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vide further that the amount disallowed still be used as a measuring rod to determine the amount allowable within the percentage limitation would correct this defect yet maintain the essential simplicity of the solution.

STATE WRONGFUL DEATH STATUTES AS APPLIED IN MARITIME ACTIONS

Recent decisions of the Supreme Court of the United States in the field of maritime law have been optimistically regarded as ". . . several . . . that [settle] long debated issues of admiralty law." [1] Whether this optimism is justified remains to be answered by future litigation. They may in fact "settle" issues, but possibly at the expense of opening many new points of debate; there is little doubt, however, that their impact will be extensively felt. This note will attempt to indicate their likely effects and will concern itself with problems arising from the practice in maritime law of "borrowing" state wrongful death statutes where death occurs on the navigable waters of a state.

A framework will first be provided within which to consider this specific problem by summarily tracing the three main concepts involved: (1) the warranty of seaworthiness; (2) persons to whom the warranty is owed; and (3) recoveries for death in admiralty. Following this will be a discussion of the *Skovgaard* and *Halecki* cases recently decided by the Supreme Court.[2]

In this approach there are immediate pitfalls—each of the preliminary topics, for example, is worthy of extensive individual treatment. Secondly, the topics of warranty of seaworthiness and individuals to whom it is owed are of course intertwined in their development, and separate consideration of each is attempted solely for the sake of clarity. In addition, the lengthy introductory material is presented with a view toward an understanding of each concept before engaging in the main discussion—that of their interplay in the specific death actions which are our primary interest.

Introduction

There was no recovery for wrongful death under the general maritime law.[3] Recovery is now authorized by several federal stat-

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[1] N.Y. Times, Feb. 25, 1959, p. 62, col. 5.

[2] United N.Y. & N.J. Sandy Hook Pilots Ass'n v. Halecki, 358 U.S. 613 (1959); The Tungus v. Skovgaard, 358 U.S. 588 (1959).

[3] The Harrisburg, 119 U.S. 199 (1886).

utes, and indirectly by wrongful death statutes of the various states. The latter remedy has grown, by federal decisional law using a concept of "borrowing," to fill the void in the maritime law. In the federal area, there are the death provisions in the Jones Act [4] and the Longshoremen's and Harbor Workers' Act.[5] The latter involves recovery under the workmen's compensation concept rather than a plenary action. As such, it falls outside of the "recoveries" with which we are concerned.

For deaths occurring beyond a marine league from shore, Congress, in 1920, provided the Death on the High Seas Act.[6] Within this marine league, *i.e.,* in the territorial waters of a state, the individual state's death statutes are applicable.

Seaworthiness

> The eventful development of the doctrine of unseaworthiness in [the Supreme] . . . Court is familiar history. Although of dubious ancestry, the doctrine was born with The Osceola [7] and emerged full-blown forty years later in Mahnich v. Southern S.S. Co.,[8] as an absolute and nondelegable duty which the owner of a vessel owes to the members of the crew who man her.[9]

Certainly in the field of personal injury this "absolute, nondelegable" duty to provide a vessel reasonably fit to perform its functions is, as the Court indicates, of "dubious" ancestry.[10]

Prior to *The Osceola,*[11] there were cases in which such a duty was mentioned as being owed to mariners,[12] but these were situations in which mariners sought to obtain only their wages. As a defense to these claims vessel owners would allege nonperformance by the seaman who could then admit but justify the nonperformance on the ground that the vessel owner failed to provide safe appliances with which to accomplish the particular job, or, in effect, failed to provide a seaworthy vessel. Thus, the mariner's nonperformance, justified by the vessel's "unseaworthiness," would not prejudice his wage demands. Our concern, however, is with the warranty of seaworthiness for the breach of which an action for damages will lie.

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[4] 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1952).
[5] 44 Stat. 1424 (1927), 33 U.S.C. § 901 (1952).
[6] 41 Stat. 537 (1920), 46 U.S.C. § 761 (1952).
[7] 189 U.S. 158 (1903).
[8] 321 U.S. 96 (1944).
[9] United N.Y. & N.J. Sandy Hook Pilots Ass'n v. Halecki, 358 U.S. 613, 616 (1959).
[10] For an exhaustive discussion of seaworthiness see Tetrault, *Seamen, Seaworthiness, and the Rights of Harbor Workers,* 39 CORNELL L.Q. 381 (1954).
[11] 189 U.S. 158 (1903).
[12] See, *e.g.,* Dixon v. The Cyrus, 7 Fed. Cas. 755 (No. 3930) (D. Pa. 1789).

It is this warranty of which Mr. Justice Brown speaks in his reference to the owner's obligation of seaworthiness in *The Osceola.*[13]

Although Mr. Justice Brown apparently premises the duty on negligence,[14] the proposition is generally cited as the original definitive American statement on the vessel owner's absolute duty to provide a seaworthy vessel.[15] Actually, it took forty years for a case to hold the duty absolute.[16] The finding of actual negligence in individual cases appears to have caused the lengthy interim. Certainly, there was no hesitancy to impose liability without fault upon the vessel owner. In fact, after *The Osceola,* cases referred in dictum to the absolute duty of the vessel owner to provide a seaworthy vessel.[17]

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[13] 189 U.S. 158 (1903). "Upon a full review, however, of English and American authorities upon these questions, we think the law may be considered as settled upon the following propositions:

. . . .

2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship." *Id.* at 175.

[14] The case cited by Mr. Justice Brown for this proposition is Scarff v. Metcalf, 107 N.Y. 211 (1887), which involved a failure on the part of the master of a vessel to allow his injured mate to be hospitalized. This failure to follow a doctor's directions resulted in an amputation for which the vessel owner was held liable. The court discussed the obligation of a vessel owner to provide medical care for the seaman. It distinguished the case from one in which the master and mate would be fellow servants. Here, said the court, the master was performing the duty of the owners. His negligence is theirs since "the master stands as the agent and representative of the owners. . . ." *Id.* at 216.

In *The Osceola* the Court, following the existing maritime law, held that a vessel owner was not liable for the operating negligence of the master. Neither the cases cited nor the proposition itself appears to indicate an intent to establish an absolute duty to provide a seaworthy vessel.

Other cases cited by Mr. Justice Brown in the decision also premised liability on negligence. For example, Couch v. Steel, 3 El. & Bl. 402, 118 Eng. Rep. 1193 (K.B. 1854), in which a count for unseaworthiness was successfully demurred to because of "lack of knowledge or deceit"; Hedley v. Pinckney & Sons, 7 Asp. M.Y.C. 135, [1894] A.C. 222(E), in which the court stated: "[T]he obligation [of] . . . the owner and the master, and every agent charged with the loading of the ship or the preparing thereof for sea, [is that they] *shall use all reasonable means to insure the seaworthiness of the ship for the voyage. . . .*" *Id.* at 228. (Emphasis added.) In light of the foregoing, it seems that if Mr. Justice Brown meant to establish an absolute liability, he would have expressly stated it.

[15] See, *e.g.,* Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946). "That an owner is liable to indemnify a seaman for an injury caused by the unseaworthiness of a vessel . . . has been settled law . . . since *The Osceola. . . .*" *Id.* at 90.

[16] Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944).

[17] See, *e.g.,* Carlisle Packing Co. v. Sandanger, 259 U.S. 255 (1922); The H.A. Scandrett, 87 F.2d 708 (2d Cir. 1937).

The doctrine of seaworthiness was originally adopted from the maritime law relating to marine insurance [18] and carriage of goods by sea.[19] The former required a "seaworthy" vessel as a prerequisite to underwriting. The latter implied in every contract of affreightment a warranty that the vessel was adequately outfitted so as to be able to withstand the perils of ocean voyage encountered in fulfilling the contractual obligations. These origins led to later problems. Often, in a personal injury case, a court would define the doctrine of unseaworthiness and then cite cargo cases to substantiate its definition.[20]

Although the authorities cited were often inapplicable, the end sought was effectively achieved, and the doctrine of unseaworthiness, as an absolute and nondelegable duty, is now firmly established.[21] The fact that it imposes liability without fault must be borne in mind when state death statutes are sought to be utilized to create a right of recovery. There has been little trouble in the past in applying these to maritime torts involving negligence. The statutes were clearly meant to apply to negligent acts and it was but a short step to their extension to maritime as well as terrene negligence. Where, as here, a liability without fault unique to the maritime law—seaworthiness—is involved, such extension is less simple.

Persons to Whom the Duty Is Owed

Before 1945, seamen were apparently the only individuals owed the duty of being provided with a seaworthy vessel. Actually, since seaworthiness prior to this was presumably premised on negligence, there was no great incentive for other groups to seek admission to the favored class. Unlike the seaman, who historically had been denied a cause of action for negligence against his employer,[22] others not similarly handicapped could simply bring an ordinary negligence

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[18] See, *e.g.*, Hedley v. Pinckney & Sons, 7 Asp. M.Y.C. 135, [1894] A.C. 222(E). "The word 'seaworthy' is a well-known term in shipping law, and has a perfectly definite and ascertained meaning. It is used to describe the condition in which a vessel insured under a voyage policy is bound to be on leaving port if the contract of insurance is to be effectual against the underwriter." [1894] A.C. at 227.

[19] See, *e.g.*, Marine Ordinances of Louis XIV, Title Third, Art. XII (1681), 30 Fed. Cas. 1203 (1897). For present statements concerning the applicability of seaworthiness to cargo, see The Harter Act, 27 Stat. 445 (1893), 46 U.S.C. §§ 190-96 (1952); Carriage of Goods by Sea Act, 49 Stat. 1207 (1936), 46 U.S.C. §§ 1300-15 (1952).

[20] See, *e.g.*, Carlisle Packing Co. v. Sandanger, 259 U.S. 255, 259 (1922), where Mr. Justice McReynolds cited two cargo cases, The Silvia, 171 U.S. 462 (1898), and The Southwark, 191 U.S. 1 (1903), in support of a definition of seaworthiness in a personal injury action.

[21] See United N.Y. & N.J. Sandy Hook Pilots Ass'n v. Halecki, 358 U.S. 613 (1959). ". . .[T]he doctrine . . . emerged . . . as an absolute and nondelegable duty. . . ." *Id.* at 616.

[22] See GILMORE & BLACK, ADMIRALTY 248-50, 279-80 (1957).

action without additionally alleging an unseaworthy condition. The seaman, of course, had to successfully allege such a condition to recover. However, with the advent of seaworthiness as imposing liability without fault, the impetus was provided for mariners outside the seaman category to press for inclusion within the benefited class.

In 1920 the Jones Act[23] was passed by Congress to provide a seaman with a cause of action in negligence against his employer, usually the vessel owner. Thereafter, with respect to personal injury actions, the positions of seamen, longshoremen and harborworkers began to converge.

The seaman now had a cause of action for negligence to accompany his existing action for unseaworthiness. Then, in a series of Supreme Court cases,[24] longshoremen and many harborworkers were brought within that group of persons to whom the duty to provide a seaworthy vessel was owed. The explanation for the extension was that these workers were doing the work formerly performed by seamen. Modern technical advancement, complexity of vessel operation and the resultant specialization of labor should not work to limit the scope of the vessel owner's prior duty to all individuals in the ship's service. As a result, seamen, longshoremen and certain categories of harborworkers may now proceed against the vessel owner on either or both theories—negligence and unseaworthiness.

The different periods of limitation may also play an important part in electing a remedy. Where the negligence action may be extinguished due to passage of the statutory period of limitation, the count for unseaworthiness may remain extant, due to laches as applied in admiralty. However, if passage of time precludes the negligence action, failure to fall within the group owed the duty of a seaworthy vessel would still preclude any recovery.

The key difficulty in this area is the determination of just which workers are "doing work traditionally done by seamen," so as to belong to the favored group.[25]

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[23] 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1952).

[24] The idea of individuals other than seamen themselves being entitled to the same treatment as actual seamen began in International Stevedoring Co. v. Haverty, 272 U.S. 50 (1926), in which Mr. Justice Holmes indicated that loading and discharging cargo was a function "formerly rendered by the ship's crew." *Id.* at 52. Although the statement was made in order to enable longshoremen to come within the Jones Act provisions, it was later utilized in Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946), to extend unseaworthiness to longshoremen, and in Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953), to certain categories of longshoremen.

[25] See United N.Y. & N.J. Sandy Hook Pilots Ass'n v. Halecki, 358 U.S. 613 (1959) (dissenting opinion).

Recoveries for Wrongful Death in Admiralty

As previously mentioned, there was no recovery for death in the general maritime law.[26] State statutes were, however, early utilized by admiralty courts to permit recovery for wrongful death.[27] This policy was in conformity with the admiralty practice allowing state law to supplement the maritime law where it is neither in conflict with, nor will have an adverse effect upon, the desired uniformity of the maritime law.

Originally, the question of which "death act" would apply when death occurred outside the territorial waters of a state was answered by applying the death act of the state where the vessel was registered.[28] Subsequent federal legislation curtailed the applicability of the state statutes. In 1920 the Jones Act[29] and the Death on the High Seas Act[30] were passed. In the Jones Act, the seaman was not only provided with a cause of action for negligence, but his representatives were given a right to recover for his negligently caused wrongful death, all of which was pursuant to the Federal Employers' Liability Act[31] which the Jones Act made applicable to seamen.[32]

It should be noted that the death provision in the Jones Act is limited to "negligently caused deaths," which excludes recovery under it for unseaworthiness.[33] This legislation precluded the application of state statutes to individuals affected by the act, limiting their recovery to the federal statute.[34]

The Death on the High Seas Act[35] affected an area rather than individuals. It became the basis of recovery for any death occurring beyond a marine league from any state—also, in effect, excluding the subsequent application of state death acts to the high seas. If the Death on the High Seas Act were made applicable to all navigable waters it would result in the elimination of the application of state death acts in admiralty. The legislative intent was, however, to leave the individual state's death statute effective within its own territorial waters.[36]

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[26] The Harrisburg, 119 U.S. 199 (1886).

[27] See The Hamilton, 207 U.S. 398 (1907) (Delaware wrongful death statute applied to injury causing death occurring at sea).

[28] *Ibid.*

[29] 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1952).

[30] 41 Stat. 537 (1920), 46 U.S.C. § 761 (1952).

[31] 35 Stat. 65 (1908), 45 U.S.C. §§ 51-60 (1952).

[32] See GILMORE & BLACK, ADMIRALTY § 6-29 (1957).

[33] Kunschman v. United States, 54 F.2d 987 (2d Cir. 1932).

[34] Lindgren v. United States, 281 U.S. 38 (1930).

[35] 41 Stat. 537 (1920), 46 U.S.C. § 761 (1952).

[36] See The Tungus v. Skovgaard, 358 U.S. 588 (1959). "The legislative history of the Death on the High Seas Act discloses a clear congressional purpose to leave 'unimpaired the rights under State Statutes as to deaths on waters within the territorial jurisdiction of the States.' S. Rep. No. 216, 66th Cong., 1st Sess. 3; H.R. Rep. No. 674, 66th Cong., 2d Sess. 3." *Id.* at 593.

The third statute effecting recoveries for death in the maritime law is the death provision in the Longshoremen's and Harborworkers' Act.[37]

The Jones Act and the Longshoremen's Act provide the exclusive recovery for death between, respectively, a seaman's representatives and his employer, and longshoremen's and harborworkers' representatives and their employers; these acts remain exclusive, regardless of whether the tort on which the complaint is based occurred within or beyond a marine league from shore.

Although the above statutes appear to have greatly reduced the area in which state statutes have effect, this is not actually the case. First of all, many, if not most, "wrongful" deaths occur within the territorial waters of a state—the most accident-prone period of a voyage is understandably during loading and discharging. Secondly, although the representatives of longshoremen and harborworkers are precluded from any recovery beyond that granted under the Longshoremen's Act, this limitation is applicable only to actions against the employer. Ordinarily this employer is an independent contracting stevedore or repair firm. Therefore, the representative may elect to proceed under the state act against the vessel owner for his allegedly tortious conduct. It can readily be seen that the area in which state statutes determine the rights of decedent's representatives remains extremely broad.

The Tungus v. Skovgaard [38]

The *Skovgaard* case was a libel in personam by a widow and administratrix for wrongful death, in which she alleged failure to provide the decedent with a safe place in which to work. He had been called aboard the vessel by his employer, an independent contractor hired to accomplish the discharge of the vessel's cargo of cocoanut oil. The pump used in discharging the oil had become defective, and the decedent was summoned to assist in its repair. His death occurred when he fell into eight feet of hot oil while attempting to accomplish the necessary repairs. The libelant based her claim on the New Jersey wrongful death statute.[39] The Court of Appeals for the Third Circuit reversed [40] the district court's dismissal of the libel. The lower court had held that an action for wrongful death based upon unseaworthiness would not lie: that petitioner did not owe the decedent the duty to use reasonable care to provide a safe place in which to work. The Supreme Court, on certiorari, affirmed the court of appeals' interpretation of the New Jersey death statute as including a recovery based upon unseaworthiness. It left to the

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[37] 44 Stat. 1424 (1927), 33 U.S.C. § 902(2) (1952).
[38] 358 U.S. 588 (1959).
[39] N.J. STAT. ANN. § 2A:31-1 (1952).
[40] Skovgaard v. The M/V Tungus, 252 F.2d 14 (3d Cir. 1957).

district court the determination of what defenses, if any, are available under New Jersey law. The Supreme Court also held that since the officers of the *Tungus* remained in control of the vessel, the shipowners owed the decedent the duty to provide a safe place in which to work.

The importance of the case is the way in which the Court adopts a state-created right and applies it to a cause of action based on a maritime tort. The decedent was one of those individuals to whom was owed the duty to provide a seaworthy vessel.[41] That duty was breached, resulting in his death. Since the maritime law provides no recovery for wrongful death, the state act was utilized to provide a right of action. Once the state act was incorporated, it was determinative of its own extent and limitations.

The Court declared that absent express declarations within the statute concerning applicability and limitations, state court interpretations of the act are binding. Where there is neither express statutory intent nor state court construction, the district court may construe the statute and, if not "clearly erroneous," those determinations will be upheld.

Mr. Justice Brennan concurred with the result but dissented from the majority's use of state law. He declared that the Court was ignoring a basic distinction between rights and remedies, that the death acts should provide merely the remedy, that the maritime law prescribes the rights and duties involved and the state statute is merely a "remedial incident . . . rationally utilized through analogy by courts charged with the enforcement of federal rights and duties and the construction of a proper pattern of remedies to that end." [42] He decried the effects on the maritime law of the Court's holding. The holding will involve the interpretation of each state's statute to determine the intent of its legislature with regard to application of the statute to maritime torts. His fear is of the effect that interpretation of forty-nine state death acts will have on the uniformity of the maritime law.

United N.Y. & N.J. Sandy Hook Pilots Ass'n v. Halecki [43]

The *Halecki* case was tried on the law side of the federal court under the "saving to suitors" clause.[44] Federal jurisdiction was based upon diversity of citizenship. As in the prior case, the action was

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[41] The Tungus v. Skovgaard, 358 U.S. 588, 595 n.9 (1959).

[42] *Id.* at 604 (concurring opinion).

[43] 358 U.S. 613 (1959).

[44] 28 U.S.C. § 1333 (1952): "The district courts shall have original jurisdiction exclusive of the courts of the States, of: (1) Any civil case of admiralty and maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

based upon the New Jersey wrongful death act[45] for negligence and unseaworthiness. The Court of Appeals for the Second Circuit affirmed a jury verdict for the administratrix, holding that the New Jersey statute incorporates liability for unseaworthiness and adopts the federal rule of comparative negligence for torts committed upon the navigable waters of a state. The Supreme Court reversed. It found that Halecki failed to come within the group to whom is owed the duty of providing a seaworthy vessel. Decedent, engaged in cleaning generators with carbon tetrachloride, was held not to be doing work traditionally done by seamen.

The lower court had submitted the case to the jury on both negligence and unseaworthiness. The Supreme Court held that petitioner owed decedent the duty to use reasonable care to provide him with a safe place in which to work. As a result, the case was returned by the Court to determine the question of recovery based solely on a negligent failure to exercise reasonable care for the safety of the decedent.

The Court, in conformity with its opinion in *Skovgaard,* viewed with approval the court of appeals' approach to the case as one involving an interpretation of state law.

Mr. Justice Brennan, dissenting, followed the disapproval he had voiced in *Skovgaard* of the error in the state law approach. In addition, he viewed the Court's determination that Halecki was not possessed of the right to a seaworthy vessel as equally erroneous. He considered Halecki's job as clearly within the scope of the *Sieracki* and *Hawn* decisions,[46] there being a clear analogy between Halecki's work and the work historically done by seamen.[47] In his approach he views the *Sieracki* doctrine as embracing all those in the ship's service. He does not attempt to determine whether a particular function was ever actually performed in the past by seamen, and considers such an approach an "inversion" of the *Sieracki* principle, which will lead to uncertainty in the law.

In a concurring opinion to both cases, Mr. Justice Frankfurter states his reasons for refraining from his usual assertion in cases involving state law to the effect that the cases should be held in the federal courts while an authoritative construction of state law is sought.

The holdings in *Skovgaard* and *Halecki* do not actually indicate a solution to problems involved in state supplementation of the general maritime law. Rather, they affirm the approach to be used by the lower courts in enforcing state-created rights in the maritime

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[45] N.J. STAT. ANN. § 2A:31-1 (1952) (the same statute involved in *Skovgaard*).

[46] Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953).

[47] See note 24 *supra* and accompanying text.

law. State rather than federal law is to determine the application of the right.

The cases illustrate the unique conflicts problems confronting the courts in maritime cases. The initial jurisdiction of admiralty is determined by the nature of the claim. If it is maritime, a federal court sitting in admiralty is competent to hear the case. A contract must be essentially maritime and a tort must have occurred on navigable waters to fulfill the court's jurisdictional requirement. Once the requirement is met, the court sitting without a jury hears the case and applies the general maritime law as supplemented by federal legislation. Such was the intent of the framers of the Constitution, who left to the district courts original jurisdiction of ". . . any civil case of admiralty and maritime jurisdiction." [48] In addition, under the "saving to suitors" clause, common-law courts may exercise jurisdiction over maritime matters. It is, however, settled that this clause simply saves to litigants remedies available at common law, preserving the applicability of the substantive maritime law to maritime actions tried in state courts.[49] If the proper jurisdictional requirements are met, actions under the "saving to suitors" clause may also be brought on the law side of the federal court. In any event, the maritime rights are still determined by the substantive maritime law.

As previously mentioned, it has become the practice to supplement the maritime law through the use of state decisional and statutory law. This utilization may be accomplished in two ways: by analogy of common-law principles, and by enforcement of rights arising out of state statutes. For example, the adoption of a state statute to preclude abatement of a cause of action has been applied as an incident, regardless of its importance to the litigants involved, to preserve the enforceability of a maritime right.[50] Application of a state statute may, however, create a right the extent of which is to be determined according to the creating state's legislative intent. Mr. Justice Stewart, in *Skovgaard* and *Halecki,* therefore looked to state law to determine the construction placed upon these statutes and the applicable defenses under them. The initial determination is whether the breach of duty proximately causing death is one recognized by state law and to which its statute is applicable. If it is, then the state statute will be examined to determine whether a right to recover for the death exists. In *Skovgaard* the court of appeals found that New

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[48] Judiciary Act of 1789, § 9, as amended, 28 U.S.C. § 1333 (1952).

[49] Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 383 (1918), quoting with favor The Moses Taylor, 71 U.S. (4 Wall.) 411, 431 (1866): "That clause only saves to suitors 'the right of a common-law remedy, where the common law is competent to give it.' It is not a remedy in the common-law courts which is saved, but a common-law remedy. . . ."

[50] Just v. Chambers, 312 U.S. 383 (1941). The Court in this case does not make the same distinction as made here. It is contended, however, that the distinction between preservation and creation of a right is valid.

Jersey adopted the federally defined duty to provide a seaworthy vessel. It also found that according to New Jersey law, petitioner owed decedent the duty to exercise due care in order to provide him with a safe working area. *Halecki* was similarly treated, although decedent failed to fall within that "favored group" to which was owed the absolute duty of a seaworthy vessel. Interestingly, the Court in *Halecki* approved the lower court's holding concerning the adoption by New Jersey law of the admiralty doctrine of comparative negligence. This "adoption" involves travelling a rather circuitous route in finding an applicable standard.

It is the maritime law that initially incorporates the state statute within the admiralty framework to fill a void. Then the state statute and state decisional law construing and applying the statute are examined to determine the extent to which the statute is applicable to a maritime tort. When the Supreme Court in *Halecki* approved a determination that New Jersey law incorporated the admiralty doctrine of comparative negligence, it consented to a "dual" applicability of the statute. In New Jersey contributory negligence is a complete defense where land torts are involved. By assenting to a different rule for maritime torts, the Court consents to the theory that a state statute may be subject to a different matrix of rights, duties and liabilities for torts occurring on navigable waters.[51] The circle is complete when the question of where these separate standards are going to be obtained is answered. Where but to the maritime law would state courts look if the above approach is used?

The problem becomes more acute when it is realized that state courts are under no compulsion to follow the approach apparently approved by the Supreme Court. A holding by the highest court of a state that its statute is to be applied uniformly, regardless of the place where the tort occurs, is thereafter binding and precludes the "dual" applicability theory.

Due to the unique jurisdictional makeup of American maritime law, as well as the overriding desirability of uniformity in this area, *Erie R.R. v. Tompkins*[52] has been given little effect. Article III of the Constitution extends the jurisdiction of the federal courts to "all

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[51] See United N.Y. & N.J. Sandy Hook Pilots Ass'n v. Halecki, 251 F.2d 708, 716-17 (1958) (dissenting opinion).

[52] 304 U.S. 64 (1938), construing the "Rules of Decisions Act," 28 U.S.C. § 725 (1940), which read at that time: "That the laws of the several states, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." It is presently worded: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652 (1952).

cases of admiralty and maritime jurisdiction." [53] The federal courts in exercising this jurisdiction over maritime matters have interpreted and applied the so-called general maritime law, that body of law growing out of the historical customs, usages and occasional statutes promulgated by seafaring nations. This federal court interpretation supplemented by federal statutes became the maritime law of this country. When the navigable waters to which this law applies are part of the territorial waters of a state, a conflicts problem arises. While a state has technical jurisdiction within a marine league from shore,[54] the supremacy of the maritime law was early indicated. State courts exercising jurisdiction over maritime litigation have on occasion applied their own interpretation of the maritime law.[55] This erroneous practice has not been followed,[56] since it is incorrect to allow the utilization of the "saving to suitors" clause to affect the substantive law applicable to a maritime action. The clause saved a common-law remedy, based upon the federally defined maritime law. The disruptive effect a contrary practice would have upon the maritime law is obvious. The proper disposition of maritime actions in state courts is, then, analogous to a federal court's enforcement of state law under *Erie*. To insure uniformity, the state court determines the rights of parties to a maritime action in accordance with the maritime law as defined in the federal courts.

The *Erie* decision insured federal application of the laws of the various states, and overruled Justice Story's indication of the existence of a uniform general commercial law. Uniformity of law on navigable waters is considered of greater importance than the uniform application of the various states' laws to their natural limits when those limits include navigable waters. This conflicting desire for uniformity in both state and maritime law has therefore been resolved in favor of the maritime law, while the general commercial law of Mr. Justice Story was considered an unacceptable encroachment upon the desired uniform application of state law. *Erie R.R. v. Tompkins* [57] would not appear to have been meant to apply in admiralty.

State Death Acts

By reason of the holdings in *Skovgaard* and *Halecki*, an important question to litigants is the nature of the various state death

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[53] U.S. CONST. art. III, § 2.

[54] The Tungus v. Skovgaard, 358 U.S. 588 (1959) (dissenting opinion). "The State territorial waters, while within the cognizance of federal maritime law, are also subject to the jurisdiction of the States." *Id.* at 595 n.9, citing Toomey v. Witsell, 334 U.S. 385 (1948).

[55] See, *e.g.*, Belden v. Chase, 150 U.S. 674 (1893).

[56] See Garrett v. Moore-McCormack Co., 317 U.S. 239, 244-45 (1942).

[57] 304 U.S. 64 (1938).

acts. Although all have enacted statutes creating a right to recover for a death, a comparison indicates their many differences. The majority are patterned after the familiar "Lord Campbell's Act," [58] which was the initial statutory relief to fill this unfortunate shortcoming of the common law. The New Jersey act,[59] held in *Skovgaard* to include a right of recovery for unseaworthiness, contains similar wording and is representative of the majority of state death acts.

There has been little hesitancy in the past to allow a state-created right of recovery to lie.[60] It would therefore seem that, absent a contrary expression by state court or legislature, statutes with similar wording apply to deaths caused by a breach of the duty of seaworthiness. The reasons for application in individual cases may differ. It could, for example, result from an analysis of the statute concluding that each term is descriptive of a category of acts for which a recovery will lie. Thus, "neglect" could include all negligent acts, leaving one of the others, *e.g.*, "wrongful act" or "default," to embrace a breach of duty regardless of fault.[61]

It would be difficult to apply to the breach of the warranty of seaworthiness a statute which expressly premises recovery on negligence [62] or, as in Massachusetts, culpability of the wrongdoer.[63] However, regardless of the seeming lack of logic, such a result may be reached in at least some cases. For justification, it could be stated that absolute duties were unknown at the time the statute was passed. Therefore, although specifying negligence, it was in fact intended to encompass all "wrongfully" caused deaths, including unseaworthiness.

It could also be argued that public policy and the remedial aspect of the wrongful death acts are grounds for application. It thus appears that every statute is possibly applicable to unseaworthiness.

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[58] Fatal Accidents Act, 1846, 9 & 10 Vict., c. 93: "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 amount in law to felony."

[59] N.J. STAT. ANN. § 2A:31-1 (1952).

[60] See Magruder & Grout, *Wrongful Death Within the Admiralty Jurisdiction*, 35 YALE L.J. 395 (1926).

[61] See Skovgaard v. The M/V Tungus, 252 F.2d 14, 17 (3d Cir. 1957).

[62] See, *e.g.*, GA. CODE ANN. § 105-1301 (1956). The statute applies to "all cases where the death of a human being results from a crime or from criminal or other negligence." *Ibid.*

[63] MASS. ANN. LAWS c. 229, § 6E (1955). Damages are "assessed with reference to the degree of culpability of the wrongdoer." See O'Leary v. United States Lines Co., 215 F.2d 708 (1st Cir. 1954). In this case the widow of a longshoreman was denied recovery under the Massachusetts act due to her failure to prove negligence. See generally, Comment, *State Wrongful Death Statutes in Admiralty*, 7 STAN. L. REV. 261 (1955).

The above hypothetical approaches are possibilities only where there has been no authoritative holding to the contrary. Once a state court passes upon the question of death statute application in admiralty, it is definitive.

The essential elements of wrongful death statutes may be roughly divided into six categories: (1) acts to which the statute is applicable; (2) lien provision, if any; (3) statute of limitations; (4) measure of damages; (5) limitation, if any, on amount recoverable; and (6) distribution of recovery.

As already discussed, category 1 differs in "Lord Campbell's" acts [64] and acts apparently premised on negligence.[65] The latter appear by their express terminology to allow recovery only where negligence can be shown. The former, due to their wording, appear more easily applicable to actions based upon a liability without fault. Where "wrongful act, neglect or default" once seemed merely redundant, each is now being held to describe a separate act for which the statute will lie.

There are several which fall into neither of the above subcategories. They are apparently not limited to negligence,[66] which

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[64] ARIZ. REV. STAT. ANN. § 12-611 (1956); ARK. STAT. § 27-906 (Supp. 1957); COLO. REV. STAT. § 41-1-2 (1953); D.C. CODE ANN. § 16-1201 (1951); HAWAII REV. LAWS § 246-6 (1955); ILL. ANN. STAT. c. 70, § 1 (Smith-Hurd 1956); ME. REV. STAT. ANN. c. 165, § 9 (1954); MD. ANN. CODE art. 67, § 1 (1957); MICH. STAT. ANN. § 27.711 (Supp. 1957); MISS. CODE ANN. § 1453 (Supp. 1958); MO. ANN. STAT. § 537.080 (Vernon Supp. 1958); NEB. REV. STAT. § 30-809 (1956); NEV. REV. STAT. § 41.080 (1957); N.J. STAT. ANN. § 2A:31-1 (1952); N.M. STAT. ANN. § 22-20-1 (1953); N.Y. DECED. EST. LAW § 130; N.C. GEN. STAT. § 28-173 (Supp. 1957); N.D. REV. CODE § 32-2101 (1943); OHIO REV. CODE ANN. § 2125.01 (Baldwin 1958); OKLA. STAT. ANN. tit. 12, § 1053 (Supp. 1958); R.I. GEN. LAWS c. 10, § 7-1 (1956); S.C. CODE § 10-1951 (1952); S.D. CODE § 37.2201 (Supp. 1952); VT. STAT. ANN. tit. 14, § 1491 (1959); VA. CODE ANN. § 8-633 (Supp. 1958); WASH. REV. CODE § 4.20.010 (1958); W. VA. CODE ANN. § 5474 (1955); WIS. STAT. § 331.03 (1957); WYO. COMP. STAT. ANN. § 3-403 (Supp. 1957).

[65] DEL. CODE ANN. tit. 10, § 3704(b) (1953) (". . . caused by unlawful violence or negligence . . . ."); GA. CODE ANN. § 105-1301 (1956) (". . . shall include all cases where the death of a human being results from a crime or from criminal or other negligence."); MASS. ANN. LAWS c. 229, § 2 (Supp. 1958) ("A person who (1) by his negligence causes the death of a person in the exercise of due care. . . ."); PA. STAT. ANN. tit. 12, § 1601 (Purdon 1953) (". . . shall be occasioned by unlawful violence or negligence . . . .").

[66] They merely use slightly different terminology than that found in the "Lord Campbell's Acts." ALA. CODE ANN. tit. 7, § 123 (1940); ALASKA COMP. LAWS ANN. § 61-7-3 (Supp. 1958); CAL. CODE CIV. PROC. § 377 (Deering 1953); CONN. GEN. STAT. § 52-555 (1958) (not a separate wrongful death statute but a survivor's action to which is added the additional element of death); FLA. STAT. ANN. § 768.01 (1941); IDAHO CODE ANN. § 5-311 (1948); IND. ANN. STAT. § 2-404 (Supp. 1957); IOWA CODE ANN. § 635.9 (1950); KAN. GEN. STAT. ANN. § 60-3203 (Supp. 1957); KY. REV. STAT. ANN. § 411.130 (Baldwin 1955); LA. CIV. CODE ANN. art. 2315 (West 1952); MINN. STAT. ANN. § 573.02 (Supp. 1958); MONT. REV. CODES ANN. § 93-2810 (1947);

is the important element when questioning their application to unseaworthiness.

Several states [67] provide for maritime liens (category 2) in their acts,[68] thereby entitling the party to proceed in rem against the vessel in an admiralty court.

The statutes of limitation (category 3) are ordinarily one,[69] two [70] or three [71] years. Once again, however, there are several exceptions. Alabama, for example, in its separate death statute, applicable where the decedent was a minor child, allows parents six months in which to bring an action after which the cause of action passes to the child's personal representative.[72]

The damages recoverable (category 4) are, for the most part, the pecuniary loss suffered through the loss of decedent on whom the beneficiary relied, at least in some measure, for support.[73] The considerations include age at death, life expectancy, estimated earning capacity and, in some instances, express allowance for loss of decedent's educational, cultural and moral assistance to his children.[74] Some also allow recovery for loss of love and affection.[75] Funeral

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N.H. REV. STAT. ANN. § 556:12 (1955); ORE. REV. STAT. § 30-020 (1957); TENN. CODE ANN. § 20-607 (1955); TEX. REV. CIV. STAT. ANN. art. 4671 (1952); UTAH CODE ANN. § 78-11-7 (1953).

[67] States will hereafter be referred to by name only, when reference to notes 64, 65 or 66 will disclose the statute's location in the particular state code. Citations will be given only where the citation is to a section of a state statute apart from the general heading under which the wrongful death statute is found.

[68] Florida; Maryland; MINN. STAT. ANN. § 579.01 (Supp. 1958); MISS. CODE ANN. § 1565 (1942); ORE. REV. STAT. § 783.010 (Supp. 1957); VA. CODE ANN. § 8-633 (Supp. 1958).

[69] CAL. CODE CIV. PRAC. § 340 (Deering 1958); Connecticut (one year after injury sustained or discovered except a limit of 3 years after act); District of Columbia; KY. REV. STAT. ANN. § 413.140 (Baldwin 1954); Louisiana; Massachusetts (except that no recovery where death occurred 2 years after injury); Minnesota (in a libel against the vessel, but 3 years for an in personam action); MISS. CODE ANN. § 728 (1942); Missouri; North Carolina; Pennsylvania; TENN. CODE ANN. § 28-304 (1955).

[70] Alabama; ALASKA COMP. LAWS ANN. § 55-2-7 (1949); ARIZ. REV. STAT. ANN. § 12-542 (1956); FLA. STAT. ANN. § 95.11 (1941); GA. CODE ANN. § 3-1004 (1936); Hawaii; IDAHO R. CIV. P. § 15; Indiana; Iowa; Kansas; Nebraska; New Hampshire; New York; N.D. REV. CODE § 28-0-118 (1943); Ohio; Oklahoma; Oregon; Rhode Island; TEX. REV. CIV. STAT. ANN. art. 5526 (1958); Utah; Vermont; Virginia; WIS. STAT. § 330.21 (1957); Wyoming.

[71] Arkansas; MICH. STAT. ANN. § 27.605 (Supp. 1957); MONT. REV. CODE ANN. § 93-2605 (1947); New Mexico; South Dakota.

[72] See also Maryland (6 months) and S.C. CODE § 10-143 (1952) (6 years).

[73] Practically all jurisdictions use this measure. Exceptions are Georgia (full present value); Nevada (pecuniary and exemplary); New Mexico (compensatory and exemplary); North Dakota (as jury finds proportionate to the injuries); Virginia (such damages as to the jury seem fair and just); West Virginia (fair and just as found by the jury).

[74] See, *e.g.*, Kansas.

[75] See, *e.g.*, Hawaii.

expenses are usually includible. The Massachusetts act determines damages ". . . with reference to the degree of culpability of [the wrongdoer]. . . ." [76]

Most states do not have limitations on the amount recoverable (category 5). Those that do, have in recent years increased the amounts, reflecting the existing economy.[77] Some also have mandatory minimum sums recoverable.[78]

The distribution of the amounts recovered (category 6) is accomplished in one of several ways. Some statutes expressly provide a scheme of distribution or allow judge or jury to apportion the amount recovered. They ordinarily provide for the dependent next of kin, with preference for the spouse and children. Recovery is in most cases apportioned according to the degree of dependency of the individuals involved. Other states utilize the ordinary statutes of descent and distribution, treating the recovery as personalty.[79] The amount is usually not subject to the debts of the decedent.

Conclusion

It can be seen that these differences between jurisdictions are more than incidental. Legislation extending the Death on the High Seas Act would provide one solution. By eliminating the necessity of divining the intent of state legislatures, uniformity would be restored to the maritime law in the area. The right of recovery would become a creation of the maritime law subject to a single uniform application to deaths occurring on all navigable waters.

The adoption of state statutes to fill a void in the maritime law could never have been meant to be at the expense of the desired uniformity of that law.

The present situation creates confusion in both the federal and state courts. The federal courts must determine state law

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[76] MASS. ANN. LAWS c. 229, § 6E (1955).

[77] Alaska ($50,000); Colorado ($25,000); Illinois ($10,000); Indiana (formerly had a $15,000 limitation which was removed); Kansas ($25,000); Massachusetts ($20,000); Minnesota ($25,000); Missouri ($25,000); New Hampshire ($10,000, which is increased to $25,000 if there is a surviving spouse, child, children, or dependent grandparents); Oregon ($20,000); South Dakota ($20,000); Virginia ; ($30,000, formerly $25,000); West Virginia ($10,000 unless more pecuniary loss is shown, and then $25,000); Wisconsin ($15,000 for pecuniary loss; additional $25,000 to spouse or parents for loss of society and companionship).

[78] Massachusetts ($2,000); Rhode Island ($2,500).

[79] These states have within their wrongful death statutes the distribution scheme to be used for any recoveries: Alabama; Colorado; CONN. GEN. STAT. § 45-280 (1958); Georgia; Indiana; Iowa; Louisiana; New Jersey; North Carolina; Oklahoma; Pennsylvania; Vermont; West Virginia; Wyoming. Many states provide that the recovery shall descend according to their regular laws of descent where there are no named statutory beneficiaries. See, *e.g.*, Alaska, Arizona, Missouri, New Hampshire, New York, Rhode Island.

with no state precedent to guide them. The state courts must make a similar determination and also seek a standard by which the state right should be applied in a maritime action, also under the handicap of no precedent—in their case federal—to guide them. In either case, the judge must determine whether the state act is meant to apply to unseaworthiness, whether it should be applied in conformity to or differently from the way in which it is applied on land and, if differently, to what extent. Litigants are left to conjecture on what the answers to the above will be.

By expressly reserving the manner of distribution of any recovery to the state in whose waters the wrong occurred, the state's interest would be preserved. By resolving the uncertainty, the statutory assistance would tend to avoid the endless litigation which under existing circumstances seems inevitable.