Vanderbilt Journal of Transnational Law

Volume 7
Issue 3 *Summer 1974*

Article 9

1974

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Recommended Citation

Stanley D. Miller, G. Cranwell Montgomery, and Douglas I. Friedman, Recent Decisions, 7 *Vanderbilt Law Review* 750 (2021)
Available at: https://scholarship.law.vanderbilt.edu/vjtl/vol7/iss3/9

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RECENT DECISIONS

ADMIRALTY—MARITIME WRONGFUL DEATH ACTION—A MARTIME WRONGFUL DEATH ACTION FOR UNSEAWORTHINESS ALLEGING LOSS OF SUPPORT, SERVICES, SOCIETY AND FUNERAL EXPENSES IS NOT BARRED BY DECEDENT'S RECOVERY OF DAMAGES FOR PERSONAL INJURIES DURING HIS LIFETIME

Prior to his death, respondent's husband brought suit under general maritime law, alleging unseaworthiness,[1] and recovered for past and future wages, pain and suffering, and medical and incidental expenses resulting from injuries received on board petitioner's vessel[2] in Louisiana's navigable waters. After her husband's death, respondent filed a maritime wrongful death action based on unseaworthiness to recover damages for loss of support, services, society and funeral expenses. Petitioner contended that this suit constituted an attempt to relitigate the same causes of action in order to recover twice for the same injuries and was, therefore, barred by the doctrine of *res judicata*. Obversely, respondent argued that her right to recover damages was based upon new causes of action that had not accrued during her husband's life and consequently were not barred. The District Court dismissed respondent's suit on grounds of *res judicata* and failure to state a claim.[3] The Fifth Circuit Court of Appeals reversed. On Writ of Certiorari, the United States Supreme Court, *held* affirmed. A maritime wrongful death action for unseaworthiness alleging loss of support, services, society and funeral expenses is not barred by decedent's recovery of damages for personal injuries during his lifetime. *Sea-Land Services, Inc. v. Gaudet*, 94 S. Ct. 806 (1974).

1. "Seaworthiness" has been defined as the "absolute nondelegable duty of a shipowner to provide . . . a vessel 'sufficient in all respects for the trade in which it is employed' . . . and to prevent . . . injury to seamen by any part of the vessel or equipment used in the ordinary course of their employment." Moragne v. State Marine Lines, Inc., 211 So.2d 161, 163 (Fla. 1968), *aff'd*, 398 U.S. 375 (1970). As Gilmore and Black suggested in their treatise "the unseaworthiness doctrine has become the principal vehicle for personal injury recovery." G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY §§ 6-38 (1957).

2. Respondent's husband was a longshoreman working on board petitioner's vessel.

3. The ruling that all of the claims were barred by the doctrine of *res judicata* left the respondent without a claim in the district court.

Until *Moragne v. States Marine Lines*[4] was decided in 1970, maritime law governing wrongful death was a confusing morass often yielding vastly different results in similar factual situations. The early American precedents generally permitted survivors to sue for wrongful death under general maritime law.[5] But in 1886, the United States Supreme Court announced in *The Harrisburg*[6] that the American courts had misread the English precedent[7] and refused to permit further wrongful death actions unless the state in which the accident occurred provided a statutory remedy. Suits for nonfatal personal injuries, however, continued to be cognizable under general maritime law.[8] In 1920, recognizing the need for a more adequate wrongful death remedy, Congress enacted the

4. 398 U.S. 375 (1970) (claim by wife based on unseaworthiness for wrongful death of decedent longshoreman in state waters).

5. In *The E.B. Ward, Jr.*, 17 F. 456, 457 (C.C.E.D. La. 1833), the court characterized the wrongful death decisions prior to 1833 according to the following approaches: "(1) that the action does survive; (2) that it does not survive; (3) that when the tort resulting in death was committed on navigable waters within the body of a country where the prevailing state law gave a right of action, the admiralty court would allow the action and enforce the remedy by a proceeding *in rem*." It is certain, however, that a majority of the cases permitted recovery. The Columbia, 27 F. 704 (S.D.N.Y. 1886) (pilot boat run down and sunk by steamship attempting to receive pilot); Hollyday v. The David Reeves, 12 F. Cas. 386 (No. 6,625) (D. Md. 1879) (death of minor son following collision between parent's sailing yacht and steamer).

6. 119 U.S. 199 (1886).

7. As the Court noted in *Moragne v. States Marine Lines*, 389 U.S. 375, 379-88, the old common law prohibition against recovery was based on the "felony-merger" doctrine which held that the civil action of the decedent's beneficiaries was merged into or preempted by the felony, which was an offense against the crown and the more serious of the two. The felon was punished by death, and his property was forfeited to the crown leaving nothing for the plaintiffs in the civil action. Several earlier American decisions recognized that this basis for the rule made it inapplicable in the United States. *See* The Sea Gull, 21 F. Cas. 909 (No. 12,578) (C.C.D. Md. 1865) (death of wife resulting from collision of two steamers); Plummer v. Webb, 19 F. Cas. 894 (No. 11,234) (D.C. Me. 1825) (death of minor son while serving as cabin boy caused by beating inflicted by first mate, dismissed on other grounds). For an excellent discussion of the development of admiralty law prior to *Moragne*, see J. George & C. Moore, *Wrongful Death and Survival Actions Under the General Maritime Law: Pre-Harrisburg through Post-Moragne*, 4 J. MARITIME L. & COM. 1 (1972-73).

8. Atlantic Transport Co. v. Imbrovek, 234 U.S. 52 (1914).

Death on the High Seas Act[9] and the *Jones Act*.[10] The Death on the High Seas Act (DOHSA) gave a remedy for deaths occurring as a result of negligence and unseaworthiness beyond the three-mile limit; the Jones Act provided a remedy for seamen who were killed or injured as a result of their employer's negligence both on water and on land. But the Jones Act provided no remedy for unseaworthiness. In the years after these statutes became law, unseaworthiness became the functional equivalent of strict liability and the primary basis of recovery under DOHSA and in state law actions in those states that recognized the doctrine. *The Tungus v. Skovgaard*[11] required admiralty courts to apply the state wrongful death law as an integrated whole with all its breadth and limitations. Consequently, if a fatal injury occurred on the navigable waters of a state whose wrongful death statute did not recognize unseaworthiness, an admiralty court sitting in that jurisdiction was obliged to apply a nonmaritime standard of liability in the case. Further complications arose in 1964, when the Supreme Court held in *Gillespie v. United States Steel Corp.*[12] that the Jones Act was the exclusive remedy for seamen killed in state waters. Thus, a patchwork of rights and remedies attached or failed to attach depending upon the anomalous circumstances of whether one was a seaman, whether the accident occurred within state waters and, if so, whether that state had an unseaworthiness

9. The Death on the High Seas Act, 46 U.S.C. §§ 761-67 (1966) was initially enacted in 1920. The Act gives to the personal representative of any person whose death was caused by wrongful act, neglect, or default, more than one marine league from shore, an action in admiralty for the benefit of the decedent's wife or husband, parent, child or dependent relative. The action must be brought within two years from the date the cause of action arose. Contributory negligence of the decedent does not bar recovery but mitigates damages. Unseaworthiness actions are permitted under this Act.

10. Merchant Marine Act (Jones Act), 46 U.S.C. § 688 (1964). This Act, also initially adopted in 1920, incorporates by reference the provisions of the Federal Employer's Liability Act (F.E.L.A.), 45 U.S.C. §§ 51-59 (1966). The Jones Act gives the personal representative of a crew member the right to maintain a wrongful death action within three years from the day the cause of action accrued for the benefit of the surviving widow or husband and children; if none, for the employee's parents; if none, for the next of kin. Contributory negligence is not a bar to recovery but a mitigating factor.

11. 358 U.S. 588 (1959).

12. 379 U.S. 148 (1964) (action by mother and dependent children for wrongful death of seaman killed in state waters).

remedy.[13] *Moragne v. States Marine Lines* sought to untangle the thicket in one stroke by overruling *The Harrisburg* and creating a wrongful death remedy for unseaworthiness under general maritime law in order to restore uniformity to federal admiralty law in a manner consistent with the current public policy of permitting recovery in wrongful death situations. Although cognizant that *Moragne* would produce new problems, the Court expressly relegated the task of finding solutions to the lower federal courts, but advised them to look for persuasive analogies in the state and federal wrongful death statutes and case law.[14] Left unresolved were questions relating to beneficiaries, time limitations on actions, vitality of state wrongful death remedies, damages, and the effect of recovery in a prior personal injury action. Regarding the last issue—the effect of a victim's personal injury action on a survivor's later action for wrongful death—most wrongful death statutes have employed terms substantially identical to the provisions

13. Three discrepancies produced by *The Harrisburg* line of cases have been identified. (1) "[W]ithin 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. [(2)] [I]dentical 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, see *Kernan v. American Dredging Co.* 355 U.S. 426, 430 n.4 (1958)—but not within the territorial waters of a state whose local statute excludes unseaworthiness claims. [(3)] The third, and essentially the 'strangest anomaly is that a true seaman—that is, a member of a ship's company, 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 state statute." Moragne v. States Marine Lines, 398 U.S. 375, at 395-96.

14. In effect, the Court directed the lower courts to employ their inherent power to create federal common law in these cases. *See* Maier, *Coordination of Laws in a National Federal State: An Analysis of the Writings of Elliott Evans Cheatham*, 26 VAND. L. REV. 209, 225-26 (1973).

Specifically, the Court advised that with respect to "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. The experience thus built up counsels that a suit for wrongful death raises no problems unlike those that have long been grist for the judicial mill." Moragne v. States Marine Lines, 398 U.S. at 408. *See also* 1 CALIF. W. INT'L L.J. 151 (1970-71); 24 ARK. L. REV. 526 (1971); 17 N.Y. L.F. 304 (1971); 4 J. MARITIME L. 1 (1972-73).

in *Lord Campbell's Act,*[15] which initially created the remedy. The vast majority of the state cases construing this language have held that a recovery for injuries during the victim's life conclusively bars a second recovery for the same injury.[16] Similarly, in *Michigan Central Railroad Company v. Vreeland,*[17] the Supreme Court found the wrongful death provision of the Federal Employee's Liability Act, later incorporated into the Jones Act, to be "essentially identical with" Lord Campbell's Act. Therefore when the Court faced the question of a second recovery in *Mellon v. Goodyear,*[18] it held that recovery was barred by the victim's settlement of his personal injury action during his lifetime. However, there are state cases that have permitted a second recovery.[19] Also, DOHSA could

15. Lord Campbell's Act, St. 9 and 10 Vict. c. 93, An Act for compensating the Families of Persons killed by Accidents. (Aug. 26, 1846) "Whereas no Action at Law is now maintainable against a Person who by his wrongful Act, Neglect, or Default may have caused the Death of another Person . . .: Be it therefore enacted . . . That whensoever the Death of a Person shall be caused by wrongful Act, Neglect, or Default, and the Act, Neglect, or Default is such as would (if Death had not ensued) have entitled the Party injured to maintain an Action and recover Damages in respect thereof, then and in every such Case the Person who would have been liable if Death had not ensued shall be liable to an Action for Damages, notwithstanding the Death of the Person injured, and although the Death shall have been caused under such Circumstances as to amount in Law to Felony.

II. And be it enacted, That every such Action shall be for the Benefit of the Wife, Husband, Parent, and Child of the Person whose Death shall have been so caused, and shall be brought by and in the Name of the Executor or Administrator of the Person deceased; and in every such Action the Jury may give such Damages as they may think proportioned to the Injury resulting from such Death to the Parties respectively for whom and for whose Benefit such Action shall be brought . . . .

III. Provided always, and be it enacted, That not more than One Action shall lie for and in respect of the same Subject Matter of complaint; . . ."

16. S. SPEISER, RECOVERY FOR WRONGFUL DEATH (Supp. 1972).

17. 227 U.S. 59, 70 (1913).

18. 277 U.S. 335 (1928) (action by wife and children under FELA for wrongful death of railroad employee who had previously executed full settlement and release).

19. Rowe v. Richards, 35 S.D. 201, 151 N.W. 1001 (1915) (claim by widow and surviving child for wrongful death of decedent after decedent had executed a full release). There, the court declared "[w]e must confess our inability to grasp the logic of any so called reasoning through which the conclusion is drawn that the husband simply because he may live to suffer from a physical injury and thus

conceivably be read to permit a second recovery,[20] but the question has never been decided. Generally, then, a second recovery is not permitted under either federal or state law. The issue of damages awardable under federal and state wrongful death statutes is more variegated. The measure of damages awardable under most state statutes,[21] the Jones Act and DOHSA is the survivors' pecuniary loss.[22] Pecuniary loss generally includes four elements: (1) the support the decedent would have provided during his lifetime to the beneficiary,[23] (2) loss of services the decedent would have provided to the beneficiary,[24] (3) deprivation of parental nurture and guidance that the deceased parent would have given his minor child[25] and (4) loss of inheritable estate.[26] Thus while loss of support and services are clearly compensable under both state and federal law, the elements of loss of society,[27] survivors' grief and funeral expen-

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become vested with a cause of action for the violation of his own personal right has an implied power to release a cause of action—one which has not then accrued; one which may never accrue; one which from its very nature cannot accrue until his death; and one which if it ever does accrue will accrue, in favor of his wife and be based solely upon the violation of a right vested solely in the wife." 35 S.D. at 215, 151 N.W. at 1006.

20. The character of admiralty relief should be guided by the principle that "certainly it better becomes the humane and liberal character of proceedings in admiralty to give rather than to withhold the remedy, when not required to withhold it by established and inflexible rules." The Sea Gull, 21 F. Cas. 909, 910 (No. 17, 578) (C.C.D. Md. 1865). DOHSA does not expressly restrict the plaintiff to one action for each injury, and DOHSA is the only federal statute "that deals specifically and exclusively with actions for wrongful death . . . for breaches of duties imposed by maritime law." Moragne v. States Marine Lines, 398 U.S. at 407. Thus, it could be argued that no "established and inflexible rules" would preclude a second recovery.

21. *See* S. SPEISER, *supra* note 16, at § 3.1.

22. DOHSA limits recovery to "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).

23. Noel v. United Aircraft Corp., 342 F.2d 232 (3d Cir. 1964) (death of passenger in airplane that crashed on the high seas); Petition of Marina Mercante Nicaraguense, S.A., 248 F. Supp. 15 (S.D.N.Y. 1965).

24. Sabine Towing Co., Inc. v. Brennan, 85 F.2d 478 (5th Cir. 1936) (action for death of crewman of tug that floundered due to unseaworthiness).

25. Moore-McCormack Lines, Inc. v. Richardson, 295 F.2d 583 (2d Cir. 1961).

26. National Airlines, Inc. v. Stiles, 268 F.2d 400 (5th Cir. 1959).

27. The term "society" is generally used in connection with the marriage partner's right to enjoyment of the spouse's capacity for usefulness, aid, and

ses are much less certain. Except for one early aberration,[28] the pre-*Moragne* decisions in the federal courts refused to award damages for loss of society on the theory that society was never thought to be capable of pecuniary valuation under DOHSA or the Jones Act.[29] The federal cases litigated since *Moragne* have also refused to permit recovery for loss of society.[30] In contrast, a majority of the states, either expressly or by judicial construction, now afford recovery for loss of society.[31] Recovery for survivors' grief has generally been disallowed under DOHSA and the Jones Act, as well as under general maritime law,[32] although this item is recoverable under some state statutes. Funeral expenses have been regarded more favorably by the courts. Although DOHSA and the Jones Act

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comfort. The term generally encompasses sexual relations and is often used synonimously with the term "consortium." *SQEE* Doe v. Doe, 59 Tenn. App. 108, 438 S.W.2d 353 (1968); Furnish v. Missouri Pacific Ry. Co., 102 Mo. 669, 15 S.W. 315 (1891).

28. The E.B. Ward, Jr., 23 F. 900 (C.C.E.D. La. 1885).

29. Igneri v. Cie. de Transports Oceaniques, 323 F.2d 257 (2d Cir. 1963); Middleton v. Luckenbach, S.S. Co., 70 F.2d 376 (2d Cir. 1934); Dugas v. National Aircraft Corp., 310 F. Supp. 21 (E.D. Pa. 1970).

30. Simpson v. Knutsen, 444 F.2d 523 (9th Cir. 1971); Petition of United States Steel Corp., 436 F.2d 1256 (6th Cir. 1970); Green v. Ross, 338 F. Supp. 365 (S.D. Fla. 1972).

31. Of the 44 states that measure damages by the loss sustained by the beneficiaries, 27 permit recovery for loss of society. Arizona, Idaho, Louisiana, New Mexico, Puerto Rico, South Carolina, Utah, Virginia, and Washington have equivocal statutes, which have been construed by their courts as including recovery for loss of society. The wrongful death statutes of California, Delaware, Michigan, Minnesota, Montana, Pennsylvania, Texas, and the Virgin Islands, which either expressly or by judicial construction limit recovery to pecuniary losses, have been judicially construed to permit recovery for the pecuniary value of the decedent's society. *See* S. SPEISER, *supra* note 16, § 3.42, at 209-219.

32. S. SPEISER, *supra* note 16, § 3.45 at 222. The earlier admiralty cases also allowed nothing for "the grief of surviving relatives or a solace for bereavement." Hollyday v. The David Reeves, 12 F. Cas. 386-88 (No. 6,625) (D.C. Md. 1879). Many state courts have also taken this view, but there now appears to be a tendency to permit recovery for such damages. *See* S. SPEISER, *supra* note 16, §§ 3.45-3.46. One recent decision construing *Moragne, In Re Sincere Navigation Corp.*, 329 F. Supp. 652 (E.D. La. 1971), expressly permits recovery for survivor's grief noting that the trend in recent years in the common law states, as well as scholarly opinion, supported such recoveries. The Fifth Circuit has refused to permit recovery for survivor's grief commenting that "the current rationales underlying recoverability for survivor's grief damages in state death actions are too divergent and ill defined to override the policies against recoverability manifested

do not permit recovery,[33] federal courts prior to *The Harrisburg* and after *Moragne*, as well as a majority of the state courts, have awarded damages for funeral expenses.[34]

In the instant case the Court confronted the question of the *res judicata* effect of a prior personal injury judgment on a general maritime wrongful death action by declaring forthrightly that the state and federal precedents were essentially inapplicable since each was constrained by statutory limitations. Since the wrongful death remedy created by *Moragne* is not a statutory construct, the Court found itself free to evaluate the validity of the respondent's action without regard to state or federal precedent.[35] Thus emancipated from precedent, the Court found the doctrine of *res judicata* inapplicable to these facts.[36] The decedent's suit was confined to recovery for *his own* loss of wages, pain and suffering, medical and incidental expenses. On the other hand, the suit brought by his wife sought recovery for *her* loss of support, services and society and for funeral expenses, and, consequently, was predicated on a

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in general maritime law and in the federal statutes." Petition of M/V Elaine Jones, 480 F.2d 11, 33 (5th Cir. 1973). The latest reported decision on the question reaffirms that approach. Hueschen v. Flour Ocean Services, Inc., 483 F.2d 1396 (5th Cir. 1973) (action for death of son killed instantly while standing on barge).

33. Under these acts, funeral expenses are considered expenses of the estate of the deceased rather than a pecuniary loss to the beneficiaries. *See* Cities Service Oil Co. v. Launey, 403 F.2d 537 (5th Cir. 1968) (action by widow under Jones Act for wrongful death of seaman). *But see* Moore v. The O/S Fram, 226 F. Supp. 816 (S.D. Tex. 1963) (Jones Act and DOHSA action by common-law wife, children and mother for drowning of shrimp crawler master); *and* Farmer v. The O/S Fluffy D, 220 F. Supp. 917 (S.D. Tex. 1963) (action for stabbing death of captain of shrimp boat under Jones Act and DOHSA—recovery permitted under the concept that the beneficiaries were ultimately responsible for payment of funeral expenses).

34. *See* S. SPEISER, *supra* note 16, at § 3.49.

35. 94 S. Ct. at 812.

36. Commenting on the state and federal cases barring the subsequent wrongful death action the court said "the bar does not appear to rest in those cases so much upon principles of *res judicata* or public policy as upon statutory limitations on the wrongful death action. As one authority has noted, '[t]he fact that all civil remedies for wrongful death derive from statute has important consequences. Since the right was unknown to common law, the legislatures which created the right were free to impose restrictions upon it.' 2 F. Harper & F. James, The Law of Torts § 24.2, p. 1285 (1956)." 94 S. Ct. at 812.

separate and unique cause of action. Referring to *Cromwell v. County of Sac*,[37] the Court pointed out that the doctrine of *res judicata* applies only to causes of action that have been previously litigated. Since none of the causes of action in the second suit had been litigated, the doctrine of *res judicata* does not apply. While discounting the likelihood of a double recovery by the plaintiff, the Court did observe an "apparent overlap" between the decedent's recovery for loss of future wages and the dependent's claim for support. Recognizing that under traditional notions of collateral estoppel[38] non-parties in the first action are generally not bound in a second action, the Court proceeded to carve out an exception to this general rule by treating the decedent-claimant in the suit for personal injuries as a fiduciary representing the interests of his beneficiaries.[39] Consequently, survivors, as beneficiaries, would be collaterally estopped from later litigating their loss of support if the decedent had litigated the question of future wages in the first action. This reasoning, the Court explained, preserves the integrity of the doctrine of collateral estoppel since the decedent's beneficiaries would be constructive parties in the first action. After concluding that the second lawsuit could be maintained, the Court considered the question of damages. Noting preliminarily that recovery for support and services is permitted in the vast majority of the state and federal wrongful death actions,[40] the Court reasoned that the recovery for loss of society is not inconsistent with

37. 94 U.S. 351 (1876).

38. *See* Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 320-27 (1971).

39. The Court cites to an article and a note which lend support to that approach: Vesta, *Preclusion/Res Judicata Variables*, 50 IOWA L. REV. 27, 63-64 (1964), which suggests that the second action would be barred since it was "derivative" of the first suit. The note, *Developments in the Law of Res Judicata*, 65 HARV. L. REV. 818, 855-56 (1952), suggests that the party on whose account the action is brought is the real party in interest and is therefore bound by the action commenced by his fiduciary. Whether an injured party's wife or children could be presumed to be the parties on whose account an action for loss of future wages is brought is questionable in view of the lack of decided cases reaching the question. The court's approach is bolstered somewhat by the RESTATEMENT OF JUDGMENTS, § 92 (1942), which deals expressly with wrongful death actions and provides that "the rules of *res judicata* apply in actions brought after death as to issues in an action brought by him (the decedent) and terminating in a judgment before his death."

40. *See* notes 20 and 21 *supra*.

the guidance given in *Moragne* to look to DOHSA, the Jones Act and the state statutes for persuasive analogies. Although the federal statutes disallow a survivor's recovery for loss of society,[41] the Court identified a clear majority of the states that have rejected the federal approach and expanded their damage remedies to include loss of services.[42] The Court noted further that the trend was unmistakeably in favor of permitting recovery for loss of services.[43] Furthermore, the Court reflected, its decision to align general maritime law with state law on this point rather than the federal admiralty analogies was compelled by the humanitarian policy of maritime law to show "special solicitude" for injuries occurring within its jurisdiction.[44] The Court had little difficulty with allowing the recovery of funeral expenses on the grounds that the pre-*Harrisburg* decisions and post-*Moragne* decisions, as well as a majority of the states, permitted recovery for these items. Consequently, a maritime wrongful death action for unseaworthiness alleging loss of support, services, society and funeral expenses is not barred by decedent's recovery of damages for personal injuries during his lifetime.

The dissent, led by Mr. Justice Powell, objected to this expansion of admiralty law as an unwarranted violation of the principle of *stare decisis*, which would generate confusion in application and frequently result in duplicative recoveries. The dissent maintained that a recovery by a beneficiary of a decedent who had previously recovered during his lifetime extended a cause of action to plaintiffs suing under the general maritime law that other plaintiffs suing under DOHSA or the Jones Act would not have. Further, the dissent contended that the majority's extension of damages to allow recovery for loss of society is inconsistent with the congressional directive expressed in DOHSA and the Jones Act that recovery be limited to pecuniary losses. Both of these extensions, the dissent insisted, are violative of the policy expressed in *Moragne* that subsequent decisions under the general maritime law should achieve results that are consistent with results that would be achieved under the federal and state statutory remedies. Further,

41. *See* notes 28 and 29 *supra*.
42. *See* note 30 *supra*.
43. *Id*.
44. *See* 94 S. Ct. at 811.

the dissent argued that the collateral estoppel device constructed by the majority to prevent duplicative recovery will not adequately prevent a sympathetic jury from generously awarding damages in the wrongful death action when the damage cannot be objectively ascertained. This presents a particular problem to the defendant, Justice Powell suggested, since an unseaworthiness action is essentially one of strict liability historically limiting damages to pecuniary losses. Additionally, the dissent pointed out that the defendant would be deprived of the comfort of knowing that the action had been conclusively resolved and that additional expenditures for litigation would not be required at some later time.

The Court's opinion in the instant case conclusively resolved the *res judicata* question and the damage questions relating to loss of society and funeral expenses, both of which were left unresolved in *Moragne*. Rather than merely synthesize solutions to these questions from convenient legal analogies, the Court chose to venture into uncharted waters and, in doing so, broadened the scope of the maritime death action at the expense of the uniformity that *Moragne* sought to achieve.[45] This result puts general maritime law at odds with the recovery permitted under the Jones Act. The dissent suggests the possibility that the beneficiaries of a seaman injured on land could not maintain a second action pursuant to the Jones Act remedy while the beneficiaries of a seaman injured on the water would be permitted such an action under general maritime law.[46] The need to avoid such fortuitous results was a compelling consideration in *Moragne*. The willingness of the majority to expand recovery was viewed by the dissent as portending an overruling of the *Mellon* line of cases and thereby effecting a similar expansion under DOHSA, the Jones Act, and its predecessor, the Federal Employee's Liability Act. This kind of expansion, however, entails several risks. As the dissent cogently observes, judicial supervision cannot effectively prevent a sympathetic jury from giving the plaintiff a double recovery. Further, the majority's position on *res judicata* will likely encourage survivors to sue after the

45. One of the justifications for the *Moragne* decision was the need to "assure uniform vindication of federal policies . . . ." 398 U.S. at 401.

46. The dissent here impliedly suggests that *Moragne* was remedial in character providing a cause of action for unseaworthiness only when the action was previously barred rather than offering an alternative remedy to the sailor's beneficiaries. 94 S. Ct. at 820.

compensated victim has died, and thus cause the defendant to incur additional litigation expense and, in every case, deny him the comfort of knowing that his liability has been conclusively adjudicated. The same uniformity problem is created by the Court's willingness to permit recovery for loss of society. Although consistent with the majority of the state courts, the general maritime law now goes significantly further than Congress provided in the statutory wrongful death remedies,[47] suggesting again the possibility of disparate treatment in similar circumstances. The dissent believes that this development will discourage the use of federal statutory remedies. Actions under DOHSA will certainly be diminished, but it can hardly be said that this decision will discourage use of the Jones Act since most lawsuits involving the death of a seaman were brought under the general maritime law even before this decision came down. Indeed, the result that the dissent fears is inherent in the meaning of the *Moragne* decision, which created a new nonstatutory cause of action. It is too late to lament the loss of DOHSA and the Jones Act. Moreover, the augmented recovery afforded plaintiffs by this decision is more consistent with the humanitarian character of admiralty than the less generous alternatives open to the Court. The federal statutory remedies have long been regarded by many as poorly written, stopgap measures that offered an outdated remedy and spawned useless litigation. While the decision leaves unanswered the questions of recovery for survivors' grief, appropriate beneficiaries, time limitations and the viability of state wrongful death statutes, the majority opinion clearly defines a posture favoring a broadening of the maritime wrongful death remedy at the expense of the uniformity born of statutory interpretation. This implies, perhaps, that the humanitarian character of the result may be of greater consequence than precedent in determining the outcome of future cases.

Stanley D. Miller

47. *See* note 28 *supra*.

CONSTITUTIONAL LAW—FOURTH AMENDMENT SEARCH AND SEIZURE—WITHOUT CONSENT, WARRANT OR PROBABLE CAUSE, A ROVING PATROL SEARCH OF A VEHICLE TWENTY-FIVE MILES FROM BORDER IS AN UNREASONABLE SEARCH AND SEIZURE WITHIN MEANING OF FOURTH AMENDMENT

Petitioner[1] was stopped twenty-five miles north of the Mexican border by officers of the Immigration and Nationalization Service who searched his car for aliens unlawfully in the country.[2] The search disclosed a large quantity of marijuana, and petitioner was convicted in district court of knowingly receiving, concealing and facilitating the transportation and concealment of illegally imported marijuana.[3] Petitioner appealed, alleging that the roving patrol search, twenty-five miles from the border and without consent, warrant or probable cause, was in violation of the fourth amendment guarantee against unreasonable searches and seizures.[4] The government argued that the search was reasonable considering the circumstances involved in an extended border search and the authority granted the immigration service under section 287(a) of the Immigration and Nationality Act[5] and 8

1. Condrado Almeida-Sanchez, a Mexican citizen with a valid United States work permit.

2. Because of the difficulty in deterring the influx of Mexican aliens in the immediate vicinity of the border, the Immigration and Naturalization Service (INS) has established permanent and periodic checkpoints and roving patrols in areas removed from the border. Checkpoint and roving patrol searches, loosely termed "extended border searches," are designed to intercept aliens illegally within the country before they become lost in anonymity in the large urban areas further removed from the border. The officers who apprehended Almeida-Sanchez were conducting a roving patrol. The officers' search of the vehicle, without a warrant or probable cause, included the area between the back seat and the trunk because of an official INS bulletin that indicated that aliens were being illegally transported concealed behind the backseats of vehicles.

3. 21 U.S.C. § 176(a) (1964) (statute dealing with the illegal importation and transportation of narcotics).

4. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

5. "Any officer or employee of the [Immigration and Naturalization] Service authorized under regulations prescribed by the Attorney General shall have power without warrant . . .

C.F.R. § 287.1.[6] The Court of Appeals for the Ninth Circuit affirmed the conviction solely on the basis of Section 1357 of the Act.[7] On writ of certiorari from the United States Supreme Court, *held*, reversed. Without consent, warrant or probable cause, a roving patrol search of a vehicle twenty-five miles from the border is an unreasonable search and seizure within the meaning of the fourth amendment. *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

The fourth amendment guarantees freedom from unreasonable searches and seizures;[8] the Supreme Court has held that, as a general rule, the search will not be reasonable without a search warrant issued pursuant to a determination of probable cause by a magistrate. Only in extraordinary circumstances will the Court allow exceptions to this rule.[9] For each exception the courts have found a predominant government interest that, at least to a limited extent, outweighs the Constitutional guarantee. Thus, in *Carroll v. United States*,[10] the Supreme Court held that because of the inherent mobility of an automobile, an auto search without warrant is reasonable in terms of the fourth amendment. However, the search is reasonable only if there is valid probable cause to believe that the automobile contains "that which by law is subject to seizure."[11] The Court has also authorized municipal administrative searches for housing-code violations pursuant to an "area warrant" based on the municipal authority's appraisal of conditions in the area as a whole, rather than its knowledge of conditions in each particular building.[12] Moreover, the Court has held that war-

(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle. . . ." Immigration and Nationality Act § 287; 8 U.S.C. § 1357(a) (1970) [hereinafter cited as the Act].

6. "*Reasonable Distance.* The term 'reasonable distance,' as used in section 287(a)(3) of the Act, means within 100 air miles from any external boundary of the United States . . . ." Attorney General's Regulation, 8 C.F.R. § 287.1(a)(2) (1970) [hereinafter cited as the Regulation].

7. United States v. Almeida-Sanchez, 452 F.2d 459 (9th Cir. 1971).

8. U.S. CONST. amend. IV.

9. Chambers v. Maroney, 399 U.S. 42, 51 (1970).

10. 267 U.S. 132 (1925).

11. 267 U.S. at 149.

12. Camara v. Municipal Court, 387 U.S. 523, 536 (1967). As it affects the individual homeowner, the decision significantly diluted the requirement for

rantless searches of pervasively regulated, federally licensed businesses are not unreasonable and constitute only a limited intrusion on the licensee's reasonable expectation of privacy.[13] Additionally, it has been long recognized that the guarantees of the fourth amendment do not apply to customs searches.[14] And in 1917, the power to search without probable cause or warrant was extended to officers of the Immigration and Nationalization Service to assist in their attempt to discover aliens illegally seeking entry into the country.[15] Since 1946, immigration officials have been authorized by Congress to search without probable cause or warrant within a reasonable distance from any United States border or external boundary.[16] Consequently, the courts have held consistently that the immigration service has absolute authority—without warrant or probable cause—to search for aliens in any type of vehicle within 100 miles of the border.[17] This authority to search is exercised at border entry points, permanent and periodic checkpoints on major roads leading from the border, and by roving patrols checking the more infrequently used back roads in the border area. Although conducted solely for the detection of aliens illegally entering or within the country, immigration searches frequently disclose "plain view" evidence of another crime or give the inspecting officer probable cause to believe that another crime is being committed; the officer then is empowered to conduct an even more thorough search of the vehicle.[18] Typically, the evidence dis-

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probable cause. The Court conditioned the issuance of area warrants on (1) a long history of judicial and public acceptance of this type search, (2) the public interest protected by such searches and (3) the limited intrusion on individual privacy occasioned by administrative or inspective searches. 387 U.S. at 537; *see*, See v. City of Seattle, 387 U.S. 541 (1967) (*Camara* applied to commercial structures).

13. United States v. Biswell, 406 U.S. 311 (1972) (search of a business licensed to sell firearms); Colonade Catering Corp. v. United States, 397 U.S. 72 (1970) (search of a liquor distributorship).

14. "[E]very [customs official] . . . shall have full power and authority, to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods. . . ." Act of July 31, 1789, ch. 5, 1 Stat. 29, 43 (1789).

15. Act of Feb. 5, 1917, ch. 29, § 16, 39 Stat. 874, 886 (1917).

16. The Act, *supra* note 5; the Regulation, *supra* note 6.

17. *See generally*, Gordon, *Powers and Responsibilities of Immigration Officers*, 59 A.B.A.J. 64 (1973).

18. Border patrol officers wear two hats, serving as specially appointed cus-

covered is narcotics and the defendant is prosecuted under federal narcotic statutes.[19] In the Ninth Circuit,[20] the leading such case is *Fernandez v. United States.*[21] Fernandez, an alien, was stopped by immigration officials at a permanent checkpoint approximately 60 miles north of the Mexican border. Marijuana was discovered[22] and Fernandez was convicted of smuggling and transporting narcotics. On appeal, he challenged the constitutionality of the search and the Act and Regulation[23] under which the search was conducted. The court determined that the Act represented congressional recognition of the nation's right to protect its own boundaries and called it "clearly constitutional."[24] The Regulation was held reasonable in light of all the circumstances.[25] Moreover, the thorough search was sustained on the grounds that valid probable cause arose from the detection of the marijuana-like odor.[26] In *Fumagalli v. United States,*[27] even though the defendant's car was thoroughly

toms officials in addition to being officers of the Immigration and Nationalization Service. Under the Tariff Act of 1930, 19 U.S.C. § 1401(i) (1970), Congress empowered the Secretary of the Treasury to make these special appointments; the Secretary further delegated the power to the Bureau of Customs to designate the border patrol officers as "acting Custom Patrol officers." T.D. 53654, 89 Treas. Dec. 334 (1954); *see,* United States v. Thompson, 475 F.2d 1359, 1362 (5th Cir. 1973); United States v. McDaniel, 463 F.2d 129 (5th Cir. 1972).

19. Customs searches on or near the border the sole purpose of which is the discovery of illegal narcotics are excluded from this discussion, but it should be noted that, depending on the court involved, differing standards of the reasonableness of the search apply.

20. Because of the proximity to the Mexican border, the majority of narcotics violations discovered by immigration officials occur in the Fifth, Ninth and Tenth Circuits.

21. 321 F.2d 283 (9th Cir. 1963).

22. In the course of routine immigration questioning, one of the officers detected the odor of marijuana apparently coming from the hood of the vehicle, whereupon a thorough search was conducted that disclosed marijuana and other narcotics.

23. The Act, *supra* note 5; the Regulation, *supra* note 6.

24. 321 F.2d at 285.

25. 321 F.2d at 286. The court considered the large volume of illegal alien traffic on the road in question, the minimum safety hazards posed to motorists by the location of the checkpoint, the limited intrusion and delay, and the 31-year continuous usage of the checkpoint.

26. 321 F.2d at 287. The court did not discuss whether the search would have been held valid based solely on the Act and the Regulation.

27. 429 F.2d 1011 (9th Cir. 1970).

searched without probable cause,[28] the search was held a "part of a routine investigation for 'illegal aliens' " and fully justified under the Regulation.[29] In similar cases, the Fifth and Tenth Circuits have generally followed the Ninth.[30] None of the courts, however, have sustained immigration searches when the contraband narcotics were discovered in a place or area of the vehicle wherein no alien could possibly be concealed.[31] And only the Fifth Circuit has refused blanket affirmation of extended border searches by gloss of statute. In *United States v. McDaniel*,[32] the Fifth Circuit noted that although the difficulty of apprehending aliens illegally entering the country necessitates some relaxation of the fourth amendment standards, the Act and the Regulation cannot render a search for aliens immune per se to a judicial inquiry of reasonableness. "[T]he search in question must be reasonable upon *all* of the facts, only one of which is the proximity of the search to an interna-

28. The vehicle was stopped at a regular checkpoint 49 miles from the border. During the course of the search for aliens, marijuana was discovered in the trunk in plain view.

29. 429 F.2d at 1013; *see, e.g.*, Duprez v. United States, 435 F.2d 1276 (9th Cir. 1970) (a warrantless search approximately 70 miles north of the border by immigration officials is justified under 8 U.S.C. § 1357, and the designation "border search" is neither applicable nor necessary in determining the reasonableness of the search); United States v. Miranda, 426 F.2d 283 (9th Cir. 1970) (where immigration officers "operating out of" a permanent checkpoint stopped and searched defendant's vehicle "not far from" the checkpoint; the marijuana discovered under the hood during a search for aliens held admissible in evidence); Barba-Reynes v. United States, 387 F.2d 91 (9th Cir. 1967) (marijuana discovered under back seat of vehicle after odor detected during trunk search for aliens).

30. *See, e.g.*, United States v. McCormick, 468 F.2d 68 (10th Cir. 1972); United States v. Anderson, 468 F.2d 1280 (10th Cir. 1972); United States v. DeLeon, 462 F.2d 170 (5th Cir. 1972).

31. *See, e.g.*, Roa-Rodriguez v. United States, 410 F.2d 1206 (10th Cir. 1969) (marijuana discovered in the pocket of defendant's jacket which was in the trunk of the vehicle); United States v. Winer, 294 F. Supp. 731 (D.C. Tex. 1969) (under the front seat of a small foreign car); United States v. Hortze, 179 F. Supp. 913 (D.C. Cal. 1959) (in a cigarette package on the floor of the vehicle).

32. 463 F.2d 129 (5th Cir. 1972). Immigration officers stopped McDaniel at a permanent checkpoint eight miles from the border. After routine questioning, the officers requested that he open the trunk, as they had requested each driver who had passed during the night in question. Within the trunk were several large burlap bags covered with Mexican newspapers which the seemingly nervous defendant claimed contained alfalfa, but which a search revealed to be marijuana.

tional border."[33] After examining all the facts, the court sustained the conviction.[34]

In the instant case, Mr. Justice Stewart, writing for a plurality of the Court, first surveyed the common exceptions to the warrant requirement. Noting that an auto search under *Carroll* requires probable cause and an administrative search without consent under *Camara*, a warrant, Stewart observed that the instant search "embodied precisely the evil [the unfettered discretion of the official involved] the Court saw in *Camara* when it insisted that the 'discretion of the official in the field' be circumscribed by obtaining a warrant prior to the inspection."[35] Stewart distinguished *Colonade* and *Biswell*[36] from the instant case since in the former, government inspections of pervasively regulated businesses constitute only a limited intrusion on the businessman's expectation of privacy whereas the petitioner here had assumed no limitations to his privacy. Furthermore, immigration officers do not share the government inspector's certainty that the premises searched are engaged in the regulated activity, thereby increasing the possibility of unwarranted intrusions upon the privacy of innocent citizens.[37] Turning to the statute, Stewart recognized the governmental power to exclude aliens and to do so by "routine inspections or searches" at the border or a functional equivalent thereof.[38] Finding that the search occurred neither on the border nor its functional equivalent, and without consent or probable cause, the majority held that the "search violated peti-

33. 463 F.2d at 133.

34. Among the "facts" considered were: (1) the proximity of the checkpoint to the border and the ease and frequency with which aliens were entering the country in that area; (2) the early morning hours during which the checkpoint was in operation and the consequential minimal intrusion and inconvenience caused innocent citizens; (3) the nervousness of the defendant *in addition to* the statutory authority to search; and (4) the totality of all the circumstances leading to a "reasonable suspicion" that the bags contained contraband thereby allowing the immigration officers to "shift" hats and search the bags as customs inspectors. 463 F.2d at 133-34.

35. 413 U.S. at 270.

36. *Supra*, note 13.

37. 413 U.S. at 272.

38. The Court theorized that "functional equivalent" might mean either an established checkpoint at the "confluence of two or more roads that extend from the border" or an interior, international airport. 413 U.S. at 273.

tioner's right to be free of 'unreasonable searches and seizures.' "[39] Concurring in the result, Mr. Justice Powell relied heavily on *Camara* and concluded that area warrants based on an equivalent of probable cause could be used to support roving patrol immigration searches in border areas. Powell noted that, as with administrative searches in *Camara*, roving patrol searches could be justified on their long history of judicial and public acceptance, the lack of effective, alternative methods and the limited invasion of the individual's privacy occasioned by administrative searches not specifically performed to discover evidence of a criminal nature.[40] Powell emphasized that an area warrant would remove the immigration officer's "unfettered discretion" and place it in the hands of the disinterested judiciary.[41] Mr. Justice White, writing for the dissent, found the search reasonable on the exigent circumstances and the express grant of congressional authority as evidenced by the Act and the Regulation.[42]

The question left unanswered by the opinion in the instant case is its ultimate effect on the detection of aliens illegally within the country. Section 287(a) of the Immigration and Nationality Act and the Attorney General's regulation, 8 C.F.R. § 287.1, were not expressly ruled unconstitutional and apparently survived, even though greatly impaired by the Court's decision. Read most narrowly, the opinion would seem to render the Act and Regulation unconstitutional as applied to virtually all roving patrol searches. In *United States v. Byrd*,[43] a Fifth Circuit decision involving almost identical circumstances and decided since the instant case,

39. 413 U.S. at 273.

40. In its brief to the Court, the Government, in support of its analogy to administrative searches, asserted that only 3% of those aliens discovered were criminally prosecuted. 413 U.S. at 278.

41. In addition, Justice Powell outlined what he considered to be factors relevant to a determination of probable cause for the issuance of an area warrant: (1) the frequency with which aliens are illegally transported in a given area; (2) the proximity of the area to the border; (3) extent of travel in and geographic characteristics of the area to be searched; and (4) the probable degree of interference with the rights of innocent persons, considering the scope of the search, its duration and the concentration of alien traffic in relation to the general traffic of the road or area. 413 U.S. at 283-84.

42. 413 U.S. at 285-99.

43. 483 F.2d 1196 (5th Cir. 1973) (roving patrol stopped defendant 45 miles north of the border, and while leaning through a rear window to search for aliens, the officer smelled marijuana which he subsequently discovered in the trunk).

the court said that the first question is whether or not the search was a "border search" as defined by the Court in *Almeida-Sanchez* (at the border or its functional equivalent); if not, the fourth amendment guarantees apply. The Fifth Circuit ruled the search invalid.[44] Read only slightly more broadly, the Court's opinion could be construed to proscribe all warrantless searches conducted without probable cause or a warrant unless they occur at the border or its functional equivalent. This reading would seem to undermine the validity of searches conducted at many of the long established, permanent checkpoints.[45] With some reluctance, the Tenth Circuit agrees. In *United States v. King*,[46] a case involving a search at a permanent checkpoint 98 miles from the border, that court remarked that 8 C.F.R. § 287.1 represents an administrative determination of reasonableness authorized by Congress. Nevertheless, constrained to follow *Almeida-Sanchez*, the Tenth Circuit held that the search is reasonable only if the checkpoint is functionally equivalent to the border and remanded the case for a determination thereof. In view of the unanswered questions, the most likely effect of the opinion will be the implementation of area warrants for immigration searches, the solution so strongly suggested by Justice Powell. Considering all the factors involved in the prevention of illegal entry by aliens, such procedure falls easily within the *Camara* rationale, and the present Court would apparently so find.[47] Most importantly, area warrants will allow the Immigration Service the needed flexibility to cope (in some measure) with the virtually insoluble problem of illegal immigration, yet retain in the judiciary the power of watchful scrutiny to ensure that all intrusions into the fourth amendment rights of the people in border areas are well considered and, above all, reasonable.

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44. 483 F.2d at 1201.

45. For example, the Immigration Service maintains a permanent checkpoint on Interstate 5 north of Oceanside, California, approximately 66 miles north of the border. It is not near the border, nor is it at a confluence of roads leading directly from the border, and there are a number of towns, including San Diego, between the border and the checkpoint. Its location, therefore, would not seem to fit within the Court's definition of "functional equivalent."

46. 485 F.2d 353 (10th Cir. 1973).

47. In the instant case, Justice Stewart noted that the four justices joining in the majority opinion were split on the issue; Justice Powell recommended it; and the remaining four justices, though believing it unnecessary, endorsed it. 413 U.S. at 270 n.3, 279-85, 288.

JURISDICTION—SECURITIES EXCHANGE ACT OF 1934—SECTION 10(b) APPLIES TO FRAUDULENT TRANSACTION IN UNLISTED FOREIGN SECURITIES WHEN THE ONLY CONDUCT WITHIN THE UNITED STATES IS THE USE OF THE MAILS AND THE TELEPHONE

Plaintiffs, an American citizen and a trust company,[1] sued defendants, Canadian citizens and corporations,[2] under section 10(b)[3] of the Securities Exchange Act of 1934 (1934 Act) and Rule 10b-5,[4] for damages arising from the proposed merger of defendant Anthes Imperial Limited (Anthes) into defendant Molson Industries Limited (Molson). The complaint alleged that defendants' misrepresentations caused plaintiffs, shareholders of Anthes, to incur a substantial loss on the sale of their stock to the tender offeror, Molson.[5] Moving to dismiss the complaint, defendants argued that they never entered the United States and that their only contact with plaintiffs was through the telephone and the mails; therefore the alleged violation occurred outside the country

1. Plaintiffs were Glen J. Travis of St. Louis, Missouri, and the St. Louis Union Trust Company, a Missouri corporation with its principal place of business in Missouri. The St. Louis Trust Company was the trustee of a Travis family trust.

2. The corporate defendants were Anthes Imperial Limited (Anthes), Molson Industries Limited (Molson), and Dominion Securities Limited (Dominion). Dominion was the broker handling the merger of Anthes into Molson. The stock of these corporations was not registered with the Securities Exchange Commission or listed on any American national stock exchange, but each corporation owns subsidiaries and conducts business in the United States.

The 23 individual defendants were controlling shareholders, officers and/or directors of Anthes and/or Molson.

3. 15 U.S.C. § 78j(b) (1970).

4. 17 C.F.R. § 240.10b-5. The 1934 Act is not self-executing. Rule 10b-5 was enacted to implement § 10(b). "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, (1) to employ any device, scheme, or artifice to defraud, (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5 (as amended 1951).

5. Plaintiffs alleged that when the tender offer was made, defendants led plaintiffs to believe that if they retained their stock until after the expiration of the tender offer to Canadian shareholders, a separate offer would be made to them, which would provide an after tax result to the Americans equivalent to that

and the court lacked subject matter jurisdiction.[6] The district court agreed and dismissed the complaint.[7] On appeal to the Eighth Circuit Court of Appeals, *held*, reversed and remanded. When American shareholders of unlisted Canadian stock are fraudulently induced by Canadian buyers to sell, the buyers' use of the mails and the telephone is conduct within the United States sufficient to confer subject matter jurisdiction on the district court under section 10(b) of the 1934 Act. *Travis v. Anthes Imperial Ltd.*, 473 F.2d 515 (8th Cir. 1973).

When a case has substantial transnational aspects, one significant consideration for a court is whether United States law applies to the particular case.[8] The general rule, stated in 1909 in

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received by the Canadian shareholders. No such offer was ever made to plaintiffs and they sold their shares for substantially less than they would have received had they sold them when they first learned of the tender offer. The plaintiffs also alleged that their exclusion from the merger constituted self-dealing because it resulted in.increased voting control, improved dividends and higher salaries and benefits for the individual defendants. 473 F.2d at 519.

6. Defendants also sought dismissal on the grounds of (1) lack of personal jurisdiction, (2) insufficiency of service of process, and (3) failure to state a claim upon which relief can be granted. The trial court did not consider these contentions. The first of these was fully briefed and argued in the instant case; the latter two were not. 473 F.2d at 520.

7. Travis v. Anthes Imperial Ltd., 331 F. Supp. 797 (E.D. Mo. 1971).

8. Another significant consideration is whether the law should be applied to the particular case, however, in applying the 1934 Act this question has been bypassed. Indeed, Professor Ehrenzweig suggests that in fraud cases the forum state will always apply its own law. A. EHRENZWEIG, A TREATISE ON THE CONFLICTS OF LAW 558-59 (1962). Whether the law should be applied is a policy problem, which entails evaluating the interests and deciding whether American interests are more substantial than those of other nations. In this way, the courts can refuse to hear cases that would conflict with the interests of another nation and are not important to the United States. When there are competing national interests the court should balance the interests and assume jurisdiction only if the American interests are more substantial than any others. See discussion of *Lauritzen* and *Hellenic infra*, notes 32-36 and accompanying text. *See*, Note, *Extraterritorial Application of Section 10(b) and Rule 10b-5*, 34 OHIO ST. L.J. 342, 352-53 (1973) (hereinafter cited as *Extraterritorial Application*); Trautman, *The Role of Conflicts Thinking in Determining the International Reach of American Regulatory Legislation*, 22 OHIO ST. L.J. 586, 611-627 (1961) (hereinafter cited as Trautman). For discussion in a related area see Haight, *International Law and Extraterritorial Application of the Antitrust Laws*, 63 YALE L.J. 639 (1954), and Note, *Extraterritorial Application of the Antitrust Laws*, 69 HARV. L. REV. 1452, 1453-62 (1956).

American Banana Co. v. United Fruit Co.,[9] is that federal legislation is presumed to apply only within the territorial limits of the United States. In *American Banana*, the Court found that the Sherman Antitrust Act could not be applied in an action between two American corporations in which the plaintiff did not allege that defendant's activities had a substantial effect with the country.[10] When the defendant is a foreign national, however, the territorial presumption limits jurisdiction to acts that occur within the United States. An alleged wrongful act committed outside the country is beyond the jurisdiction of the courts, even though the same act committed within the country is unlawful. Consequently, as international trade increased during the twentieth century, the territorial presumption caused harsh results in many transactions.[11] In 1945, the Second Circuit, responding to this difficult situation,[12] decided in *United States v. Aluminum Co. of America*,[13] that when a defendant's foreign activities have an allegedly substantial effect within the United States, the court has subject matter jurisdiction. In *Alcoa*, the government alleged that the effect of the defendant Canadian corporation's foreign activities was restraining trade within the United States and, therefore, was violative of the Sherman Antitrust Act. Finding for the government, the court reasoned that the location of the wrongful act itself should not prevent the exercise of jurisdiction when there was a wrongful effect within the United States.[14] The Court in *Steele v. Bulova Watch Co., Inc.*[15] followed this interpretation, finding defendant's foreign manufacturing activities violative of the Lanham Act[16] because the plaintiff's trade reputation was adversely affected by the entrance of defendant's products into the United

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9. 213 U.S. 347 (1909).

10. 213 U.S. at 359. The American Banana Company alleged that the United Fruit Company had instigated the government of Costa Rica to seize the Banana Company's plantation, resulting in injury to plaintiff's plantation, supplies and railway.

11. *Extraterritorial Application*, *supra* note 8, at 342.

12. For a discussion of the major cases in the extraterritorial application of § 10(b) of the 1934 Act see *Extraterritorial Application*, *supra* note 8.

13. 148 F.2d 416 (2d Cir. 1945).

14. 148 F.2d at 443.

15. 344 U.S. 280 (1952).

16. 15 U.S.C. §§ 1051-1127 (1970) (statute protecting registered trademarks).

States.[17] When construing section 10(b) of the 1934 Act, however, the courts initially applied the territorial presumption in addition to the jurisdictional requirements of Rule 10b-5[18]—that the defendant utilize either a means of interstate commerce, the mails, or the facilities of a national securities exchange. Consequently, American investors defrauded in international transactions were protected only if a "necessary and substantial act"[19] of the alleged fraud occurred within the United States. At the time the Second Circuit decided *Schoenbaum v. Firstbrook*,[20] the claims of defrauded investors depended upon the location of the elements of the prohibited act, a situation similar to *Alcoa*. The court found that when foreign transactions have an allegedly harmful effect on American investors, the restrictive territorial presumption should not be applied and, therefore, jurisdiction should attach. In *Schoenbaum*, an American shareholder of a Canadian corporation listed on the American Stock Exchange sued Canadian defendants alleging violation of section 10(b) of the 1934 Act and Rule 10b-5. The court reasoned that since section 10(b) embodies the national public interest of protecting American investors from fraudulent schemes, the alleged harm to plaintiff and the threat to the vitality of the national stock exchange constituted an effect within the United States sufficient to warrant jurisdiction, even though all of the alleged wrongful acts occurred in Canada.[21] Clearly, the deci-

17. 344 U.S. at 286-88. Defendant was an American manufacturer assembling products in Mexico. Although no Mexican laws were violated, the goods exported to the United States infringed plaintiff's trademark. *See*, Strassheim v. Daily, 221 U.S. 280 (1911) (acts outside Michigan held sufficient to confer jurisdiction when effect is within Michigan).

18. *Supra* note 4.

19. Ferraioli v. Cantor, 259 F. Supp. 842, 846 (S.D.N.Y. 1966) (location of corporate executive offices in New York City constitutes substantial nexus); Kook v. Crang, 182 F. Supp. 388, 390 (S.D.N.Y. 1960) (registration of firm under 1934 Act and incidental use of telephone and mails not necessary and substantial). *But see* S.E.C. v. Gulf Int'l Fin. Corp., 223 F. Supp. 987, 994 (S.D. Fla. 1963) (use of newspaper advertisements substantial).

20. 405 F.2d 200 (2d Cir. 1968).

21. 405 F.2d at 206-09. The court relied on § 18 of the RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (hereinafter cited as RESTATEMENT). "[Section] 18 Jurisdiction to Prescribe with Respect to Effect within Territory: A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either (a) the conduct and its effect are generally recognized

sion stated that the extraterritorial application of the 1934 Act to those transactions that involve stock listed on a national exchange is proper, but the full effect of the case on the territorial presumption was unclear. As a minimum the court recognized that the presumption was satisfied by the stock listing on a national security exchange, a significant departure from the strict rule of *American Banana*. On the other hand, it was possible that the court had discarded the presumption entirely and viewed the listing as simply meeting the "national security exchange" requirement[22] of Rule 10b-5. This uncertainty was resolved in *Leasco Data Processing Equip. Corp. v. Maxwell*,[23] in which the operative facts[24] were essentially the same as in *Schoenbaum*, except that the stock was not listed on a national exchange. The court found that the meetings between the parties, an essential link in the alleged fraudulent transaction, was conduct within the United States sufficient to confer jurisdiction on the district court.[25] Since the territorial contacts in *Leasco* were less than in *Schoenbaum*, the decision indicated the declining importance of the territorial presump-

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as constitutent elements of a crime or tort under the law of states that have reasonably developed legal systems, or (b)(i) the conduct and its effect are constitutent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems." RESTATEMENT § 18 (1965). For a discussion of the "effects" doctrine as applied to securities regulation see Note, *Extraterritorial Application of the Securities Exchange Act of 1934*, 69 COLUM. L. REV. 94, 95-99 (1969); Becker, *Extraterritorial Dimensions of the Securities Exchange Act*, 2 N.Y.U.J. INT'L L. & POL. 233, 235-39 (1969); *see*, Trautman, *supra*, note 8, at 609; Note, *Offshore Mutual Funds: Possible Solutions to a Regulatory Dilemma*, 3 LAW & POL. INT'L BUS. 157, 186-87 (1971).

22. *Supra* note 4.

23. 468 F.2d 1326 (2d Cir. 1972). For a discussion of *Leasco* and the law see 6 VAND. J. TRANSNAT'L L. 687 (1973).

24. Plaintiff was an American investor owning stock in a British corporation not listed on a national stock exchange; all defendants were British; and part of the negotiations for the alleged fraudulent transaction were held in New York City and Long Island.

25. 468 F.2d at 1336-37. The court relied on § 17 of the RESTATEMENT. "Jurisdiction to Prescribe with Respect to Conduct, Thing, Status, or Other Interest within Territory. A state has jurisdiction to prescribe a rule of law (a) attaching legal consequences to conduct that occurs within its territory, whether or not such consequences are determined by the effects of the conduct outside the territory,

tion; however both *Schoenbaum* and *Leasco*, revealing a reluctance to abandon the territorial presumption outright,[26] found either an effect or conduct within the United States in addition to the harm to the American investor and the jurisdictional requirements of Rule 10b-5.

In the instant case, the court found both an effect and conduct within the United States sufficient to confer jurisdiction on the district court.[27] Noting that defendants' alleged self-dealing and

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and (b) relating to a thing located, or a status or other interest localized, in its territory." RESTATEMENT § 17 (1965). The second illustration applies directly to *Leasco*. "X and Y are in state A. X makes a misrepresentation to Y. X and Y go to state B. Solely because of the prior misrepresentation, Y delivers money to X. A has jurisdiction . . . ." *Id.*

26. Neither *Schoenbaum* nor *Leasco* considered whether jurisdiction should have been exercised in view of competing national interests and policy, although there was no reason to consider the interests of other forums after assuming jurisdiction. It must be noted, however, that courts often recognize such interests when rendering decisions. For example, if a foreign jurisdiction has taken a contrary position on the same issue, the courts may limit opinions to exclude that forum. Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633 (2d Cir. 1956) (use in Canada of valid Canadian trademark not reviewable); United States v. Holophane Co., 119 F. Supp. 114 (S.D. Ohio 1954) (Holophane not allowed to infringe valid foreign patent and trademark rights in foreign states). For a comparison of these two cases see Note, *Extraterritorial Application of United States Legislation Against Restrictive or Unfair Trade Practices*, 51 AM. J. INT'L L. 380 (1957). When it is likely that another jurisdiction might make a contrary decision on the same problem, the courts may include a "savings clause" in the opinion that allows noncompliance in conflicting states. United States v. Imperial Chem. Indus., 105 F. Supp. 215 (S.D.N.Y. 1952). The limitations on the exercise of enforcement jurisdiction is discussed in RESTATEMENT § 40: "Limitations on Exercise of Enforcement Jurisdiction. Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as (a) vital national interests of each of the states, (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person, (c) the extent to which the required conduct is to take place in the territory of the other state, (d) the nationality of the person, and (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state." RESTATEMENT § 40 (1965). For a discussion of international law in the federal courts see Note, *Limitations on the Federal Judicial Power to Compel Acts Violating Foreign Law*, 63 COLUM. L. REV. 1441, 1482-94 (1963) [hereinafter cited as *Limitations on the Federal Judicial Power*].

27. The court adopted both §§ 18 (effects) and 17 (conduct) of the RESTATEMENT, *supra* notes 21 and 25 respectively.

plaintiff's monetary loss were constituent elements of activity to which section 10(b) of the 1934 Act applies, the court, relying upon *Leasco*, reasoned that jurisdiction would attach if there was significant conduct with respect to the alleged violations within the United States. The court also reasoned, relying on *Schoenbaum*, that when conduct outside the United States has a substantial effect within the country, jurisdiction could be exercised. The court first found that defendants' use of the mails and telephone in the United States was an essential link in the alleged fraudulent transaction and, therefore, jurisdiction attachs; the court also found that jurisdiction attachs because the diminished value of plaintiff's stock and the lesser dividends received by other American shareholders constituted a substantial effect[28] within the United States.[29]

The instant case is the final step in the extraterritorial application of section 10(b) of the 1934 Act and Rule 10b-5. Although both *Schoenbaum* and *Leasco* weakened the territorial presumption when applying the 1934 Act, both cases required an effect or conduct within the United States in addition to the requirements of Rule 10b-5 that an American investor be harmed and that the transaction utilize either a national securities exchange, a means of interstate commerce, or the mails. The instant case, however, did not require an additional effect or conduct, as the court based jurisdiction on an allegation of harm to an American investor and the use of the mails and telephone. The territorial presumption was discarded and was not used to restrict the extraterritorial application of section 10(b) and Rule 10b-5. Although the instant case appears sound because of the national public interest involved, the decision may cause future courts difficulty in cases in which American interests are minor. Courts will have to distinguish the instant case on its facts, and the rule of law that evolves

28. The court notes that even if all the fraudulent dealings took place in Canada, the 1934 Act would apply. In the instant case the alleged fraud was actually perpetrated through the telephone and mails. 473 F.2d at 527-28.

29. The court exercised personal jurisdiction over those defendants who acted within the district or caused foreseeable consequences therein. The court indicated that on the basis of the record there was personal jurisdiction over three of the individual defendants and over Anthes and Molson, and directed the district court to resolve the question as to the remaining defendants on remand after giving the plaintiffs an opportunity for discovery. 473 F.2d 530.

will be riddled with exceptions. For example, if an American shareholder in St. Louis receives an innocent telephone call from a foreign buyer in Mexico, which starts a chain of events leading to a fraudulent purchase outside the United States, under the instant case, the call could probably be construed as an essential link in the fraudulent transaction and could constitute conduct sufficient for the exercise of jurisdiction. Furthermore, in the above example, if the American investor is visiting Canada and the telephone conversation to Mexico goes in part over cables in the United States, under the instant case, this would also *seem* to be sufficient conduct. In each situation above the interests of the United States are questionable, yet the case at bar indicates that the federal courts should assume jurisdiction.[30] Since considerations of national interest might indicate that jurisdiction should not be exercised, the instant court should have evaluated the applicability of the 1934 Act, rather than automatically applying section 10(b) and Rule 10b-5 after deciding that the statute was applicable. A better approach would determine first, whether the 1934 Act applies, and secondly, whether it should be applied in view of national interest and policy, assuming jurisdiction only upon a satisfactory answer to both questions.[31] When there are competing national interests in a case, the Court may balance the interests to determine whether to exercise jurisdiction. In *Lauritzen v. Larsen*,[32] after deciding that the alleged wrongful act was within the ambit of the Jones Act,[33] the Court then balanced the interests, considering the nationalities of the parties, the place of the wrongful act, the place of the contract, the law of the forum and the accessibility of a foreign forum.[34] The Court found that foreign interests outweighed

30. The instant court suggests these results by noting that even if the fraudulent acts occurred entirely in Canada, defendants would be liable, *supra* note 28.

31. See discussion *supra* note 8.

32. 345 U.S. 571 (1953) (Danish seaman sought recovery in New York City for injuries caused by a fellow seaman on a Danish ship in Havana).

33. 46 U.S.C. § 688 (statute providing a cause of action for injured seaman). The court usually applies the balancing test when there is a question of assuming jurisdiction under the Jones Act.

34. This list is not exclusive; for instance, defendant's base of business operations may be important, as well as other factors. Pavlou v. Ocean Traders Marine Corp., 211 F. Supp. 320, 325 (1962). Section 6 of the RESTATEMENT (SECOND) OF CONFLICTS suggests similar considerations: "(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant

those of the United States, and, therefore, would not assume jurisdiction.[35] Using the balancing test, when the interests of the United States are more substantial than any other forum, or one of the American interests is so significant as to be substantial in itself, the court assumes jurisdiction.[36] The balancing test organizes the law according to the weight of the various competing factors and would be particularly appropriate for cases under section 10(b) because, like the Jones Act, the 1934 Act is a public statute that creates private rights and a private cause of action. The similar nature of the statutes indicates that the balancing test used in Jones Act cases would also be appropriate in actions under the 1934 Act.[37] In the instant case, for example, a court would probably find that (1) the United States has a vital national interest in protecting her investors from deceptive schemes; (2) although the plaintiffs are American and defendants are not, they had assets in the United States; (3) custom permits the exercise of jurisdiction when activities threaten the financial security of the forum state[38] and (4) the plaintiffs could expect fair dealing from the defendants. These findings suggest that the instant court was correct in applying American law to the particular case, but the advantage

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policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied."

35. 345 U.S. at 592.

36. Hellenic Lines Ltd. v. Zacharias Rhoditis, 398 U.S. 306, 310 (1969). The Court weighs the facts in view of the underlying objective of the statute being applied. 398 U.S. at 309 n.4. Since § 10(b) of the 1934 Act is construed liberally to protect American investors from fraudulent schemes, the balancing test would evaluate the circumstances in view of that objective.

37. The balancing test has also been used in trademark cases. Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633 (2d Cir.) *cert. denied*, 352 U.S. 871 (1956); George W. Luft Co. v. Zande Cosmetic Co., 142 F.2d 536 (2d Cir.) *cert. denied*, 323 U.S. 756 (1944); Trautman, *supra* note 8, at 618.

38. Custom permits the exercise of jurisdiction over (1) activities that threaten the political or financial security of the forum state, (2) activities of nationals absent a conflicting exercise of jurisdiction by the state in whose territory the activities occur, (3) activities universally regarded as hostile to mankind, and (4) activities preparatory of the commission of a crime when part of the crime occurs within the forum state. *Limitations on the Federal Judicial Power, supra* note 26, at 1474.

of the balancing method is that the law develops in a flexible manner allowing the courts to avoid cases, such as the above hypotheticals, which do not concern a substantial national interest, and that the instant case would then be useful in determining the importance of various factors in future decisions.

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