

December 1970

## Admiralty - Wrongful Death. *Moragne v. States Marine Lines, Inc.*, 90 S. Ct. 1772 (1970)

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### Repository Citation

Lawrence J. Lipka, *Admiralty - Wrongful Death. Moragne v. States Marine Lines, Inc.*, 90 S. Ct. 1772 (1970), 12 Wm. & Mary L. Rev. 432 (1970), <https://scholarship.law.wm.edu/wmlr/vol12/iss2/9>

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*Lauritzen* are not to be construed as exhaustive.<sup>27</sup> The result would appear to be that future courts, since they will be allowed to consider additional factors under the *Hellenic Lines* rationale, will move toward a broadened application of the Jones Act.

JOHN A. SCANELLI

Admiralty—WRONGFUL DEATH. *Moragne v. States Marine Lines, Inc.*, 90 S. Ct. 1772 (1970).

The surviving widow of a longshoreman killed while working aboard the *Palmetto State* on navigable waters within the state of Florida brought a wrongful death action against the shipowner, States Marine Lines, Inc., claiming unseaworthiness of the vessel.<sup>1</sup> The district court and the Court of Appeals dismissed petitioner's complaint on the grounds that general maritime law did not support a death action, and that unseaworthiness was not a basis of liability under the Florida statute.<sup>2</sup> The United States Supreme Court reversed, holding that wrongful death based on unseaworthiness is maintainable under the authority of "general maritime law."<sup>3</sup> The Court reasoned that maritime law has always been a separate body of jurisprudence, administered by different courts, with components of civil law and common law. To insure uniform application, maritime law should not be dependent upon either state law or common law.

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27. *Id.* at 1734.

1. Petitioner initially brought suit in a Florida state court (not reported) from which the case was removed to the federal District Court for the Middle District of Florida on diversity grounds. The district court dismissed the unseaworthiness count (not reported) and the widow appealed. The United States Court of Appeals for the Fifth Circuit certified a stipulated question whether unseaworthiness is within the contemplation of Florida's wrongful death statute to the Florida Supreme Court. See FLA. STAT. ANN. § 25.031 (1965) (certification procedure). Following a negative answer to the certified question, 211 So. 2d 161 (Fla. 1968), the Court of Appeals affirmed the district court's dismissal. 409 F.2d 32 (5th Cir. 1969).

2. FLA. STAT. ANN. § 768.01 (1965).

3. *Moragne v. States Marine Lines, Inc.*, 90 S. Ct. 1772 (1970). General maritime law is a curious blend of bits and pieces gathered from various legal systems. It is a general and rather vague set of principles that have validity in a nation only to the extent that the nation accepts and implements them through its courts or legislation. See, e.g., *Southern Pacific R.R. v. Jensen*, 244 U.S. 205 (1916); *The Lottawana*, 88 U.S. (21 Wall.) 558, 572, 574 (1874). "To ascertain, therefore, what the maritime law of this country is, it is not enough to read the French, German, Italian and other foreign works on the subject, or the codes which they have framed; but we must have regard to our own legal history, constitution, legislation, usages and adjudications as well." 88 U.S. at 576.

Prior to 1900, the remedy of "maintenance and cure" marked the limits of the shipowner's liability for seamen injured aboard ship.<sup>4</sup> Unseaworthiness was interpreted as a certain species of the larger concept of negligence.<sup>5</sup> The Supreme Court had foreclosed two large sectors of seamen's rights. In *The Osceola*<sup>6</sup> it had denied recovery where injury was attributed to fellow crew members, while in *The Harrisburg*<sup>7</sup> it had established that there was no action for wrongful death in the absence of a statute. At the time no relevant federal statutes existed, and the courts began applying state statutes to maritime cases where death occurred within state territorial waters.<sup>8</sup> In the 1920's, Congress belatedly passed the Death on the High Seas Act<sup>9</sup> which provided a remedy for the death of "any person" occurring *beyond* the three-mile limit, and the Jones Act<sup>10</sup> which gave "seamen" a remedy for injury or death occur-

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4. 90 S. Ct. at 1780. Under this doctrine an injured or ill seaman is entitled to wages, food, and lodging for his period of hire, and nursing and medical treatment until the maximum cure is realized. The employer's liability is extinguished-only if the illness or injury results from the seaman's gross and willful misconduct. See, e.g., *Vaughan v. Atkinson*, 369 U.S. 527 (1962); *Warren v. United States*, 340 U.S. 523 (1951); *Farrel v. United States*, 336 U.S. 511 (1949).

5. The duty to provide a seaworthy vessel was recognized in America as early as 1789, *Dixon v. The Cyrus*, 7 Fed. Cas. 755 (No. 3930) (D. Pa. 1789), and this duty was satisfied merely by exercising due care in making the vessel fit for sea, *Pacific S.S. Co. v. Peterson*, 278 U.S. 130 (1928). The breach of duty, however, did not allow recovery of compensatory damages; it merely permitted a seaman to leave the vessel without incurring criminal liability or forfeiture of wages.

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

7. 189 U.S. 158 (1903).

8. *Western Fuel Co. v. Garcia*, 257 U.S. 233, 242 (1921) states that the rationale for supplementing maritime law with state wrongful death statutes is that the state remedy would not materially prejudice the uniformity of maritime law. The general understanding was that the statutes of the coastal states did not apply beyond state boundaries. *The Hamilton*, 207 U.S. 398 (1907), because of special circumstances, applied state law on the high seas beyond the three-mile state territorial limit. See generally *Magruder & Grout, Wrongful Death Within the Admiralty Jurisdiction*, 35 YALE L.J. 395 (1926).

9. Death on the High Seas by Wrongful Act, 46 U.S.C. § 761 (1964).

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

10. Merchant Marine Act of 1920, 46 U.S.C. § 688 (1964) (commonly called the Jones Act).

ring in the course of employment. The Longshoremen's and Harbor Workers' Compensation Act,<sup>11</sup> also passed during this period, provided "dockworkers" with an injury or death remedy against their employers.

Ostensibly, all voids were filled. By bits and pieces of authority drawn from state or federal statutes, seamen and dockworkers had a remedy for personal injury or death occurring on navigable waters. However, admiralty courts construing this piecemeal legislation were confronted with an almost hopeless task in attempting to achieve maritime uniformity. Beneficiaries prescribed under the various acts were different,<sup>12</sup> statutory authority overlapped.<sup>13</sup>

Inconsistencies continued to appear in case law. In *Lindgren v. United States*<sup>14</sup> a third mate was killed falling from a lifeboat while the vessel lay at port in Norfolk, Virginia. The surviving beneficiary did not qualify as one prescribed in the Jones Act, but could have recovered by authority of the Virginia wrongful death statute. The Supreme Court pre-

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action. . . .

A Jones Act seaman is "a man who goes to sea, a member of a ship's company (including the master), a person employed upon a floating structure which is a vessel." G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 282 (1957).

11. 33 U.S.C. § 903 (1964). "Compensation shall be payable . . . if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) . . ."

12. The Death on the High Seas Act permitted a decedent's wife, husband, parent, child or dependant relative to claim as beneficiaries. 46 U.S.C. § 761 (1964). It should be noted that all the beneficiaries can sue collectively, not in the alternative as provided in the Jones Act, which incorporates the Federal Employer's Liability Act, 35 Stat. 65 (1908), as amended, 45 U.S.C. §§ 51-60 (1964). Section 51 of this act provides recovery "for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee. . . ."

Examples of existing state variations are set out in Elston, *State Wrongful Death Acts and Maritime Torts*, 39 TEXAS L. REV. 643, 645-46 (1961). Not only do beneficiaries vary, but also standards of care, statutes of limitation, defenses available, measures of damages, and maximum amounts recoverable.

13. The Jones Act applies where a seaman is injured "in the course of employment." This could mean on the high seas, in state waters, or on land. State law applies within the three-mile limit, while the Death on the High Seas Act applies beyond the three-mile limit.

14. 281 U.S. 38 (1930). See also *Whitaker v. Blidberg-Rothchild Co.*, 195 F. Supp. 420 (E.D. Va.), *aff'd*, 296 F.2d 554 (4th Cir. 1961) (non-dependent daughter prevented dependent mother from recovering under Jones Act).

cluded reference to the Virginia statute, declaring the Jones Act "paramount and exclusive . . . of all state statutes."<sup>15</sup>

During the 1940's, courts expanded the meaning of unseaworthiness.<sup>16</sup> *Mabnick v. Southern S.S. Co.*<sup>17</sup> began the expansion and in effect held that unseaworthiness included negligent operations. Subsequently, unseaworthiness developed to include not only defects in the ship's structure, but defects in its machinery, appliances, furnishings, equipment, tackle, cargo, and the composition of officers and crew.<sup>18</sup> In a later case, *Seas Shipping Co. v. Sieracki*,<sup>19</sup> unseaworthiness evolved into a "species of liability without fault" and even more strikingly extended its reach from traditional seamen to shoreside workers. Longshoremen,<sup>20</sup> carpenters,<sup>21</sup> ship cleaners,<sup>22</sup> and ship repairmen<sup>23</sup> were dubbed "seamen" pro hoc vice on grounds that they performed the same duties and were exposed to the same hazards of the ship as were traditional seamen. The courts, in effect, had established a form of strict liability for defects found or created about the ship. Negligence was relegated to a certain species of unseaworthiness, and the broad concept of unseaworthiness emerged as the principle vehicle of recovery.

As the doctrine of unseaworthiness developed, recovery for wrongful death turned upon whether existing statutes were broad enough to absorb this expanded definition. Of the three federal statutes, only the Jones Act was firmly rooted to the negligence standard.<sup>24</sup> Some state juris-

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15. 281 U.S. at 38.

16. See G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 315 (1957). Much law review literature has developed in connection with the Supreme Court's extension of the unseaworthiness doctrine. See, e.g., Tetreault, *Seamen, Seaworthiness and the Rights of Harbor Workers*, 39 CORNELL L. Q. 381 (1954); Benbow, *Seaworthiness and Seamen*, 9 MIAMI L. Q. 418 (1955).

17. 321 U.S. 96 (1944).

18. *Lester v. United States*, 235 F.2d 625 (2d Cir. 1956) contains a good discussion of what is and what is not unseaworthiness.

19. 328 U.S. 85 (1946). *Accord*, *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 548 (1960): "The duty to provide a seaworthy vessel depends not at all upon the negligence of the shipowner or his agents." For a vigorous criticism of expanding the doctrine into absolute liability see Justice Frankfurter's dissent, *id.* at 550.

20. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946).

21. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953).

22. *Christiansen v. United States*, 192 F.2d 199 (1st Cir. 1951).

23. *Lawlor v. Socony-Vacuum Oil Co.*, 275 F.2d 599 (2d Cir.), *cert. denied*, 363 U.S. 844 (1960).

24. As originally interpreted, the Death on the High Seas Act imported a negligence standard. *The Black Gull*, 82 F.2d 758, 761 (2d Cir.), *cert. denied*, 298 U.S. 684 (1936). Subsequently it was held to include unseaworthiness. *Symonette Shipyards, Ltd. v. Clark*, 365 F.2d 464 (5th Cir. 1966); *Vessel Judith Lee Rose, Inc. v. Cherništšino*, 211

dictions accepted the doctrine of unseaworthiness, while others held to a standard of negligence in order to meet the requirements of their wrongful death statutes.<sup>25</sup> In *Tungus v. Skovgaard*,<sup>26</sup> the case of a maintenance man who had slipped on an oily deck and fallen to his death in a hot vat of coconut oil, the Supreme Court not only looked to the New Jersey statute to supply a wrongful death remedy for unseaworthiness, but felt compelled to apply the statute in toto, with all its provisions and limitations, even if it imposed a more stringent standard than general maritime law.<sup>27</sup> Maritime uniformity was thereby seriously disrupted.

*Moragne* eliminates many existing disparities of maritime death law. It overrules *The Harrisburg* and abolishes the unjustifiable anomaly created by *Lindgren*.<sup>28</sup> Survivors of seamen and dockworkers alike can now assert their wrongful death claims—based on unseaworthiness—by authority of general maritime law independent of statutory reliance, state or federal.<sup>29</sup> *Moragne* is a momentous step toward uniformity. While directly deciding the rights of dockworkers, it implicitly extends the

F. Supp. 36 (D. Mass. 1962), *aff'd*, 317 F.2d 927 (1st Cir. 1963); *State v. Weyerhaeuser S.S. Co.*, 176 F. Supp. 665 (D. Md. 1959); *McLaughlin v. Blidberg Rothchild Co.*, 167 F. Supp. 714 (S.D.N.Y. 1958).

The Jones Act is predicated on negligence. When enacted it seemed to do away with the need for unseaworthiness by incorporating FELA provisions that required merely some proof that the employer was negligent. It permits recovery for injuries or death "resulting in whole or in part from the negligence. . . ." 45 U.S.C. § 51 (1964).

The Longshoremen's Act imposes liability without fault on the employer, to include injury or death caused by acts of God.

25. See Elston, *supra* note 12. See also Kilius & Cecil, *Marine Torts Resulting in Death in State Territorial Waters*, 26 INS. COUNSEL J. 567 (1959).

26. 358 U.S. 588 (1959).

27. *Hess v. United States*, 361 U.S. 314 (1960) followed *Tungus* and applied the greater duty of care prescribed in ORE. REV. STAT. § 654.305 (Supp. 1959): the defendant "shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb. . . ."

28. The anomaly was that true seamen did not have an unseaworthiness claim for wrongful death within state waters. They could not look to the state statute because of *Lindgren*. Nor could they claim wrongful death by authority of general maritime law because of *The Harrisburg*. They were limited to the provisions of the Jones Act which did not encompass unseaworthiness. However, should death occur beyond the three-mile limit, the true seaman could base his claim on unseaworthiness under the Death on the High Seas Act. It is an anomaly that recovery should depend upon the fortuity of where the accident occurs.

Another anomaly was that, while dockworkers, unlike true seamen, could claim for wrongful death based on unseaworthiness under some states' law, a void existed in those states not accepting the doctrine.

29. *Moragne* does not preclude the use of federal or state statutory authority. Rather, where such laws do not provide a remedy to fit the needs of the petitioner he can assert his claim under authority of general maritime law.

same rights to "seamen" heretofore bereft of an unseaworthiness claim within state waters.<sup>30</sup> The Court advocates, without explicitly holding, exclusive use of maritime remedies and duties of care, thereby precluding the necessity of accommodating maritime law with state remedial statutes.<sup>31</sup>

In spite of the sweeping authority of *Moragne*, maritime law must still live with the effects of piecemeal legislation. While all voids are filled, litigation remains unduly complicated by the need to search various authorities to determine the most beneficial award.<sup>32</sup> Congress should respond by extending the coverage of the Death on the High Seas Act—applicable to "any person"—from *beyond* the three-mile limit up to the shoreline.<sup>33</sup>

LAWRENCE J. LIPKA

**Armed Services—CONSCIENTIOUS OBJECTORS—A TEST OF SINCERITY.**  
*Welsh v. United States*, 90 S. Ct. 1792 (1970).

In 1966, Elliot A. Welsh, II, claimed exemption from military service as a conscientious objector.<sup>1</sup> His claim was denied. Upon refusal to submit to induction into the armed forces, he was convicted of violating the Universal Military Training and Service Act.<sup>2</sup> The Court of Appeals for the Ninth Circuit affirmed his conviction.<sup>3</sup> In *Welsh v. United States*,<sup>4</sup> the Supreme Court reviewed its previous decision in *United States v.*

30. See note 28 *supra*.

31. 90 S. Ct. 1791-92 (1970).

32. The *Moragne* Court refrained from spelling out the elements of the new cause of action under general maritime law. Certain technical aspects such as the statute of limitation and the list of beneficiaries who can assert the claim can be determined by analogy to existing federal maritime statutes.

*Moragne* should have expressly overruled *Tungus* by declaring that state statutes, if used, should only provide a remedy and not state substantive duties. But this was not done. Conceivably, therefore, one beneficiary claiming for wrongful death under general maritime law, might assert his right by analogy to existing federal maritime statutes, while another might assert his claim by analogy to state statutes using the state statutory list of survivors and standards of care.

33. A bill has been introduced in the United States Senate which would, among other things, extend the Death on the High Seas Act to include deaths in state territorial waters. To date no hearings have been scheduled or other action taken on the bill. S. 3143, 91st Cong., 1st Sess. §§ 2, 9 (1969), reprinted in 115 CONG. REC. S 14,355 (daily ed. Nov. 14, 1969).

1. Universal Military Training and Service Act, 50 U.S.C. APP. § 456(j) (1964).

2. 50 U.S.C. APP. § 462 (1964).

3. *Welsh v. United States*, 404 F.2d 1078 (9th Cir. 1968).

4. 90 S. Ct. 1792 (1970).