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MARITIME WRONGFUL DEATH—*HIGGINBOTHAM* REVERSES TREND AND CREATES NEW QUESTIONS

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Seldom has an area of law produced as much surprise to those who study and practice it as has maritime wrongful death in recent years. The latest surprising, and, to many, disappointing decision was handed down by the Supreme Court during the past term in *Mobil Oil Corporation v. Higginbotham*,[1] in which the Court held that beneficiaries may not recover for loss of society in actions for wrongful death arising outside territorial waters. The simple holding and the rationale—that common law in derogation of a statute may not supplant the statute—present no real problems, but the decision represents a startling reversal of the judicial trend toward uniformity and liberal recovery begun eight years ago in the unexpected and celebrated decision in *Moragne v. States Marine Lines, Inc.*[2] The importance of *Higginbotham* can be appreciated only through an understanding of the trend and its reversal, and what the latter may bring.

HISTORY

Like its land counterpart,[3] admiralty tort law initially re-

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1. 98 S. Ct. 2010 (1978).

2. 398 U.S. 375 (1970).

3. The history of the general common law rule that there can be no tort recovery when the victim dies was summarized by Justice Harlan in *Moragne* in the following language:

> Legal historians have concluded that the sole substantial basis for the rule at common law is a feature of the early English law that did not survive into this century—the felony-merger doctrine. See [F.] Pollock, [Law of Torts 55 (London ed. 1951)]; Holdsworth, The Origin of the Rule in *Baker v. Bolton*, 32 L.Q. Rev. 431 (1916). According to this doctrine, the common law did not allow civil recovery for an act that constituted both a tort and a felony. The tort was treated as less important than the offense against the Crown, and was merged into, or pre-empted by, the felony. *Smith v. Sykes*, 1 Freem. 224, 89 Eng. Rep. 160 (K.B. 1677); *Higgins v. Butcher*, Yel. 89, 80 Eng. Rep. 61 (K.B. 1606). The

fused to recognize recovery when either the victim or the tortfeasor died.[4] However, legislatures of each of the states repudiated the common law rule barring recovery for torts on land by passing non-abatement,[5] wrongful death,[6] and survival[7] statutes, or some combination thereof.[8] Accordingly, the common law rule that the tort died with the victim (or the tortfeasor, although the latter had been less significant)[9] ceased to be of importance in general tort law.

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doctrine found practical justification in the fact that the punishment for the felony was the death of the felon and the forfeiture of his property to the Crown; thus, after the crime had been punished, nothing remained of the felon or his property on which to base a civil action. Since all intentional or negligent homicide was felonious, there could be no civil suit for wrongful death.

The first explicit statement of the common-law rule against recovery for wrongful death came in the opinion of Lord Ellenborough, sitting at *nisi prius*, in *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (1808). That opinion did not cite authority, or give supporting reasoning, or refer to the felony-merger doctrine in announcing that '[i]n a civil Court, the death of a human being could not be complained of as an injury.' *Ibid.* Nor had the felony-merger doctrine seemingly been cited as the basis for the denial of recovery in any of the other reported wrongful-death cases since the earliest ones, in the 17th century. *E.g., Smith v. Sykes, supra; Higgins v. Butcher, supra.* However, it seems clear from those first cases that the rule of *Baker v. Bolton* did derive from the felony-merger doctrine, and that there was no other ground on which it might be supported even at the time of its inception . . . .

398 U.S. at 382-83.

4. The Harrisburg, 119 U.S. 199 (1886); George & Moore, *Wrongful Death and Survival Actions Under the General Maritime Law: Pre-Harrisburg Through Post Moragne*, 4 J. MAR. L. & COMM. 1 (1972); Sacchetti, *Survival of Tort Actions Under Federal Maritime Law*, 16 B.C. IND. & COMM. L. REV. 801 (1975).

5. Survival and non-abatement statutes have a similar effect. Where the victim has filed suit prior to his death, the issue is frequently expressed in terms of whether the action he has filed has "abated," or whether his heirs or beneficiaries may continue the maintenance of the suit for the damages he could have recovered if he had lived. Where the victim has not filed suit prior to death, then the issue is frequently expressed in terms of whether his heirs or beneficiaries may commence and maintain an action for the damages he could have recovered if he had lived; this latter action is generally referred to as the "survival action." The distinction may be important in maritime law because the Death on the High Seas Act (DOHSA) provides for "non-abatement" of a commenced action, but makes no provision for a survival action. *See* 46 U.S.C. § 765 (1920).

6. All fifty states have now passed wrongful death statutes. *See* S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 1.8 (1966).

7. Most states have enacted survival statutes. *See* S. SPEISER, *supra* note 6, at 24.

8. W. PROSSER, THE LAW OF TORTS § 126 at 900 (4th ed. 1971); RESTATEMENT OF TORTS § 900 (1939); S. SPEISER, *supra* note 6; Smith, *Wrongful Death Damages in North Carolina*, 44 N.C. L. REV. 402, 405, 406 nn.17 & 18 (1966).

Congress, however, did not fully abrogate the maritime common law tort rule barring recovery for wrongful death. During the decade between 1910 and 1920, Congress provided recovery for wrongful death in Jones Act (negligence) claims[10] and also provided recovery for wrongful death occurring on the high seas, outside territorial waters.[11] The Jones Act applies only to suits by beneficiaries of seamen brought against their decedent's employer on the basis of negligence, regardless of where the death occurs; the Death on the High Seas Act (DOHSA) applies to beneficiaries of all decedents, including seamen, but only if the wrongful act causing death occurs beyond three miles. Neither the Jones Act nor DOHSA permits recovery for "non-pecuniary" losses sustained by the beneficiaries, and the latter act does not provide survival benefits. Congress also did not provide statutory recovery for claims (other than negligence actions by a seaman's beneficiaries against his employer) for wrongful death within three miles. In such cases, the maritime common law "borrowed" state wrongful death statutes.[12] However, an admiralty plaintiff claiming death benefits under such a borrowed statute took the state act as he found it and was subject to all restrictions which the act placed upon recovery, including limitation statutes and bars to recovery based on contributory negligence.[13]

The combination of a common law rule generally denying recovery for wrongful death and a limited response by Congress

9. The common law initially barred recovery where either the victim or the tortfeasor died. W. PROSSER, *supra* note 8, at 898-99. There has been some statutory abrogation by states of the common law rule against recovery where the tortfeasor died, but neither the Jones Act nor DOHSA speaks to the issue. Admiralty courts, however, have refused to continue the rule. For a discussion of the present status of the rule in admiralty law, see Judge Rubin's opinion in *McKeithen v. S. S. Frosta*, 435 F. Supp. 584, 586 (E.D. La. 1977).

10. 46 U.S.C. § 688 (1920).

11. 46 U.S.C. § 761 *et seq.* (1920), the Death on the High Seas Act. The term "territorial waters" as used herein refers to those waters from the coast line to three miles seaward and is contrasted with the "high seas," which begin three miles beyond the coast line. Generally, "territorial waters" are treated as being within the boundaries of the adjacent state, and state law applies by its own force where there is no applicable federal law. Beyond three miles, on the "high seas," most courts hold that state law does not apply, but that federal law may "borrow" an applicable state statute. *See, e.g.*, Dugas v. National Aircraft Corp., 438 F.2d 1386 (3rd Cir. 1974).

12. The Hamilton, 207 U.S. 398 (1907).

13. The Tungus v. Skorgaard, 358 U.S. 588 (1959).

produced by 1970 an inconsistent pattern of recovery for maritime torts causing death. Where a seaman died as a result of negligence chargeable to his employer, his beneficiaries could recover both wrongful death and survival benefits, but recovery was limited to pecuniary loss. Where a seaman's death was caused by unseaworthiness and the accident occurred within territorial waters, his beneficiaries could not recover from the vessel owner. There was no federal statute permitting such wrongful death recovery, and no maritime common law remedy. While state statutes otherwise could have been "borrowed" under common law to permit recovery, the Supreme Court ruled that in adopting the Jones Act, Congress preempted any application of state law, including a state wrongful death statute, to claims by seamen against their employers.[14]

Where a non-seaman was killed within territorial waters, his beneficiaries could recover only through the applicable state statute. In each case, the court was required to determine whether the state legislature intended to extend the statute to the wrongful conduct in question. Thus, in the event of a *Sieracki* seaman[15] was killed within three miles, a judge was required to determine whether a legislature, which collectively was ignorant of the existence of a condition known as unseaworthiness, "intended" to extend wrongful death benefits to the beneficiaries of persons killed by that condition.[16]

Beyond three miles, the beneficiaries of all victims (except seamen killed through employer negligence, who were covered by the Jones Act) could recover wrongful death benefits under the provisions of DOHSA. That act, however, did not provide for recovery of survival benefits,[17] although recovery of such

14. Gillespie v. United States Steel Corp., 379 U.S. 148 (1964).

15. Since the nineteenth century, a seaman has been entitled to a warranty of seaworthiness from the vessel on which he served and its operator. Subsequent to the creation of this protection, the Supreme Court ruled that a non-seaman who was aboard a vessel doing the work of a member of the crew was entitled to the same warranty of seaworthiness as was a crew member. This decision came in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), thus giving rise to the designation "*Sieracki* seaman."

16. Moragne v. States Marine Lines, Inc., 398 U.S. at 401 n.15.

17. 46 U.S.C. § 762 (1920); G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 631 at 364 (2d ed. 1975); Barbe v. Drummond, 507 F.2d 794 (1st Cir. 1974); Dennis v. Gulf S. S. Corp., 453 F.2d 137 (5th Cir.), *cert. denied*, 409 U.S. 948 (1972).

benefits was sometimes permitted by "borrowing" the survival statute of a state with significant contacts with the accident and victims.[18]

The crazy-quilt pattern resulting from the common law rule, the limited Congressional response, and the "borrowing" of state wrongful death statutes produced a great deal of uncertainty and several intolerable anomalies. Among the latter were that: (1) the beneficiaries of a seaman killed within three miles could not recover if the accident was caused by unseaworthiness, but the beneficiaries of a *Sieracki* seaman could recover if state law afforded a remedy; and (2) whether beneficiaries of a seaman killed through unseaworthiness could recover depended upon whether the fatal accident occurred within or beyond territorial waters.[19]

Moragne—A New Common Law Remedy

In 1970 the Supreme Court in *Moragne* unanimously overruled eighty-four years and innumerable expressions of maritime common law prohibiting recovery in death cases except where permitted by statute, and declared that henceforth admiralty common law would grant such recovery. Justice Harlan was assigned the Herculean task of expressing with convincing logic the Court's reversal of form, and he responded with an opinion which ranks among the classics in maritime law.

The *Moragne* decision allowed recovery by beneficiaries of longshoremen and seamen killed within territorial waters as a result of the unseaworthy condition of a vessel. Events following *Moragne,* however, lessened the importance of the decision

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Section 765 of DOHSA provides that in the event of the death of a victim after suit has been filed to recover his personal injuries, his beneficiaries may be substituted in the action and may recover the damages to which they are entitled under DOHSA, *i.e.*, wrongful death damages. The section has not been interpreted as having any effect upon survival actions beyond three miles.

18. Dugas v. National Aircraft Corp., 438 F.2d 1368 (3d Cir. 1971); United States v. The S. S. Washington, 172 F. Supp. 905 (E.D. Va. 1959), *aff'd. sub nom.*, United States v. Texas Co., 272 F.2d 711 (4th Cir. 1959); Canillas v. Joseph H. Carter, Inc., 280 F. Supp. 48 (S.D. N.Y. 1968); Abbott v. United States, 207 F. Supp. 468 (S.D. N.Y. 1962); *In re* Gulf Oil Corp., 172 F. Supp. 911 (S.D. N.Y. 1959); McLaughlin v. Blidberg Rothchild Co., 167 F. Supp. 714 (S.D. N.Y. 1958).

19. Moragne v. States Marine Lines, Inc., 398 U.S. at 396; *see also* G. Gilmore & C. Black, *supra* note 17, § 6-32 at 36.

to these beneficiaries. First, the problem of the *Sieracki* seaman and his warranty of seaworthiness practically, if not actually, disappeared with the 1972 amendments to the Longshoremen's and Harbor Worker's Act.[20] Then, in *Usner v. Luckenbach Overseas Corp.*,[21] the Supreme Court aborted the budding doctrine of "instant unseaworthiness," thus reducing the number of instances in which a seaman's death was due to conduct classified as unseaworthiness. Since other wrongful death actions within territorial waters involving ordinary tort actions or seamen negligence claims were clearly within the reach of borrowed state statutes, *Moragne* would have had little lasting impact if it had been confined to territorial waters and if the damages it afforded (an issue not reached in *Moragne*) had not exceeded those provided by the Jones Act and DOHSA.

However, *Moragne* left unanswered several questions whose impact on maritime law could have been great and lasting. One such question was whether the *Moragne* remedy was limited to actions within three miles, or whether it applied beyond territorial waters, thus encroaching upon DOHSA. Another was whether *Moragne* covered the claims of a seaman's beneficiaries suing the seaman's employer for negligent conduct, thus invading the domain of the Jones Act. A third question was whether *Moragne* provided benefits not recoverable under DOHSA or the Jones Act. Finally, if *Moragne* did apply beyond three miles, or in seaman-employer negligence actions, and it permitted recovery of items of damages, or relief to beneficiaries, not allowed by those acts, would it supersede them? The answer to the first of these questions was relatively certain: if there is a common law in a jurisdiction, it logically applies throughout the territorial limits of the jurisdiction. Thus, the lower courts assumed that *Moragne* applied beyond three miles, although there was no affirmative expression to

20. 33 U.S.C. §§ 901 *et seq.* (1972). In particular note the amendments to §§ 903(a) and 905(a) and (b). These sections substitute a negligence action for the warranty of seaworthiness formerly owed by the shipowner to the maritime worker. Since the 905(b) negligence action, which is governed by land tort principles, should be encompassed within every wrongful death statute, the maritime common law wrongful death recovery would appear no longer necessary for actions by maritime workers against vessel owners.

21. 400 U.S. 494 (1971).

that effect by the Supreme Court until the *Higginbotham* decision.[22]

The Court decided the third question, and set the stage for resolution of the final question in *Sea-Land Services, Inc. v. Gaudet.*[23] There, a divided Court held that in an action involving death within territorial waters, the *Moragne* remedy included damages for loss of society, the kind of "non-pecuniary" damages not permitted under either the Jones Act or DOHSA. From this point, it was only a matter of time before the courts were presented with a *Moragne*/DOHSA clash: where a victim had been killed beyond three miles, could his survivors recover loss of society or other non-pecuniary damages? The first two appellate courts to receive the problem reached opposite conclusions; the First Circuit, in *Barbe v. Drummond,*[24] held that DOHSA prevailed and that the *Moragne-Gaudet* non-pecuniary benefits were not available. However, the Fifth Circuit, in *Law v. Sea Drilling Corp.,*[25] reached the opposite conclusion. The latter circuit was in "good company"; admiralty's preeminent scholars, Gilmore and Black, had suggested that *Moragne* eventually would make both DOHSA and the wrongful death provisions of the Jones Act superfluous.[26]

Higginbotham—NEW ANOMALIES

It was in this setting that the Supreme Court granted writs

22. *See* Barbe v. Drummond, 507 F.2d 794 (1st Cir. 1974); Spiller v. Thomas H. Lowe, Jr., & Assoc. Inc., 466 F.2d 903 (8th Cir. 1972); Sennett v. Shell Oil Co., 325 F. Supp. 1 (E.D. La. 1971). There is no clear pronouncement in *Higginbotham* that the *Moragne* remedy applies beyond three miles, and there are statements which may be construed as implying that it does not. Thus, the Court stated that "DOHSA governs wrongful death recoveries on the high seas . . . ." 98 S. Ct. at 2014. Similarly, the majority commented about the "difference between applying one national rule to fatalities in terrritorial waters and a slightly narrower national rule to accidents farther from land." *Id.* at n.18. All of the other significant language in the decision implies that DOHSA governs only when it is specifically applicable, and that in those areas about which DOHSA is silent, admiralty common law would be dispositive. That language, and the illogic in accepting a common law rule that is applicable by its own force only in certain geographical areas of the jurisdiction which adopts it, leads to the assumption that there is no merit to the argument that in *Higginbotham* the Court was holding that *Moragne* applied only in territorial waters.

23. 414 U.S. 573 (1974).

24. 507 F.2d 794 (1st Cir. 1974).

25. 510 F.2d 242 (5th Cir.), *on rehearing,* 523 F.2d 793 (5th Cir. 1975).

26. G. GILMORE & C. BLACK, *supra* note 17, at § 6-33.

in a subsequent Fifth Circuit case, *Higginbotham,* and handed down a surprising decision, which concluded in these terms:

> The Death on the High Seas Act . . . announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival and damages . . . . The Act does not address every issue of wrongful death law, . . . but when it does speak directly to a question, the courts are not free to "supplement" Congress' answer so thoroughly that the Act becomes meaningless.[27]

Since Congress in DOHSA had "spoken directly" to the issue of non-pecuniary damages, the courts were not free to supplement the DOHSA remedy by allowing such damages through *Moragne.*

The command of *Higginbotham* is clear: common law in derogation of a statute must yield to the statute.[28] However, application of the command presents new problems, such as:

1. When has Congress "spoken directly" to issues of wrongful death or survival?

2. When does allowance by the common law of a remedy not authorized by congressional act "so thoroughly [supplement the Act] that the Act becomes meaningless?"

3. Finally, if the differences between the maritime common law and statutory remedies produce the same kinds of anomalies as those resulting from the federal and state statutory remedies in pre-*Moragne* days, may these anomalies persist? If not, since the statutes must prevail, must the common law yield?

All of these questions will be answered; the only issue is by whom. Congress, of course, may respond by adopting a general death action applicable to all deaths within the maritime jurisdiction, including those within territorial waters. If Congress does act, it should reconsider some of its earlier decisions

27. 98 S. Ct. at 2015.

28. The difficulties involved in maintaining a common law remedy in the face of a legislative scheme for recovery could have been realized by a review of the Georgia experience. *See* Malone, *The Genesis of Wrongful Death,* 17 STAN. L. REV. 1043 (1965). Since *Moragne,* at least one state, Massachusetts, has recognized a common law wrongful death remedy even though there was a preexisting statutory remedy. *See* Gaudette v. Webb, 362 Mass. 60, 284 N.E.2d 222 (Mass. 1972).

in DOHSA and the Jones Act, such as those denying recovery for non-pecuniary damages, utilizing statutes of limitation; and using language which denies recovery to the beneficiaries of a victim who settles his claim and then dies of causes resulting from the accident.[29] The legislative body may also reassess the wisdom of providing differing statutes of limitation, differing classes of beneficiaries, and differing elements of recovery for negligence and unseaworthiness, a result now produced by the combination of the Jones Act and DOHSA.

If Congress does not act, the courts must answer the questions, and given the great volume of maritime wrongful death litigation in recent years, the answers should not be long in coming. Many problems and anomalies will have to be considered.

1. The Beneficiaries

There appears to be no conflict between DOHSA and the maritime common law (hereinafter *Moragne*); the same beneficiaries take as a group under each theory of recovery.[30] However, a major anomaly may occur in application; DOHSA beneficiaries need not be dependent, but may only recover pecuniary loss,[31] while *Moragne* beneficiaries may not have to be dependent,[32] but can recover non-pecuniary loss, *i.e.*, loss of society.[33] Thus, if *Gaudet* remains intact, non-dependent relatives may be able to recover loss of society under *Moragne*, while not being able to recover any damages under DOHSA.

Jones Act beneficiaries take in classes, each exclusive of subsequent classes.[34] There is potential for conflict with

29. The Supreme Court reached the opposite conclusion in interpreting the common law wrongful death remedy in *Gaudet*. For a discussion of the status of the law on this issue, see *Gaudet*, 414 U.S. at 579.

30. 46 U.S.C. § 761 (1920); G. GILMORE & C. BLACK, *supra* note 17, § 6-30 at 361; The Four Sisters, 75 F. Supp. 399 (D. Mass. 1947).

31. *In re* Cambia S.S. Co., 353 F. Supp. 691 (D.C. Ohio 1973), *aff'd*, 505 F.2d 517 (6th Cir. 1974), *cert. denied*, 420 U.S. 975 (1975); Dugas v. National Aircraft Corp., 438 F.2d 1386 (3d Cir. 1971), *on remand*, 34 F. Supp. 324; Moore-McCormack Lines, Inc. v. Richardson, 295 F.2d 583 (2d Cir. 1961); The City of Rome, 48 F.2d 333 (S.D. N.Y. 1930); Noel v. Linea Aeropostal Venezolana, 260 F. Supp. 1002 (S.D. N.Y. 1966).

32. *See, e.g.*, Consolidated Machines, Inc. v. Protein Products Corp., 428 F. Supp. 209 (M.D. Fla. 1976).

33. Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974).

34. 45 U.S.C. § 51 (1939), *incorporated by* 46 U.S.C. § 688 (1920).

Moragne, because *Moragne* beneficiaries apparently take as a group, and beneficiaries in a higher class do not appear to preempt recovery by beneficiaries in a lower class. The issue then is whether *Moragne* supplements the Jones Act to a greater extent than it supplements DOHSA. The answer is not free from doubt. Actually, the Jones Act may not represent "Congress' considered judgment" on wrongful death recovery for seamen; it was passed primarily to afford a personal injury action for negligence, and was effected by a simple "wholesale" adoption of the Federal Employees Liability Act (FELA), previously passed by Congress to afford a remedy for railway employees.[35] If the Jones Act does represent Congress' "considered judgment," then Congress has spoken to the question, for the FELA clearly designates the beneficiaries, the order in which they take, and the exclusivity of recovery.

2. *Non-Pecuniary Damages*

Where DOHSA applies, non-pecuniary damages seem to be foreclosed by *Higginbotham.* However, while DOHSA expressly limits recovery to pecuniary damages,[36] the Jones Act contains no similar explicit limitation; it is the courts that have interpreted the FELA, and hence the Jones Act, as limiting recovery to pecuniary damages. Thus, it is arguable that even if the Jones Act represents Congress' "considered judgment," that body has not "spoken directly to the question" of recovery of non-pecuniary damages.[37] However, it may be equally argu-

35. "Congress, when it passed the Jones Act, apparently did not want to waste any time on thinking about the special problems of maritime workers. As a thought saving device, the draftsman hit on the odd expedient of incorporating another statute by reference." G. GILMORE & C. BLACK, *supra* note 17, § 6-26 at 351. Gilmore and Black also describe the statute as a little noticed provision, unrelated to the balance of the Merchant Marine Act of 1920, which did not draw much attention on its way through committee to the floor of the House and the Senate. *Id.* at § 6-26, at 327.

36. "The recovery in such suit shall be a fair and just compensation for the pecuniary loss . . . ." 46 U.S.C. § 762 (1920); *see also* the cases listed in note 31, *supra.* Unlike DOHSA, the Jones Act does not expressly limit recovery to pecuniary damages.

37. The Jones Act provides that "in case of the death of any seaman as a result of . . . personal injury, the personal representative of such seaman may maintain an action for damages at law . . . ." 46 U.S.C. § 688 (1920). The FELA provides that, "Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the

able that Congress' inaction in response to the Supreme Court's interpretation of the FELA and the Jones Act as denying recovery of non-pecuniary benefits has ripened into a "considered judgment" on the issue.

In the first reported post-*Higginbotham* case, a panel of the Fifth Circuit concluded that *Moragne* may not be utilized to supplement the Jones Act and permit recovery of non-pecuniary damages.[38] Judge Rubin, speaking for the court, first noted that one of the decedents in *Higginbotham,* Shinn, was a Jones Act seaman; thus, he concluded, the Supreme Court's denial of damages for loss of society to all of the plaintiffs carried with it a determination, *sub silentio,* that the beneficiaries of a Jones Act seaman killed beyond three miles could not recover loss of society under *Moragne* and *Gaudet*. Then Judge Rubin concluded that permitting recovery of loss of society by beneficiaries of a Jones Act seaman "merely because the accident occurred within territorial waters" would be inconsistent with the policy adopted by the Court in *Higginbotham*, because it would differentiate between the statutorily imposed limitation on damages created by DOHSA and the judicially created limitation imposed by the Jones Act.[39] Such a result would also create "two separate Jones Act remedies, each applicable only within its own geographical sphere."[40]

The Court's conclusion in *Ivy,* although compelling, was not compelled. In fact, the Fifth Circuit's decision may not survive its own scrutiny, since a rehearing en banc has been granted. Nowhere in *Higginbotham* did the Supreme Court allude to the Jones Act status of Shinn and his beneficiaries, and this omission makes it at least arguable that *Higginbotham* does not represent the Supreme Court's "considered judgment" on the issue, to borrow a phrase. Similarly, it is not at all clear that the Court will not tolerate two

surviving widow or husband and children of such employee." 45 U.S.C. § 51 (1939). In *Michigan Central R.R. Co. v. Vreeland,* 227 U.S. 59 (1913), the Supreme Court interpreted the FELA wrongful death provision, adopted for seamen by the Jones Act, as limiting recovery to financial or pecuniary loss.

38. Ivy v. Security Barge Lines, Inc., 585 F.2d 732 (5th Cir. 1978).

39. *Id.* at 738. The Fifth Circuit's conclusion that the Supreme Court "failed to differentiate" is technically correct, but it should be noted that the Supreme Court made no reference whatsoever to the Jones Act in its *Higginbotham* decision.

40. *Id.*

separate Jones Act remedies separated by the line between territorial waters and the high seas. The Court has tolerated a similar bifurcation in the area of unseaworthiness, which is simply another part of the same remedy,[41] and in *Higginbotham* the majority expressed a lack of concern about "minor threat[s] to . . . uniformity."[42] Consequently, the *Ivy* court may have read too much into the Court's silence in *Higginbotham*.

3. The Limitations Period

Maritime common law applies the doctrine of laches to bar stale claims involving unreasonable delay and prejudice to the defendant.[43] Both the Jones Act and DOHSA provide prescriptive periods,[44] and the language of *Higginbotham* indicates that the Court would not welcome an argument that a claim prescribed under either statute could nevertheless be kept alive by coupling the Jones Act or DOHSA claim with a *Moragne* claim and applying the doctrine of laches.[45] However, another anomaly results: a seaman's claim for unseaworthiness is barred after two years if it occurred beyond three miles, but the same claim may still be viable if it occurred within three miles.

4. Survival Actions

The Jones Act provides a general survivial action—regardless of whether the decendent filed suit before death, his personal representative may recover the damages he could have recovered if he had lived.[46] DOHSA, however, contains

41. Mobil Oil Corp. v. Higginbotham, 98 S. Ct. at 2015 & n.20.

42. *Id.* at 2014.

43. Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963); Czaplicki v. S.S. Hoegh Silvercloud, 351 U.S. 525 (1956); Garnder v. Panama R.R. Co., 342 U.S. 29 (1951).

44. DOHSA provides for a two year statute of limitations period. 46 U.S.C. § 763 (1920). When the Jones Act was adopted in 1920, the period of limitations for the FELA was two years. That period was extended to three years in 1939, 45 U.S.C. § 56, and was incorporated into Jones Act actions. McAllister v. Magnolia Petroleum Co., 357 U.S. 221, 225 n.6 (1958).

45. The Court in *Higginbotham* expressly stated that Congress, through DOHSA, has announced its considered judgment on the applicable limitations period outside territorial waters. 98 S. Ct. 2010 (1978).

46. The Jones Act provides that "in case of death of any seaman as a result of any . . . personal injury the personal representative of such seaman may bring an

no general survival provision, but does have a "non-abatement" provision, which provides:

> If a person die as the result of such wrongful act, . . . during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, . . . the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the recovery of the compensation provided in section 762 of this title.[47]

This seldom-cited provision apparently provides that upon the victim's death his pending personal injury action may be converted into a DOHSA wrongful death action by his beneficiaries. However, it has not been applied to preclude the maintenance of a separate survival action by a personal representative when death ensues before any judicial proceedings have commenced.

The Supreme Court has not yet spoken to the issue of whether admiralty common law permits recovery of survival damages,[48] but the lower courts have unanimously answered the question in the affirmative.[49] Assuming there is a general survival action in maritime common law, it will not conflict

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action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable." 46 U.S.C. § 688 (1920). The statutes referred to in the Jones Act are the wrongful death and survival provisions of the Federal Employer's Liability Act (FELA), 45 U.S.C. §§ 51-60 (1939). Under section 59 of the FELA, "any right of action given . . . to a person suffering injury shall survive to his or her personal representative . . . ." 45 U.S.C. § 59 (1939). Section 59 allows recovery for "the wrong to injured person and is confined to his personal loss and suffering before he died . . . ." St. Louis Iron Mountain & Southern Ry. Co. v. Craft, 237 U.S. 648, 658 (1915). *See also* Cox v. Roth, 348 U.S. 207 (1955).

47. 46 U.S.C. § 765 (1920).

48. In *Moragne*, the Court restricted its comments to whether an action for wrongful death existed under admiralty common law. In *Gaudet*, the Court was exclusively concerned with whether wrongful death damages could be recovered after the decedent had recovered for his disability, pain and suffering, and loss of earnings. In *Higginbotham*, the Supreme Court held that DOHSA's provision limiting recovery in wrongful death cases to pecuniary loss could not be supplemented by the admiralty common law wrongful death remedy allowing recovery of non-pecuniary loss.

49. Solomon v. Warren, 540 F.2d 777 (5th Cir. 1976); Law v. Sea Drilling Corp., 510 F.2d 242 (5th Cir. 1975); Barbe v. Drummond, 507 F.2d 794 (1st Cir. 1974); Spiller v. Thomas M. Lowe, Jr. & Assoc., Inc., 466 F.2d 903 (8th Cir. 1972); Dennis v. Central Gulf S.S. Corp., 453 F.2d 137 (5th Cir. 1972), *cert. denied*, 409 U.S. 948 (1972).

with the Jones Act. The major issue is whether any common law survival action conflicts with the provisions of DOHSA. Put another way, the issue is whether the limited non-abatement and conversion provisions of section 765 represent Congress' "considered judgment" on the entire question of survival actions beyond three miles.

The possible conflict between any survival action at admiralty common law and section 765 could be avoided by a Supreme Court decision denying survival damages under maritime common law. Such a decision arguably would do no violence to the policies which should dictate the path of maritime tort law. It is one thing to say that the beneficiaries of a person killed in maritime employment can recover nothing; it is quite another to say that those beneficiaries can not recover, in addition to the damages which they have sustained as a result of the death, the "windfall" of the damages the victim could have recovered if he had lived. A remedy for the former may be necessary to encourage maritime employment; a remedy for the latter seemingly would have little bearing on that policy.

If admiralty common law does not provide for survival benefits, the courts may continue the practice of "borrowing" state statutes. However, if common law does provide such a remedy, but DOHSA precludes its application beyond three miles because Congress is found to have considered and rejected any survival beyond section 765, then it appears illogical to hold that common law can "borrow" a state statute to afford such a remedy.

ALTERNATIVE COURSES

Higginbotham precludes recovery of non-pecuniary damages for wrongful death beyond three miles. The Jones Act, however, does not necessarily represent Congress' considered judgment on recovery of non-pecuniary damages, and the Court might permit *Moragne* to supplement the Jones Act by permitting recovery of loss of society. This would produce the anomaly that the beneficiaries of a seaman killed by negligence or unseaworthiness within three miles could recover for loss of society, but could not do so if he was killed by unseaworthiness beyond three miles. These types of inconsistencies—"minor

threat[s] to uniformity"[50]—may not bother the post-*Higginbotham* Court and thus, may be allowed to develop. However, there is another possibility. *Moragne* was premised in part on uniformity of recovery, and since *Moragne* damages can not be awarded where a federal statute provides otherwise, uniformity can only be achieved by a revision of the elements of recoverable damages at common law. *Gaudet,* it must be remembered, was a five to four decision, and the Court was hard-pressed to distinguish between the types of non-pecuniary damages it was permitting (loss of society) and other non-pecuniary damages, such as grief,[51] for which recovery was denied. One possible aftermath of *Higginbotham* could be that *Gaudet* will be overruled, and wrongful death recovery under *Moragne* will be limited to pecuniary damages.

Another possibility is that the Court will ignore the inconsistency between permitting recovery of non-pecuniary damages within three miles but not beyond, because it does not think that the practical effect is significant.[52] Of course, much

50. In *Higginbotham,* the majority wrote, "We recognize today, as we did in *Moragne,* the value of uniformity, but a ruling that DOHSA governs wrongful death recoveries on the high seas poses only a minor threat to the uniformity of maritime law." 98 S. Ct. at 2014.

51. In what has been called "the least convincing footnote in the history of our jurisprudence," G. GILMORE & C. BLACK, *supra* note 17, at 372, the majority in *Gaudet* distinguished loss of society from non-recoverable damages for grief with this language:

> Loss of society must not be confused with mental anguish or grief, which is not compensable under the maritime wrongful-death remedy. The former entails the loss of positive benefits, while the latter represents an emotional response to the wrongful death. The difference between the two is well expressed as follows:
>
> "When we speak of recovery for the beneficiaries' mental anguish, we are primarily concerned, not with the benefits they have lost, but with the issue of compensating them for their harrowing experience resulting from the death of a loved one. This requires a somewhat negative approach. The fundamental question in this area of damages is what deleterious effect has the death, as such, had upon the claimants? In other areas of damage, we focus on more positive aspects of the injury such as what would the decedent, had he lived, have *contributed* in terms of support, assistance, training, comfort, consortium, etc. . . . The great majority of jurisdictions, including several which do allow damages for other types of non-pecuniary loss, hold that the grief, bereavement, anxiety, distress, or mental pain and suffering of the beneficiaries may not be regarded as elements of damage in a wrongful death action."

Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 585 n.17 (1974) (emphasis in original) (quoting S. SPEISER, *supra* note 6, § 3.45 at 223).

52. The majority in *Higginbotham,* perhaps acknowledging the limited impor-

of what is recoverable under loss of society may be subject to purchase upon the open market and thus treated as a "pecuniary loss"; where it is not, such as the loss of love and affection, it is difficult to distinguish such loss from compensable loss of "services" such as care, guidance, and training. Attorneys engaged in litigating these kinds of cases, however, may feel that there is a great practical effect in providing the judge with an additional element of damages, or providing the jury with an additional damage charge and an additional blank in the special verdict. Certainly, the six-figure sums which would otherwise have been awarded for loss of society in *Higginbotham*[53] were not deemed insignificant by the litigants. Unless awards for loss of society are limited to insignificant sums, a possibility which the Court alluded to in *Higginbotham,*[54] the practical effect of allowing their recovery could be very great indeed.

CONCLUSION

In *Moragne,* Justice Harlan dwelled upon the anomalies which had arisen in maritime wrongful death law, because of the lack of a common law theory of recovery. Now, eight years after the Court created a common law right of recovery, the area remains riddled with anomalies. To any scholar who concluded in 1970 that the Court would no longer tolerate anomalies, *Higginbotham* must have come as a shock and could only mean that *Gaudet* could not persist. But the anomalies of 1970 may have troubled the Court simply because in a limited but important situation—a seaman or *Sieracki* seaman killed by unseaworthiness within territorial waters—there was a possibility of no recovery at all, a result clearly counterproductive to federal maritime policy. Creating a maritime common law with specified elements of damages remedied that situation, but any inconsistencies as to the amount of recovery—

tance of the issue, wrote: "It remains to be seen whether the difference between awarding loss of society damages under Gaudet and denying them under DOHSA has great practical significance. It may be argued that the competing views . . . can best be reconciled by allowing an award that is primarily symbolic . . . ." 98 S. Ct. at 2015 n.20.

53. 98 S. Ct. at 2012.

54. See note 51, *supra.*

admittedly a factor of much less importance to maritime policy—were left to prior or subsequent Congressional action.[55] Certainly, the Court has tolerated a more startling anomaly, the different treatment for "seamen" aboard "jack-up" rigs and "laborers" on fixed rigs, doing the same work in the same place and subject to the same maritime perils.[56]

It is curious to note that Justice Harlan, rejecting in *Moragne* the plea of stare decisis, commented about the uncertainty that existed because there was no common law remedy.[57] *Higginbotham* seems to assure us that the creation of a common law remedy will cause uncertainty for some time to come.

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55. Thus, in footnote eighteen of *Higginbotham*, the Court wrote:

> *Moragne* proclaimed the need for uniformity in a far more compelling context. When *Moragne* was decided, fatal accidents nearer shore might yield more generous awards, or none at all, depending on the law of the nearest State. The only disparity that concerns us today is the difference between applying one national rule to fatalities in territorial waters and a slightly narrower national rule to accidents farther from land.

98 S. Ct. at 2014 n.18.

56. In a series of cases beginning with *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959), the Fifth Circuit has held that employees working on movable oil-drilling rigs (jack-up rigs) and the like may qualify as Jones Act seamen. *Se also* Barrios v. Louisiana Constr. Materials Co., 465 F.2d 1157 (5th Cir. 1972). On the other hand, under maritime common law and the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* (1953), permanently affixed offshore installations are removed from admiralty law and treated as "artificial islands." Rodrigue v. Aetna Cas. and Sur. Co., 395 U.S. 352 (1969). *See also* G. GILMORE & C. BLACK, *supra* note 17, § 6-21 at 328; Marine Drilling Co. v. Austin, 363 F.2d 579 (5th Cir. 1966); Producers Drilling Co. v. Gray, 361 F.2d 432 (5th Cir. 1966).

57. Justice Harlan wrote:

> Nor do either of the other relevant strands of *stare decisis* counsel persuasively against the overruling of *The Harrisburg*. Certainly the courts could not provide expeditious resolution of disputes if every rule were fair game for *de novo* reconsideration in every case. However, the situation we face is far removed from any such consequence as that. We do not regard the rule of *The Harrisburg* as a closely arguable proposition—it rested on 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*, has produced litigation-spawning confusion in an area that should be easily susceptible of more workable solutions. The rule has had a long opportunity to prove its acceptability, and instead has suffered universal criticism and wide repudiation. To supplant the present disarray in this area with a rule both simpler and more just will further, not impede, efficiency in adjudication. 398 U.S. at 404-05.