at 442 n.5. The court cited *Dennis v. Central Gulf S.S. Corp.*, 323 F. Supp. 943, 949 (E.D. La. 1971), for authority on this point.

In contrast to the cases which have routinely applied the pecuniary loss standard as interpreted under DOHSA, a number of courts have taken a more liberal approach in considering the awardable damages in maritime wrongful death actions. In *Dennis v. Central Gulf Steamship Corp.*,¹²⁹ the court cited *Lamp* for the proposition that *Moragne* freed admiralty courts from applying state law in maritime wrongful death actions. The court in *Dennis* apparently formulated a rule of damages broader than the DOHSA standard. The court allowed damages for decedent's pain and suffering,¹³⁰ for loss of his support and services,¹³¹ and for funeral expenses.¹³² On appeal,¹³³ the court sustained the awards for damages but reversed the trial court's holding that *Moragne* automatically precluded federal courts from relying on state law. The court explained that the uniformity argument advanced in *Moragne* dealt "not with differing elements of damages" but rather with the need to eliminate the various bases of liability fostered by *The Harrisburg*.¹³⁴

*In re Sincere Navigation*¹³⁵ is an interesting case because the court allowed the beneficiaries to recover damages for emotional distress.¹³⁶ The court observed that state law undertakes to compensate the survivors' wounded feelings either directly, or by returning large verdicts for decedents' pain and suffering "in circumstances where its existence and intensity can only be conjectured."¹³⁷

In re Farrell Lines, Inc.,¹³⁸ decided by the same court that decided *Dennis* and *Sincere Navigation*, adopted the reasoning and conclusions of these cases and awarded damages for nonpecuniary injuries. *Farrell*

129. 323 F. Supp. 943 (E.D. La. 1971).

130. "It seems anomalous for the decedent's family to lose what the decedent could himself have collected had he filed a suit and prosecuted it to judgment during his life." *Id.* at 949.

131. *Id.* The court adjusted the awards for financial support by the amount that would be taxed as decedent's gross income. The court in *Lamp* held that the district court had erred in subtracting projected taxes from financial support on the grounds that the impact of future taxes was too unpredictable to calculate in advance. In *Dennis*, the court allowed interest from the date of death rather than the date of the judgment. An opposite result was reached in *Lamp*. The matter is within the discretion of the trial court under DOHSA. See, e.g., *National Airlines, Inc. v. Stiles*, 268 F.2d 400 (5th Cir.), cert. denied, 361 U.S. 885 (1959).

132. 323 F. Supp. at 950. The court reasoned that the overruling of *The Harrisburg* could be interpreted to have revived case law prior to that decision which allowed recovery for funeral expenses in wrongful death actions. See, e.g., *Hollyday v. Reeves*, 12 F. Cas. 386 (No. 6625) (D.C.D. Md. 1879).

133. 453 F.2d 137 (5th Cir.), cert. denied, 409 U.S. 948 (1972).

134. 453 F.2d at 140.

135. 329 F. Supp. 652 (E.D. La. 1971).

136. *Id.* at 657. "[I]t is clear that there is no bar in the maritime law to the recovery of damages for emotional injury as such." *Id.* at 654.

137. *Id.* at 659.

138. 339 F. Supp. 91 (E.D. La. 1971).

involved the collision of two vessels on the Mississippi River. The collision resulted in the death of an unmarried nineteen-year-old midshipman at the Merchant Marine Academy. Suit was brought under the general maritime law, the Jones Act, and Louisiana's wrongful death statute. Emphasizing that damages depend upon proof of actual loss and injury, the court found no proof of parents' loss of care, advice, and guidance. Damages were allowed for decedent's conscious pain and suffering due to evidence that the decedent had been badly burned prior to drowning. The fact that decedent's corpse was dismembered when recovered was not dispositive evidence of conscious pain and suffering and was therefore disregarded. The court also allowed damages for funeral expenses, loss of financial contributions, and for the parents' loss of love and affection and emotional suffering.¹³⁹ The court compared the decision in *Lamp* with *Sincere Navigation*, noting that the *Lamp* court had ignored the *Moragne* decision to the extent that the Supreme Court stated that state wrongful death acts, as well as federal statutes, would be "persuasive analogy" in fashioning a maritime wrongful death remedy. Conversely, in *Sincere Navigation*, the court relied on state laws for guidance and permitted damages which had been previously unrecognized in admiralty. Using the *Sincere Navigation* reasoning the *Farrell* court did not merely rely on Louisiana law, but rather looked to state laws in general to support its decision.¹⁴⁰

In *Smith v. Allstate Yacht Rentals, Ltd.*,¹⁴¹ a Delaware court allowed damages for survivors' emotional distress as compensable within the general maritime law. The court attacked the *Canal Barge* decision because of the interpretation given to the *Moragne* decision, stating that only the law of the adjacent state might be considered, rather than looking for the trends and the better rules and remedies afforded by the various state statutes.¹⁴² Citing *Sincere Navigation*, the court in *Smith* reasoned that liberal and humane principles should be adopted in determining the proper measure of damages in admiralty rather than established but restrictive principles. Looking to the national trend allowing recovery for emotional distress the court held that admiralty must compensate this injury under the new cause of action within general maritime law.¹⁴³

139. *Id.* at 94.

140. *Id.* at 93-94.

141. 293 A.2d 805 (Del. 1972).

142. *Id.* at 812.

143. *Id.* at 813.

*Spiller v. Thomas M. Lowe, Jr. & Associates*¹⁴⁴ recognized that allowing a survival action for pain and suffering under the general maritime law was simply a logical extension of *Moragne*. The court cited with approval the decision in *Dennis* as authority for this extension.¹⁴⁵ The court also cited *Igneri v. Cie. de Transports Oceaniques*,¹⁴⁶ stating that an admiralty court will look to prevailing land law for a remedy when none exists under maritime law.¹⁴⁷

The decisions in *Dennis*, *Farrell* and *Spiller*, throw into sharp focus one of the major unresolved questions concerning damage recoveries in general. Deferred to later in this comment is a discussion concerning the present status of survival actions especially in light of the decision in *Sea-Land*.

Absent the decision the Supreme Court reached in *Sea-Land*, the most recent federal cases¹⁴⁸ would seemingly have represented an entrenchment of pecuniary loss modeled, for the most part, on DOHSA. For example, in *Kaiser v. Traveler's Insurance Co.*,¹⁴⁹ the court denied recovery for loss of love and affection for the father of a water skier killed when he struck a partially submerged and unmarked barge while water skiing. The court also denied a recovery for survivor's grief but said the plaintiff was entitled to \$960.30, which constituted the amount expended for the funeral and which was the only pecuniary loss proved.¹⁵⁰ The court allowed recovery for only pecuniary loss, citing *Canal Barge*, but indicated that the question of what damages are recoverable "may not be completely settled" in the circuit.¹⁵¹ The Fifth

144. 466 F.2d 903 (5th Cir. 1972).

145. *Id.* at 909.

146. 323 F.2d 257 (2d Cir. 1963), *cert. denied*, 376 U.S. 949 (1964).

147. This principle has been succinctly stated recently in *Marsh v. Buckeye S.S. Co.*, 330 F. Supp. 972 (N.D. Ohio 1971):

The question of whether an action can survive to a representative of a deceased party plaintiff is strictly a matter of state substantive law. . . . Since the general maritime law itself contains no survival provision, it is only through the adoption of a state survival act by this Court that the right of survival of the action may accrue to the representative of the deceased. *Moragne* held that the general maritime law does contain a provision for wrongful death, but was silent as to the survival of personal injury actions after the death of the plaintiff. However, the thrust of *Moragne* is that the law of admiralty should be expanded so that seamen are given a federal right to recover from their employers for negligence regardless of the location of their injury or death.

Id. at 974.

148. See *Hueschen v. Fluor Ocean Servs. Inc.*, 483 F.2d 1396 (5th Cir. 1973); *Higginbotham v. Mobil Oil Corp.*, 360 F. Supp. 1140 (W.D. La. 1973); *Kaiser v. Traveler's Ins. Co.*, 359 F. Supp. 90 (E.D. La. 1973), *aff'd*, 487 F.2d 1300 (5th Cir. 1974); *In re Cambria S.S. Co.*, 353 F. Supp. 691 (N.D. Ohio 1973); *Green v. Ross*, 338 F. Supp. 365 (S.D. Fla. 1972).

149. 359 F. Supp. 90 (E.D. La. 1973), *aff'd*, 487 F.2d 1300 (5th Cir. 1974).

150. 359 F. Supp. at 95.

151. *Id.*

Circuit, however, affirmed¹⁵² the lower court's opinion as to the proper damages awardable. The irony involved was that with the appellate decision to affirm on January 11, 1974, the Fifth Circuit appeared to have finally and conclusively established¹⁵³ that the proper standard of compensable damages was one based on pecuniary loss only. Ten days later *Sea-Land* was decided wherein the Court held¹⁵⁴ that loss of society¹⁵⁵ is a compensable element of damage under general maritime law.

2. *Sea-Land Services v. Gaudet*

In addition to allowing for the recovery of loss of society the Court also held that loss of support¹⁵⁶ and loss of services¹⁵⁷ were compensable damages. *Sea-Land* involved an action by the widow of a longshoreman for the death of her husband from the injuries he sustained while working aboard the defendant's vessel in the navigable waters of Louisiana. Before the longshoreman's death he brought an action based on unseaworthiness in which he recovered damages for past and future wages, pain and suffering, and medical expenses.¹⁵⁸ The district court dismissed the widow's action based on the fact that decedent had already maintained a successful action which now served to bar the widow's suit on res judicata principles.¹⁵⁹ The Fifth Circuit Court of Appeals disagreed and stated that under the *Moragne* decision the widow had a completely independent cause of action not extinguished by a recovery obtained by the decedent prior to death.¹⁶⁰ The Supreme Court granted certiorari¹⁶¹ to consider the question of whether *Moragne* did in fact contemplate the widow's action for wrongful death as a completely separate and independent cause of action;¹⁶² finally affirming this result¹⁶³ in a 5-4 decision.¹⁶⁴ The opinion, however, concentrated

152. 487 F.2d at 1301.

153. See also *Hueschen v. Fluor Ocean Servs. Inc.*, 483 F.2d 1396 (5th Cir. 1973).

154. 94 S. Ct. at 816.

155. Loss of love and affection are elements of loss of society according to *Sea-Land*. *Id.* at 815.

156. *Id.* at 814.

157. *Id.* at 815.

158. *Id.* at 809.

159. *Id.* at 810.

160. 463 F.2d 1331, 1332 (5th Cir. 1972).

161. 411 U.S. 963 (1973).

162. 94 S. Ct. at 809.

163. *Id.* at 810.

164. Mr. Justice Powell dissented and was joined by the Chief Justice and Justices Stewart and Rehnquist. *Id.* at 820.

on two major issues, one of which concerned the aforementioned problem of *res judicata*. The second problem concerned the question of appropriate damages.¹⁶⁵

The *Sea-Land* decision will probably be recognized and criticized more for its discussion of collateral estoppel than for compensable damages for wrongful death under the general maritime law. For purposes of this comment the collateral estoppel discussion is noteworthy because of the ramifications of the decision on the relationship of survival actions to wrongful death actions. Collateral estoppel was the doctrine employed as the solution to prevent the double recovery of damages.¹⁶⁶ Resort was made to collateral estoppel because the Supreme Court, in ruling that the widow's action was separate and independent from the decedent's action, eliminated the possible application of *res judicata*.

Recovery for loss of support, having been universally recognized as proper in a wrongful death action, presented the Court with no problem as a compensable element of damage under general maritime law.¹⁶⁷ Similarly, the Court stated that the majority of state death acts, along with DOHSA, have been interpreted to permit recovery for loss of services.¹⁶⁸

Allowing the recovery of damages for loss of society, however, presented more of a problem to the Court. "Society" was interpreted to contain ". . . a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort and protection."¹⁶⁹ The problem existed because traditionally none of these losses were considered pecuniary losses and therefore were not compensable. The Court overcame this problem by stating that twenty-seven out of the forty-four state or territorial death acts which measure damages by the loss sus-

165. *Id.* at 814-17.

166. Concern was expressed in *Sea-Land* because the widow was claiming damages for loss of support although the deceased husband had recovered for loss of future wages. *Id.* at 818.

167. *Id.* at 814.

168. The Court stated that services included ". . . the nurture, training, education and guidance that a child would have received had not the parent been wrongfully killed. Services the decedent performed at home or for his spouse are also compensable." *Id.* at 815.

169. *Id.*

Loss of society must not be confused with mental anguish or grief, which are not compensable under the maritime wrongful death remedy. The former entails the loss of positive benefits, while the latter represents an emotional response to the wrongful death.

Id. at n.17.

tained by the beneficiaries allow recovery for loss of society.¹⁷⁰ Having noted that this number represents a majority of the states and that the probable trend is in this direction, the Court allowed loss of society as a compensable element of damage.¹⁷¹

The Court did not establish whether loss of society should be considered as a pecuniary or non-pecuniary loss. Many states do interpret loss of society as compensable within the framework of their statutes which are nevertheless limited to pecuniary losses only.¹⁷² In contrast, courts have interpreted loss of society as a non-pecuniary loss and, therefore, not compensable under DOHSA and most state death acts. Thus, in avoiding any characterization of loss of society, the Court apparently has demonstrated that the general maritime law will not be governed by statutorily created terminology like pecuniary loss. The Court allowed recovery for items that most courts deciding the issue since *Moragne* have disallowed. The dissent in *Sea-Land* argued that those courts disallowing recovery for loss of society or the "affection-related" damages were merely following *Moragne's* admonition not to fashion a whole new body of law in a wrongful death action.¹⁷³ This misplaced reliance should have been avoided from the outset by a more precise fashioning of the *Moragne* remedy. This criticism is especially valid because the Court admits that regardless of the national trend their decision would have been compelled so as to "comport with the humanitarian policy of the maritime law to show 'special solicitude' for those who are injured within its jurisdiction."¹⁷⁴

Finally, the Court also allowed recovery for funeral expenses in all cases where the decedent's dependents have either paid for the funeral or are liable for its payment.¹⁷⁵ Under DOHSA most cases considering this claim have held that funeral expenses were not a pecuniary loss although there were a few cases allowing such recovery.¹⁷⁶ In addition, funeral expenses were compensable under general maritime law prior to *The Harrisburg*.¹⁷⁷ As a result, the Court could find no persuasive

170. *Id.* at 816 n.21.

171. *Id.* at 816.

172. Specifically, the statutes of California, Delaware, Michigan, Minnesota, Montana, Pennsylvania, Texas, and the Virgin Islands were included in this category. *Id.* at 817 n.21.

173. *Id.* at 826.

174. *Id.* at 816.

175. *Id.* at 818.

176. See cases cited note 104 *supra*.

177. See, e.g., *Hollyday v. The David Reeves*, 12 F. Cas. 386 (No. 6625) (D.C.D. Md. 1879). See discussion at note 132 *supra*.

reason for not following the earlier admiralty rule allowing such recovery.¹⁷⁸

The dissenting opinion concentrates mainly on criticism of the Court's novel argument concerning the application of collateral estoppel. However, the dissent did criticize the Court's decision to allow recovery for loss of society as nullifying the effect of the Jones Act and DOHSA—the congressional enactments previously governing maritime wrongful death. The reasoning was that no one entitled to rely on the admiralty doctrine of unseaworthiness will seek relief under the federal statutes unless a jury trial is desired and a Jones Act count is joined.¹⁷⁹ This argument seems fairly persuasive but it must be remembered that since the expansion of the warranty of seaworthiness to encompass an absolute liability standard little reliance has been placed on DOHSA where both counts could be averred. It would be premature to determine what further effect the general maritime law will eventually have on statutory remedies.

3. *Survival Actions*

The *Moragne* decision did not determine if a claimant could recover for the decedent's pain and suffering, lost wages and medical expenses under a general maritime law cause of action. From a discussion of the common law,¹⁸⁰ earlier in this Comment, it could be seen that almost every state enacted a statute allowing for the survival of a cause of action to recover these damages as there was no right of recovery under the common law.¹⁸¹ Since *Moragne* relied on the abandonment of the common law rule in establishing a remedy for wrongful death, this reasoning should be equally applicable to survival actions. Thus, there would seem to be no public policy against the recognition of such a cause of action.

Subsequent to the *Moragne* decision all the courts confronted with the issue of survival damages basically have held that those actions which a decedent himself could have brought had he lived will survive

178. 94 S. Ct. at 818.

179. *Id.* at 820.

180. The first reported case in admiralty was *Plummer v. Webb*, 19 F. Cas. 894 (No. 11,234) (D.C.D. Me. 1825). The early cases did not allow a right of action for pain and suffering to survive death. *See, e.g., The E.B. Ward, Jr.*, 17 F. 456 (E.D. La. 1883); *Hollyday v. The David Reeves*, 12 F. Cas. 386 (No. 6625) (D.C.D. Md. 1879); *Crapo v. Allen*, 6 F. Cas. 763 (No. 3360) (D.C.D. Mass. 1849).

181. *See* SPEISER, *supra* note 2, § 14. *See also* discussion of survival action in text corresponding to notes 23-27 *supra*.

him in an action in admiralty.¹⁸² The question remains, however, whether a state survival statute may continue to be applied in admiralty.

In *Dugas v. National Aircraft Corp.*,¹⁸³ the Third Circuit held that a state survival statute could be applied to supplement DOHSA which does not provide for the survival of actions. In *Ward v. Union Barge Line Corp.*,¹⁸⁴ the Third Circuit indicated, as did the *Dennis* and *Spiller* decisions which followed, that a survival action could be maintained under general maritime law. The court implied that reference to a state survival statute for recovery under general maritime law could still be maintained after *Moragne*.¹⁸⁵

In *Sea-Land*, the Supreme Court was not faced with the issue because the decedent had recovered in an action prior to his death. As a result, the widow would have been barred from claiming traditional survival action damages.

Two questions concerning survival actions remain unanswered. Can *Moragne* be construed to have impliedly created a survival action under general maritime law? Regardless of whether *Moragne* created a survival action or not, can resort be made to a state survival statute as a basis for recovery of survival damages by the beneficiaries? If *Moragne* has not created a general maritime right of recovery for survival damages then resort to a state statute would appear to be as permissible now as it was prior to *Moragne*. The lower courts, however, have construed *Moragne* as impliedly creating a maritime action for survival damages. Certainly this would appear to be the better reasoning. Thus, resort to a state survival statute should be deemed preempted on the same rationale which it is argued that resort to state wrongful death statutes are preempted or that such statutes can only be used for guidance.

As can be seen from *Sea-Land*, use of state statutes for guidance does not mean a reference to a particular state's provision. Rather, the Court in *Sea-Land* utilized *Moragne* to the extent that reference could be made only to what the majority of states thought was compensable damages.

182. See, e.g., *Spiller v. Thomas M. Lowe, Jr. & Assoc.*, 466 F.2d 903 (5th Cir. 1972); *Dennis v. Central Gulf S.S. Corp.*, 323 F. Supp. 943 (E.D. La. 1971), *aff'd*, 453 F.2d 137 (5th Cir. 1972).

183. 438 F.2d 1386 (3d Cir. 1971).

184. 443 F.2d 565 (3d Cir. 1971).

185. *Id.* at 569.

Other portions of the *Moragne* opinion also militate in favor of a conclusion that the new federal right of action preempts the entire field. The Court, for example, in its interest in the principle of uniformity, states that its ". . . 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."¹⁸⁶ In addition, the Court indicated that the problems left unresolved by its decision could in most respects find their resolution by looking to the law applicable in personal injury cases.¹⁸⁷ This language is interesting since courts are prohibited from applying a state standard of duty different from that imposed in admiralty in personal injury cases, and state law cannot be resorted to either to increase or decrease the damages recoverable.¹⁸⁸ If this is the result in personal injury cases it would seem to be equally as valid in actions for wrongful death.

It could be argued, in addition, that reference to state statutes is no longer necessary because the reason for the reference no longer exists. The void in the maritime law could now be remedied by reference to federal law which provides both the right and remedy. Departing from the long tradition of resorting to state law to fill the void is certainly no more disruptive than establishing a completely new right of action.

Therefore, the best resolution of the problem would be a conclusion that *Moragne* not only recognized a general maritime right of action for wrongful death but also for survival damages. Accepting *Moragne* as recognizing a survival action in the maritime law, then resort to state survival statutes should only be made for guidance in fashioning a maritime remedy in the same way that *Sea-Land* found guidance in state wrongful death statutes.

V. CONCLUSION

Moragne left much for subsequent decisions to resolve. Most of the unresolved problems have been answered although they have not necessarily been finally settled. For example, the unresolved questions of proper beneficiaries and the time limitation in which to bring suit left

186. 398 U.S. at 401.

187. *Id.* at 405.

188. See *Kermaric v. Compagnie Generale*, 358 U.S. 625 (1959). See also Justice Harlan's dissenting opinion in *Hess v. United States*, 361 U.S. 314, 322 (1960) (Harlan, J., dissenting).

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by *Moragne* have been resolved in the lower courts. Until the Supreme Court decides otherwise it seems that laches should be the only doctrine to apply in limiting the time in which to bring suit and the DOHSA schedule of beneficiaries is the proper one in a wrongful death action under general maritime law. The Supreme Court in *Sea-Land* appears to have settled the question of the appropriate measure of damages by allowing recovery for loss of support, loss of services and loss of society while denying recovery for mental distress or anguish.

At this writing only the question of survival action damages has been left by the Supreme Court. Following the example of lower court decisions, it would seem that *Moragne* can be viewed as having created a survival action under maritime law with instruction to the lower courts to fashion survival damages in the same way that damages for wrongful death were to be established. Finally, *Sea-Land* has provided the lower courts with an adequate example of how and what *Moragne* intended on the relevance and applicability of state statutes and the establishment of damages.

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