SETTING SAIL WITH WRONGFUL DEATH—AN ACTION DOES LIE UNDER GENERAL MARITIME LAW FOR DEATH CAUSED BY VIOLATION OF MARITIME DUTIES—*Moragne v. States Marine Lines, Inc.*, 90 S. Ct. 1772 (1970).

Reversals by the United States Supreme Court of its earlier decisions are usually based upon changes in relevant circumstances or changes in general policy considerations. In the present case, both factors are seen relevant to the Court's disposition. The resulting law is therefore a revitalization of the past. By overruling *The Harrisburg*,[1] the Court has removed a proverbial thorn from the side of admiralty—that no action for wrongful death will lie under the general maritime law. This old rule gave rise to a heretofore unresolved gap which was created when peculiar developments precluded unseaworthiness as a basis for liability only as to deaths upon United States' territorial waters.

FACTS

In *Moragne v. States Marine Lines, Inc.*,[2] petitioner brought suit within a few months of the death of her husband, as his widow and representative, to recover damages for wrongful death from States Marine Lines, Inc., the owner of the vessel *Palmetto State*. Petitioner's claims were based upon negligence and the unseaworthiness of the vessel. Decedent was a longshoreman and was performing his regular duties on board the *Palmetto State* when a hatch beam became disengaged from its position, allegedly because of a defective locking arrangement, and fell into the hold, striking decedent in the head, killing him instantly.

After determining that the applicable Florida Wrongful Death Statute[3] did not embody the concept of unseaworthiness, the Court of Appeals for the Fifth Circuit affirmed the District Court's dismissal of petitioner's unseaworthiness claim. The United States Supreme Court granted certiorari[4] "to reconsider the important question of remedies under federal maritime law for tortious deaths on state territorial waters." As had writers in the past,[5] the Court

1. 119 U.S. 199 (1886).
2. 90 S. Ct. 1772 (1970).
3. FLORIDA STATUTES Vol. 2, § 768.01 (25th ed. 1965).
4. 396 U.S. 900 (1969).
5. *See, Judicial Expansion of Remedies for Wrongful Death in Admir-*

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finally questioned the developments of maritime law which had led to such distinctively incongruous consequences.

BACKGROUND

Even a cursory perusal of the history behind the lack of an action for wrongful death in maritime law is enough to illuminate what has, until now, been termed an anomaly. Illustrated is but another instance wherein the law had become anchored in precedent, and *stare decisis* had been the snag preventing the law from floating free.

As is pointed out in the Court's opinion, our case law on the subject was based upon early English legal history—in particular, the felony-merger doctrine.[6] For reasons not clearly understood, the Court in 1886 specifically adopted a rule consistent with the common-law that no civil action would lie for wrongful death.[7] This was particularly questionable, inasmuch as admiralty had developed as a distinct entity, separate from the body of common-law, and since the felony-merger doctrine no longer existed in England, and *never did exist* in the United States.[8]

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alty: A Proposal, 49 BOSTON U.L. REV. 114 (1969), an excellent comment proposing the same change of position adopted by the United States Supreme Court in *Moragne*; *see also*, Day, *Maritime Wrongful Death and Survival Recovery: The Need for Legislative Reform*, 64 COLUM. L. REV. 648 (1964).

6. Briefly, the felony-merger doctrine provided that all deaths attributable to another person were felonious and that any tort action was made subordinate to the felony. Since punishment for the felony included death and forfeiture of all property to the Crown, no basis remained for recovery through an action in tort. Moragne, *supra* note 2 at 1778.

7. The Harrisburg, *supra* note 1 at 205. In holding the common-law rule of no action for wrongful death applicable to admiralty, Chief Justice Waite remarked, "We know of no English case in which it has been authoritatively decided that the rule in admiralty differs at all in this particular from that at common-law." Interestingly enough, however, there had been some conflict in American cases. While the court in *The Harrisburg* relied most heavily on the language in *Insurance Co. v. Brame*, 95 U.S. 754, 756 (1878), that "No civil action lies for an injury which results in death," there were other cases such as *The Sea Gull*, 21 Fed. Cas. 909 (No. 12,578) (C.D.C. Md. 1867), which mentioned the flexibility of admiralty to act liberally and to provide such an action.

8. Justice Harlan commented that,

> We do not regard the rule of *The Harrisburg* as a closely arguable proposition—it rested upon a most dubious foundation when announced, has become an increasingly unjustifiable anomaly as the law over the years has left it behind, and, in conjunction with its corollary, *The Tungus*, 358 U.S. 588 (1959), has produced litigation-spawning confusion in an area that should be easily susceptable to more workable solutions. Moragne, *supra* note 2 at 1790.

The exigencies evidenced by *Moragne* were precipitated by two developments. As a result of an evolutionary process, highlighted by *Mahnich v. Southern Steamship Co.*[9] and *Mitchell v. Trawler Racer, Inc.*,[10] the doctrine of unseaworthiness became almost identical to the common-law concept of strict liability. The "due diligence" standard was completely discarded.[11] Meanwhile, liability under the Death on the High Seas Act[12] was expanded to include the unseaworthiness theory. The resultant strict liability under the Death on the High Seas Act was then contrasted to the negligence theories of the Jones Act[13] and the various state wrongful death statutes. In sum, representatives of persons killed within United States' territorial waters were deprived of a basic maritime concept—unseaworthiness.[14] This caused attention to focus upon an important gap in maritime law.

HOLDING OF THE COURT

In an area wrought with confusion and inconsistencies, the Court made a careful analysis of the situation and decided unanimously that (1) *The Harrisburg* was the sore spot from which present difficulties stemmed, (2) *The Harrisburg* should no longer be regarded as acceptable law, and (3) that henceforth, "an action does lie under general maritime law for death caused by violation of maritime duties."[15] One of the remarkable aspects of the decision, aside from its holding, lies in the unanimity of the Court. As is stated by Herbert R. Baer,

> It is one of the paradoxes of our judicial system that admiralty, the oldest body of law administered by our courts, is the least understood by both lawyers and judges. It is not without sig-

9. 321 U.S. 96, 103 (1944). The court held a rope "unseaworthy in the sense that it was inadequate for the purpose for which it was ordinarily used . . . its inadequacy rendered it unseaworthy whether the mate's failure to observe the defect was negligent or unavoidable."

10. 362 U.S. 539, 549, 550 (1960). The court held that the shipowner's actual or constructive knowledge of the unseaworthy condition is not essential to his liability. The duty to furnish a vessel and appurtenances reasonably fit for their intended use is absolute.

11. *Id.*

12. 46 U.S.C. § 761 (1920). The Act's coverage extends only to one marine league from shore, thereby leaving state remedies undisturbed.

13. 46 U.S.C. § 688 (1920).

14. No provision was made in any legislative enactment concerning incidents occurring within *foreign* territorial waters. *See*, ROBINSON, HANDBOOK OF ADMIRALTY LAW IN THE UNITED STATES, § 7 (1939).

15. Moragne, *supra* note 2 at 1792.

> nificance that in the past decade four Justices dissented from the majority in eleven admiralty cases, and in still more such cases dissenting opinions were filed by a lesser number of Justices who were severely critical of the law as declared by the Court.[16]

It is evident that the complete agreement of the Court in *Moragne* stems from its recognition of (1) present public policy favoring the allowance of recovery for wrongful death as evidenced by legislation, (2) anomalies perpetuated by the past law, and (3) problems of the past which arose from a lack of understanding.

The Court placed great emphasis on the impact of legislative policies.[17] In the opinion, Justice Harlan commented that, "It has always been the duty of the common-law court to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherited body of common-law principles—many of them deriving from earlier legislative exertions."[18] A perusal by the Court of pertinent legislative enactments displayed a wealth of evidence establishing a general policy favoring wrongful death actions. The Court remarked, "The policy thus established has become itself a part of our law to be given its appropriate weight not only in matters of statutory construction, but also in those of decisional law."[19] In this regard, then, it was clear that *The Harrisburg* should no longer be regarded as acceptable law.

The remaining question became whether Congress, in its enactment of the Death on the High Seas Act, the Jones Act and other compensation acts, had purposefully excluded coverage of maritime remedies in certain situations (as involved in the *Moragne* case). Inasmuch as Congress could not have anticipated the evolution of seaworthiness into a doctrine approaching strict liability, nor its application to the Death on the High Seas Act, the Court reasonably concluded "that the Death on the High Seas Act was not intended to preclude the availability of a remedy for

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16. H. BAER, ADMIRALTY LAW OF THE SUPREME COURT, *v* (2d ed. 1969).

17. Such policy was evidenced by legislation which specifically provided for actions relating to wrongful death. The culmination of such legislation saw every state equipped with a wrongful death statute. In addition, Congress in 1920 provided the Jones Act, *supra* note 13, and the Death on the High Seas Act, *supra* note 12, which gave to "seaman" and "people" respectively, a basis for wrongful death actions.

18. Moragne, *supra* note 2 at 1783.

19. *Id.* at 1782.

wrongful death under the general maritime law in situations not covered by the Act."[20]

The second factor producing harmony within the Court was the presentation by the United States, as *amicus curiae*, of contentions illustrating the anomalies which had survived until *Moragne*. As the law of admiralty stood,

(1) In territorial waters, unseaworthiness produced liability if a victim was injured, but not if killed, *The Harrisburg*,[21]
(2) Unseaworthiness causing death produced liability without, but not within the three-mile limit, *Kernan v. American Dredging Co.*,[22] and,
(3) A longshoreman could conceivably recover on an unseaworthiness basis even though a true seaman could not, *Gillespie v. United States Steel Corp.*[23]

It was made apparent to the Court that by overruling *The Harrisburg*, the situations described would be rectified.

Thirdly, it appears that the Court has at long last set sail based upon an in depth analysis of heretofore unfathomable complexities and misunderstandings. Maritime law in the United States developed from "the corpus of traditional rules and concepts found by our courts in the European authorities."[24] Naturally, variations suitable to the American theme modified the established rules as well as supplemented them. Unhappily, case law developed like backlashes on a fisherman's reel and the snarls and entanglements kept getting worse. The Court in *Moragne* took the time to unwind the tangles and thereby provided for an improved future operation.

In so doing, it is apparent that the Court was involved in major judicial legislation. This is nothing new, of course, and in quoting language from an earlier case,[25] the Court adheres to the view that "Congress has left largely to this Court the responsibility for fashioning the controlling rules of admiralty law."[26] It

20. *Id.* at 1788.
21. *See* notes 1 and 7 *supra.*
22. 355 U.S. 426 (1958).
23. 379 U.S. 148 (1964).
24. GILMORE AND BLACK, THE LAW OF ADMIRALTY 42 (1957).
25. Fitzgerald v. United States Lines, Co., 374 U.S. 16, 20 (1963).
26. It is interesting to note, as pointed out by the defendants, that no action had been taken on a bill introduced in the United States Senate (S. 3143, 91st Cong., 1st Sess.) which would have extended the Death on the High Seas Act to territorial waters.

is possible to extract from the Court's procedure a propensity towards further "law-making." Whatever validity such an assumption might possess, it would be unwarranted to assert that the Court should hesitate from further elucidation and expansion of its present ruling. As a matter of fact, the Court has conspicuously avoided procedural issues which it could have decided. Should the Court have plotted a course in addition to setting sail?

Of relevance to the Court's holding will be a further determination of (1) an appropriate limitation period, (2) beneficiaries entitled to recover, and (3) a measure of damages. The Court took cognizance of the answers of the United States, as *amicus curiae*, but did not adopt them. Rather, these questions were left to the lower courts for subsequent determination. Concern should thus focus on the appropriate directions to be implemented in the District Courts.

Since *Moragne* has enabled admiralty law to float free from its moorings in precedent, the District Courts should not become ensnarled with the statutory bases of the past. However, as in *Moragne*, legislative policies have always played a part in shaping the law. It is merely suggested that further considerations might add to the viability of developing procedures.

LIMITATION PERIOD

Laches has been the traditional limitation in admiralty for the instigation of a suit. As a guide, courts of admiralty have usually considered a related statutory provision containing a statute of limitations. The Longshoremen's and Harbor Workers' Compensation Act provides for a one year statute of limitations,[27] the Death on the High Seas Act, two years,[28] and the Jones Act, three years.[29] The writer suggests that the courts, in order to take full advantage of their discretionary powers, use the entire spectrum of the prior legislative mandates from which they may guide their decisions. In keeping with the equitable nature of the maritime law, a one to three year base would provide a desirable flexibility so that the courts might give full consideration to the equities bearing on the timeliness of a given suit.

27. 33 U.S.C. § 913 (1927).
28. 46 U.S.C. § 763 (1920).
29. 45 U.S.C. § 56 (1920).

BENEFICIARIES

Two different theories have been expressed in relevant legislation as to how beneficiaries are to be determined.[30] The *alternative beneficiary method* embodied in FELA §59[31] sets out preferences and limitations for actions brought under the Jones Act. The Death on the High Seas Act on the other hand, provides for apportionment between the possible beneficiaries.[32] Since just compensation would appear to be the legitimate goal of any award, an apportionment based upon the particular circumstance of each case seems appropriate under the general maritime law. Thus, need and degree of loss can be properly considered. In regard to loss occasioned by the passing of the decedent, it is interesting to consider the possibility of extending a right of recovery to his general creditors. At present, generally accepted practice does not allow creditors to recover for the wrongful death of their debtors. This probably precludes a change of such policy in admiralty law, since the mere situs of death would be determinative of who could recover. Perhaps an evolution of the common-law (to be referred to later) will encompass such a development, however.

DAMAGES

What should be the measure of damages in a suit brought for wrongful death under the general maritime law? Both federal statutory provisions, the Death on the High Seas Act and Jones Act, base compensation on "pecuniary loss." However, damages for pain and suffering are recoverable under the Jones Act, but not under the Death on the High Seas Act.[33] As a matter of policy, damages under the general maritime law should be shaped so as to include those expenses incurred prior to death. Special damages would, therefore, be recoverable and these might include items

30. *See, Monetary Recovery Under Federal Transportation Statutes,* 45 TEX. L. REV. 984, 986 (1967).

31. 45 U.S.C. § 59 (1920). The Federal Employers' Liability Act (FELA) provides recovery for the surviving widow or husband and children of such employee; and if none, then to such employee's parents; and if none, then to the next of kin dependent upon such employee.

32. 46 U.S.C. § 761 (1920) provides that the personal representative may sue for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative.

33. 45 U.S.C. § 59 and 46 U.S.C. § 762. *See,* Petition of Risdal & Anderson, Inc., 291 F. Supp. 355, 359 (D.C. Mass. 1968), *and Monetary Recovery Under Federal Transportation Statutes, supra* note 30 at 985.

such as hospital expenses and doctors' fees. Logically, this is no more than an extension of the seaman's right to maintenance and cure. Also, the burden of such costs is best handled if distributed throughout the industry, rather than placed upon given individuals. On a theoretical level, it seems nonsensical for either the estate or beneficiaries to recover for the pain and suffering experienced by the decedent prior to his death. After all, it is *he* who should be compensated. The passing of the decedent, then, would logically cut off such recovery. In keeping with developments of the tort law, however, it would not be amiss to suggest that recovery be allowed for the pain and suffering of the decedent's beneficiaries.[34] Hence, recovery should be allowed for pain and suffering, but the measure of such recovery must emanate from damages manifested in the beneficiaries. There is also a place for punitive damages in wrongful death actions.[35] This area is now in its infancy and its proper application can best be shaped in the relatively unstructured body of the "general" maritime law. Sanctions for "gross misconduct" should be equally applicable to maritime wrongful death actions as they are in any other field of law.

The *Moragne* case has presented other issues for the maritime law, some outside the procedural framework already discussed.[36] It is possible that the Court's decision will have implications for the general law as administered in the federal and state courts. Given the overwhelming approval of wrongful death actions in the maritime sphere, it seems that, as a corollary, there may develop a cause of action for wrongful death in the common-law generally. Arguing by analogy, federal as well as state wrongful death statutes may have been rendered superfluous. However, it must be recognized that a statute generally pre-empts the common-law,

34. This is a rapidly changing field of law, and courts have allowed witnesses of fatal accidents to recover for their anguish, especially if such witnesses were relatives of the decedent. Annot., 29 A.L.R. 3d 1337, 1357 (1970).

35. *See*, King, *Punitive Damages in Admiralty—Analysis and Impact of Cedarville*, 20 CASE W. RES. L. REV. 570 (1969).

36. Questions raised by C.J. Hardee, Jr. (attorney for petitioner in *Moragne*) in *Death Within the Waters of the State: The Moragne Case*, a paper delivered at the American Trial Lawyers' Convention, August 1970, included (1) Will the warranty of a seaworthy ship now extend to passengers under the Death on the High Seas Act? (2) May suits now be brought under the Death on the High Seas Act in the state courts with a trial by jury? (3) To what extent can the statements by the Court regarding the general denunciation of the common-law rule against actions for wrongful death be applied to other areas of the law?

though in this instance, rather than having statutes evolve from case law, general law is developing because of expressed legislative intent. In the least, the implications of the *Moragne* decision support an inference that any gaps existing in wrongful death legislation could now be filled.

ECONOMIC IMPACT

It is interesting to note the possible economic impact of the *Moragne* decision. One might think initially that more cases would be brought. As confirmed by practitioners defending admiralty tort claims,[37] it is believed that there will be no appreciable increase in the number of claims filed. Even though there has been a significant increase in the base of liability, the fact is, claimants have always brought suit on even the most flimsy grounds and are ever-willing to press only slim chances for recovery. Significantly, however, claimants are now apt to be successful in a greater number of instances. In addition, a general right of recovery for wrongful death in federal maritime law will enable suitors to file claims larger than those previously allowed under state statutes with monetary limits.[38]

INTERNATIONAL LAW AND CHOICE OF LAW

The "general" maritime law of torts has generally felt to have been embodied in the English statutory law. Nevertheless, the Supreme Court of the United States has made it very clear that "the general maritime law is enforced in this country, or in any other, so far only as it has been adopted by the laws or usages thereof."[39] Since England and most other nations have long recognized an action for wrongful death in the maritime law,[40] the recent development in *Moragne* merely brings the United States up to date with what has been the general policy of maritime law elsewhere. So then, important as *Moragne* is for the maritime law of the United States, the impact of this decision on

37. Manns, Manns & Lande, Attorneys-at-Law, telephone conversation, September 18, 1970.

38. Statutory limitations on wrongful death recovery are subject to frequent fluctuations and repeal. As of 1968, twelve states provided limitations: Colo., Ill., Kan., Mass., Minn., Mo., N.H., Ore., S.D., Va., W. Va., and Wis.

39. Liverpool & Great Western Steam Co. v. Phenix Ins. Co., 129 U.S. 397, 444 (1888).

40. 23 HALSBURY'S LAWS OF ENGLAND § 979 (2d ed. 1936); Kernan v. American Dredging Co., *supra* note 22 at 429 n.2.

international law will not be great.

What relevance *Moragne* has to international law must be measured in terms of the applicability of United States general maritime law in that sphere. In our courts at least, the considerations for choice of law set forth in *Lauritzen v. Larsen*[41] are the predominant factors weighed in a determination of which country's substantive law should apply.[42] In that opinion, the court stated,

> The purpose of a conflict-of-laws doctrine is to assure that a case will be treated in the same way under the appropriate law regardless of the fortuitous circumstances which often determine the forum. Jurisdiction of maritime cases in all countries is so wide and the nature of its subject matter so far-flung that there would be no justification for altering the law of a controversy just because local jurisdiction of the parties is obtainable.[43]

The essence of *Lauritzen v. Larsen* is the weighing of significant factors connecting the transaction to determine applicable law. These were set out as (1) the place of the wrongful act, (2) law of the flag, (3) allegiance or domicile of the injured, (4) allegiance of the shipowner, and (5) place of contract. Of course, choice of law questions arise only after the court's jurisdiction has been invoked.[44]

Because a gap in the maritime law of the United States has been filled, some choice of law problems are alleviated, while others could be intensified. In the past, admiralty courts have often achieved just results at the sufferance of conflict of laws principles. Two areas indicative of such judicial manipulations and upon which *Moragne* should have some effect may be characterized as situations,

> (1) Where in the past, a foreign court might strain to find foreign law applicable in order to provide the claimant with a remedy otherwise unavailable under United States' law, and conversely,
>
> (2) Where a United States court might be tempted to "find"

41. 345 U.S. 571 (1952).

42. GILMORE AND BLACK, *supra* note 24 at 386.

43. 345 U.S. at 591.

44. As to the Courts' discretionary jurisdiction over all maritime cases, *see, Admiralty Suits Involving Foreigners,* 31 TEX. L. REV. 889 (1953), *and* Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty,* 35 CORN. L.Q. 12 (1949).

> significant contacts pointing towards the application of United States' law so that the claimant would obtain a result more favorable than one available under a foreign statute.

The law as announced in *Moragne* should have the effect of alleviating the foreign court's problem, but intensifying the problem of the United States' court. The following examples will demonstrate those consequences.

Imagine that a foreign court, such as England, has decided to take jurisdiction of a claim involving the death of a United States' seaman. Further assume that the seaman served aboard a ship of Panamanian registry actually owned by a United States based corporation. Even though the seaman's death occurred within British territorial waters, it would seem that on a basis of significant contacts, United States' law should be applied. However, as a further consideration, suppose that it is within the court's knowledge that decedent met his death due to the unseaworthiness of the vessel, but not because of any negligence. Since the applicable United States' law (The Jones Act) provides for recovery only if fault can be shown, the British court might strain to find British law applicable inasmuch as it embodies the concept of unseaworthiness. Now, due to *Moragne*, there would be no distinction as to the availability of the unseaworthiness doctrine.

The recent case of *Groves v. Universe Tankships, Inc.*[45] especially exemplifies a perplexing situation for consideration by a United States' court. The court weighed the relevant points of contact as suggested in *Lauritzen v. Larsen* in order to determine which country's substantive law should apply. Defendants thought that United States' law was inapplicable, although suit had been brought under the Jones Act. Pertinent facts were that (1) decedent was a British citizen, (2) death occurred in Japan, (3) the ship was of Liberian registry, (4) the ship's articles provided for the application of Liberian law, and (5) the shipowner was a Liberian corporation. Somewhat amazingly, the court applied United States' law. Of interest to the court was that the Liberian shipowner was a wholly owned subsidiary of a Panamanian corporation whose owners were predominately United States' citizens. Fortunately for suitors, but unfortunately for conflicts principles, United States' maritime law under *Moragne* will be even more attractive.

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45. 308 F. Supp. 826 (S.D.N.Y. 1970).

The *Moragne* decision ultimately stands as an ideal for all law to emulate. From a confused, imprecise body of law, the result emerged as a triumph of understanding, more sensible as to its subject than the body of common-law which it parallels. Out of a labyrinth of judicial and legislative doctrine, the United States Supreme Court has brought forth a contemporary philosophy and rule that could have pervasive effects. Of relevance to the instant case, *Moragne* closed a gap in admiralty law and elevated the concept of wrongful death to its deserved place within the law.

Robert P. Irwin