approximately 150 to 175 active fixed production platforms. Bienvenu and his fellow employees lived in a base camp on pilings over the water. Bienvenu worked seven days on and seven days off, and on his work days he worked a twelve-hour shift. Bienvenu [**3] was responsible for maintaining and calibrating automated equipment located on fixed production platforms. Bienvenu had the almost exclusive use of a vessel, the MISS JACKIE, along with a skipper to transport him around the field to the platforms where he worked. The ALJ found that during an average twelve-hour work day, Bienvenu spent approximately 75% of his time performing his duties while physically located on a fixed production platform; 16.7% of his time in transit as a passenger on the MISS JACKIE; and 8.3% of his time working on equipment on the back of the MISS JACKIE.

Bienvenu was injured twice during the course of his employment while on board the MISS JACKIE in navigable waters. The first time was while moving his tool box from the dock to the boat, and the second time was while tying the MISS JACKIE to the dock. These injuries forced him to stop working.

Bienvenu claimed benefits under the LHWCA. An ALJ denied Bienvenu relief on the grounds that the LHWCA did not apply to him since he was not engaged in "maritime employment." The ALJ read this Court's prior decisions to mean that coverage under the Act was dictated by the "amount of time devoted to specific work activity [**4] by a Claimant." The ALJ ruled that Bienvenu was not a "maritime employee" because he spent the vast majority of his working hours on fixed platforms and was only fortuitously on navigable waters when injured. The extension of the LHWCA to land-based activities did not apply to Bienvenu since his work was not an integral or essential part of loading or unloading a vessel.

Bienvenu timely appealed the ALJ's decision to the Benefits Review Board ("BRB"). The BRB failed to render a timely decision and was deemed to have affirmed the ALJ's ruling. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-219. Bienvenu petitioned us for review. A panel of this Court reversed the ALJ's decision because Fifth Circuit precedent compelled a conclusion that Bienvenu passed the status test since he was on navigable waters when injured. *Bienvenu v. Texaco, Inc., 124 F.3d 692, 692-93* (5th Cir.), reh'g en banc granted, *131 F.3d 1135 (5th Cir. 1997).*

II

In 1917, the Supreme Court held that state workers' compensation systems could not reach longshoremen injured seaward of the water's edge. *Southern Pac. Co. v. Jensen, 244 U.S. 205, 61 L. Ed. 1086, 37 S. Ct. 524 (1917).* [**5] In response, Congress passed the LHWCA in 1927. See Pub. L. No. 803, 44 Stat. 1429. Technically, there were five requirements for coverage under the LHWCA as originally enacted, as later detailed by the Supreme Court in *Director v. Perini North River Associates, 459 U.S. 297, 306-07, 103 S. Ct. 634, 641-42, 74 L. Ed. 2d 465 (1983)*:

> (1) The employee could not be a "master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under 18 tons net."
>
> (2) The employee must suffer injury during the course of employment.
>
> (3) The employee had to be employed by a statutory "employer," defined to be "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States."
>
> (4) The employee had to meet a situs requirement that injury occurred upon navigable waters.
>
> (5) No federal coverage unless compensation may not validly be provided by state law. [1]

1 "Congress used [this phrase] . . . in a sense consistent with the delineation of coverage as reaching injuries occurring on navigable waters." *459 U.S. at 309; 103 S. Ct. at 643* (quoting *Calbeck v. Travelers Ins. Co., 370 U.S. 114, 126, 8 L. Ed. 2d 368, 82 S. Ct. 1196, 1203 (1962)*). The phrase was deleted in 1972. See *459 U.S. at 313-14; 103 S. Ct. at 645.*

[**6] [*904] In 1969, the Supreme Court, while

recognizing the harshness of the Jensen line, held that the LHWCA did not extend to injuries occurring on a pier attached to land. *Nacirema Operating Co. v. Johnson, 396 U.S. 212, 218-20, 24 L. Ed. 2d 371, 90 S. Ct. 347, 351-52 (1969)*. The Court stated that the "invitation to move that line landward must be addressed to Congress, not to this Court." *Id. at 224, 90 S. Ct. at 354*. Congress acted on this invitation in 1972 when it amended the LHWCA. See LHWCA Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251. The 1972 Amendments extended "coverage to more workers by replacing the single-situs requirement with a two-part situs and status standard." *P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 73, 62 L. Ed. 2d 225, 100 S. Ct. 328, 332 (1979)*. The situs test now reached shoreward to reach injuries "occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel.)" *33 U.S.C. § 903* [**7] *(a)*. The status test defined an employee as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and ship-breaker." Id. *§ 902(3)*.

In *Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 53 L. Ed. 2d 320, 97 S. Ct. 2348 (1977)*, the Supreme Court first expounded on the status test. The workers in that case were Blundo and Caputo. Blundo was injured when he fell while checking cargo as it was removed from a container. Caputo moved cargo from the hold of the vessel onto shore and was hurt when rolling a dolly into a truck. Though the 1972 Act did not expressly state that workers in their positions were covered, the Court held that both Blundo and Caputo were entitled to benefits. Blundo was covered because "one of the reasons Congress expanded coverage in 1972 was 'that containerization permits loading and unloading tasks traditionally conducted aboard ship to be performed on the land." *Pfeiffer, 444 U.S. at 74, 100 S. Ct. at 333*. Caputo fell under the LHWCA because he spent some of his time in "indisputably longshoring [**8] operations," *Caputo, 432 U.S. at 273, 97 S. Ct. at 2362* and Congress had intended "to ensure that a worker who could have been covered part of the time by the pre-1972 Act would be completely covered by the 1972 Act." *Pfeiffer, 444 U.S. at 75, 100 S. Ct. at 333*.

In Pfeiffer, the Supreme Court further elaborated on the difference between the situs and status tests by noting that the situs test limits the geographic coverage of the LHWCA, while the status test is an occupational concept that focuses on the nature of the worker's activities. *Id. at 78, 100 S. Ct. at 334-35*. The "crucial factor" in determining the scope of maritime employment "is the nature of the activity to which a worker may be assigned." *Id. at 82, 100 S. Ct. at 337*. Though the 1972 Amendments extend coverage, they do not provide benefits to all workers in the situs area, such as truck drivers who pick up goods for further trans-shipment. *Id. at 83, 100 S. Ct. at 337*.

Four years after Pfeiffer, the Supreme Court returned to this issue in Perini. In that case, a workman, Churchill, was employed in the construction [**9] of a sewage treatment plant that extended over the Hudson River. He was injured on the deck of a cargo barge where he was supervising operations. The Court found no congressional intent in the 1972 Amendments to withdraw LHWCA coverage from workmen covered by the Act before 1972. The Court held that when a worker is injured on the actual navigable waters in the course of his employment on these waters, he satisfies the status requirement, assuming that the other requirements of the LHWCA are met. *459 U.S. at 324 & n.33, 103 S. Ct. at 651*. The Court expressed no opinion on whether LHWCA coverage extends to a worker "injured while transiently or fortuitously upon actual navigable waters or to a land-based worker injured on land who then falls into [*905] actual navigable waters." *Id. at 324 n.34, 103 S. Ct. at 651*.

The Perini Court discussed three of its pre-1972 cases to illustrate the scope of the Act's coverage before the amendments were adopted. See *459 U.S. at 307-12, 103 S. Ct. at 642-45* (discussing *Davis v. Department of Labor, 317 U.S. 249, 87 L. Ed. 246, 63 S. Ct. 225 (1942)*; *Parker v. Motor Boat Sales, 314 U.S. 244, 86 L. Ed. 184, 62 S. Ct. 221 (1941)*; [**10] and *Calbeck v. Travelers Ins. Co., 370 U.S. 114, 8 L. Ed. 2d 368, 82 S. Ct. 1196 (1962)*). Parker is the case most relevant to our decision. 2

2 The employee in Davis was injured while standing on a barge and dismantling a bridge. In Calbeck, the employee was completing construction of a vessel afloat on navigable waters. Thus, the job responsibilities of the employees in those cases required more frequent

work on navigable waters than those of the employee in Parker.

In Parker, Mr. Armistead, a janitor employed by a retailer of pleasure craft, was directed to assist a salesman place outboard motors on a boat. Mr. Cooper, the salesman, then allowed Mr. Armistead to accompany him as he demonstrated the motor on the customer's boat. During the demonstration run, the vessel capsized and Armistead was killed. The Court first reviewed the evidence to determine whether the evidence was sufficient to support the deputy commissioner's finding that Armistead was acting within the [**11] course of his employment. The Court found the following portions of the record pertinent to this inquiry:

> that on the morning of the accident Armistead was sent to the river with specific instructions to help Cooper in placing the outboard motors on the boat; that there were no specific instructions as to whether or not Armistead was to stay out of the boat; that either Armistead or Cooper was told that Armistead was 'to go and help' Cooper; that Cooper, the superior of the two employees, at least acquiesced in Armistead's remaining in the boat to 'keep a lookout' for hidden objects in the muddy water; that Cooper regarded Armistead's acting as look out as 'helpful'; that employees of the respondent would sometimes make trips in boats for testing purposes, in furtherance of respondent's business; and that in one such instance an employee had taken a boat on a trip of at least fifty miles in respondent's behalf. 3

314 U.S. at 246, 62 S. Ct. at 223.

3 According to the Court of Appeals' opinion in Parker, the day of Armistead's accident, as far as the record discloses, was the only instance when his duties ever brought him into contact with navigable waters. *Motor Boat Sales, Inc. v. Parker, 116 F.2d 789, 792* (4th Cir.), rev'd, *314 U.S. 244, 86 L. Ed. 184, 62 S. Ct. 221 (1941).* Unlike the worker in *Green v. Vermilion Corp., 144 F.3d 332 (5th Cir. 1998)*, Bienvenu was not engaged in traditional longshoreman duties aboard the vessel when the injuries occurred.

[**12] The Court concluded that, based on the above evidence, the deputy commissioner and the district court correctly found that Armistead was covered under the LHWCA. The Court stated that coverage would not be denied because

> habitual performance of other and different duties on land cannot alter the fact that at the time of the accident he was riding in a boat on a navigable river, and it is in connection with that clearly maritime activity that the award was here made. Moreover, § 2(4) of the Act, *33 U.S.C.A. § 902(4)*, expressly provides for its application to 'employees (who) are employed . . . in whole or in part upon the navigable waters of the United States.

314 U.S. at 247, 62 S. Ct. at 223 (footnote and citations omitted) (alterations in original).

The Perini Court cited with approval *Pennsylvania R. Co. v. O'Rourke, 344 U.S. 334, 97 L. Ed. 367, 73 S. Ct. 302 (1953)*, which considered whether a railroad worker injured on navigable water was covered by the LHWCA. The claimant's five-man train crew had duties that included work on the railroad company's car floats, which moved freight and passengers [**13] to and from the yard by water. At the time of the accident, the crew was removing boxcars from floats. O'Rourke climbed up on a boxcar to release a brake and fell. The question presented was whether O'Rourke could bring a damage action under the Federal Employers' Liability Act (FELA) or was relegated to a compensation remedy under the LHWCA. The Court [*906] of Appeals held that the claimant was not covered under the LHWCA because he was a railroad worker and was not engaged in maritime employment. *O'Rourke v. Pennsylvania R. Co., 194 F.2d 612, 615 (2d Cir. 1952)*, rev'd, *344 U.S. 334, 97 L. Ed. 367, 73 S. Ct. 302 (1953).*

In reversing the Court of Appeals, the Supreme Court stated:

> We are clear, however, that the emphasis on the nature of respondent's duties here misses the mark. The statute applies, by its own terms, to accidents on navigable waters when the employer has any employees engaged in maritime service. . .

> . The Court of Appeals, we think, is in error in holding that the statute requires as to the employee, both injury on navigable water and maritime employment as a ground for coverage by the Compensation Act. An injured [**14] worker's particular activity at the time of injury determines of course whether he was injured in the course of his employment within *§ 902(2)*, and whether he was a member of the crew of the vessel within the exceptions of *§§ 902(3)* and *903(a)(1)*. This explains the emphasis on the factor of the individual's job in Parker v. Motor Boat Sales, Inc. . . ."

344 U.S. at 339-40, 73 S. Ct. at 305.

The Court had the following to say about Parker.

> The result in Parker, as well, is totally inconsistent with any 'duties test.' Armistead, the employee there, was a janitor with the motor boat company. He had been ordered to ride in one of the boats during a test trip in order to keep a lookout for hidden objects. Compensation under the Harbor Workers Act could not have been paid in connection with his death if we were to test its applicability by the nature of his regular work.

Id. at 341, 73 S. Ct. at 306 (citation omitted).

In 1985, the Supreme Court considered whether a welder employed on a platform in Louisiana waters was covered under the LHWCA. *Herb's Welding, Inc. v. Gray, 470 U.S. 414, 84 L. Ed. 2d 406, 105 S. Ct. 1421 (1985).* [**15] The Court held that because Gray, the welder, was not injured on navigable waters he could attain coverage only by qualifying for the 1972 Amendments' expanded coverage for shore side workers. The court concluded that Gray did not qualify for this expanded coverage because he was not engaged in "maritime employment." This employment was limited to longshoring, shipbuilding and ship repairing. Gray's welding work on stationary platforms did not fit within this definition. See *id. at 424-26, 105 S. Ct. at 1427-29.*

The Court made clear, however, that this definition of maritime employment did not apply to workers injured on navigable waters: "This view of 'maritime employment' does not preclude benefits for those whose injury would have been covered before 1972 because it occurred 'on navigable waters.'" *Id. at 424 n.10, 105 S. Ct. at 1428 n.10.*

The Court also discussed the Court of Appeals' position that because Gray would be covered while traveling by boat to work on the platform, a finding of no coverage while Gray was on the platform created a "curious hole" in coverage.

> Gray traveled between platforms by boat and might have been covered, [**16] before or after 1972, had he been injured while in transit. See *Director, OWCP v. Perini North River Assoc., 459 U.S. at 324, 103 S. Ct. at 651.* But see *id., at 324, n. 34, 103 S. Ct. at 651, n. 34.* ("We express no opinion whether such coverage extends to a worker injured while transiently or fortuitously upon actual navigable waters."). . . . Any coverage attributable to the LHWCA itself was de minimis. We also note in passing a substantial difference between a worker performing a set of tasks requiring him to be both on and off navigable waters, and a worker whose job is entirely land-based but who takes a boat to work.

Id. at 427 n.13, 105 S. Ct. at 1429 n.13.

With this general background, we now turn to the arguments of the parties in this case.

III.

A.

In light of Bienvenu's injury on navigable waters, Texaco acknowledges, as it [*907] must, that Bienvenu need not establish that he was engaged in maritime employment as that term is used in § 2(3) of the Act. The Supreme Court's decisions in Perini and Herb's Welding foreclose this argument. Those cases recognize that the 1972 Amendments were not intended to alter [**17] the scope of coverage for workmen injured on navigable waters. As our discussion above demonstrates, before 1972, any workman injured in the course of his employment actually engaged in the performance of his assigned duties on navigable waters enjoyed coverage under the LHWCA. He was not required to perform the traditional maritime work described in § 2(3) of the Act.

Relying on language in Perini, Texaco argues that workers like Bienvenu who are injured on navigable waters must establish that they were "required to perform their employment duties on navigable waters."

Texaco argues that the one hour per day Bienvenu spent on the deck of the MISS JACKIE, working on compressors and other platform equipment, could have been performed on the platform had Bienvenu chosen to do so and therefore that this work does not bring him within the LHWCA coverage. We disagree with this reading of Perini. The Perini Court, in discussing the pre-1972 law relative to coverage under the Act, stated: "It becomes clear from this discussion that the 1927 Act, as interpreted by Parker, Davis, and Calbeck, provided coverage to those employees of statutory 'employers,' injured [**18] while working upon navigable waters in the course of their employment." *459 U.S. at 311, 103 S. Ct. at 644*. In the very same paragraph the Court cites with approval the following quote from Gilmore and Black: "Any worker injured upon navigable waters in the course of employment was 'covered' . . . without any inquiry into what he was doing (or supposed to be doing) at the time of his injury." *Id. at 311, 103 S. Ct. at 644* (citation omitted) (alteration in original).

Immediately following this discussion the Court uses the language upon which Texaco relies: "As a marine construction worker required to work upon navigable waters, and injured while performing his duties on navigable waters, there can be no doubt that Churchill would have been covered under the 1927 LHWCA." *Id. at 311-12, 103 S. Ct. at 644-45*.

We cannot read the above sentence as demanding that a worker demonstrate that the duties he was performing aboard the vessel were in response to a direct order from his superior. We believe that all Perini requires is that the claimant show that he was injured on navigable waters while in the course of his employment. 4

4 Two other passages from Perini buttress this conclusion:

> We are unable to find any congressional intent to withdraw coverage of the LHWCA from those workers injured on navigable waters in the course of their employment and who would have been covered by the Act before 1972.

Id. at 315, 103 S. Ct. at 646.

> There is nothing in these comments or anywhere else in the legislative reports, to suggest, as Perini claims, that Congress intended the status language to require that an employee injured upon the navigable waters in the course of his employment had to show that his employment possessed a direct (or substantial) relation to navigation or commerce in order to be covered.

Id. at 318-19, 103 S. Ct. at 648.

[**19] In this case, the ALJ found that Bienvenu spent one hour out of a twelve-hour workday, or approximately 8.3% of his work time, actually performing job responsibilities on navigable waters. From the record, it is clear that Bienvenu had been performing the same work from the MISS JACKIE for about eleven years. Surely if Texaco had some objections to Bienvenu's working on platform equipment aboard the MISS JACKIE over this extended period of time it would have made them known. Under these circumstances, Bienvenu was entitled to assume that he had the discretion to perform his repair and maintenance work on production equipment at the location he deemed most efficient, including on the vessel. Bienvenu was in the course of his employment when he performed the above-described work on the MISS JACKIE and Bienvenu is covered under the LHWCA unless Texaco prevails on its argument that Bienvenu was aboard the MISS JACKIE fortuitously or transiently [*908] and for that reason has no coverage. We now turn to this argument.

B.

As we discussed above, the Supreme Court in Perini reserved the question of whether a workman aboard a

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vessel "transiently or fortuitously" enjoyed coverage [**20] under the LHWCA. The Court in Herb's Welding reiterated this reservation. *470 U.S. at 427 n.13, 105 S. Ct. at 1429 n.13.*

The Director argues that while the Supreme Court reserved this question in Perini, the cases it cited as representative of the pre-1972 law on coverage indicate that the Court would reject any such hole in coverage. While it is not free from doubt, we believe that the signals from the Supreme Court in Perini and again in Herb's Welding indicate that the Supreme Court would hold that a workman who is aboard a vessel simply transiently or fortuitously, even though technically in the course of his employment, does not enjoy coverage under the LHWCA. We join the Eleventh Circuit in reaching this conclusion. See *Brockington v. Certified Elec., Inc., 903 F.2d 1523, 1528 (11th Cir. 1990)*; see also *Zapata-Haynie Corp. v. Barnard, 933 F.2d 256, 260 (4th Cir. 1991)* (noting that the plaintiff was "not merely fortuitously over water when his injury occurred").

We therefore hold that a worker injured in the course of his employment on navigable waters is engaged in maritime employment and meets the status test [**21] [5] only if his presence on the water at the time of injury was neither transient or fortuitous. The presence, however, of a worker injured on the water and who performs a "not insubstantial" amount of his work on navigable waters is neither transient nor fortuitous. Though we decline to set today the exact amount of work performance on navigable waters sufficient to trigger LHWCA coverage, instead leaving that task to the case-by-case development for which the common law is so well-suited, see *Barrett v. Chevron, U.S.A., Inc., 781 F.2d 1067, 1073 (5th Cir. 1986)* (en banc) (adopting case-by-case review to determine coverage under the Jones Act), we will provide some guiding thoughts on the matter.

5 See *Perini, 459 U.S. at 324, 103 S. Ct. at 650* ("When a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status requirement . . . .").

First, the threshold amount must be greater than a modicum of activity in order [**22] to preclude coverage to those employees who are merely commuting from shore to work by boat. Also, the routine activity of assisting in tying the vessel to the dock and loading or unloading one's tools and personal gear onto the vessel do not count as meaningful job responsibilities. Moreover, we agree with the Supreme Court in Herb's Welding that there is a substantial difference between a worker "performing a set of tasks requiring him to be both on and off navigable waters, and a worker whose job is entirely land based but who takes a boat to work." *470 U.S. at 427 n.13, 105 S. Ct. at 1429 n.13.* The time Bienvenu actually worked on production equipment aboard the MISS JACKIE constituted 8.3% of his time at work. This is not an insubstantial amount of Bienvenu's work time and is sufficient to trigger LHWCA coverage. [6]

6 Because Bienvenu's work on the production equipment aboard the MISS JACKIE is sufficient to trigger LHWCA coverage, we do not consider whether his time aboard the MISS JACKIE being shuttled from platform to platform should be included in determining whether he spent more than a modicum of his work time on navigable waters.

[**23] Our conclusion today that the Supreme Court would deny LHWCA coverage to a worker injured on a vessel that he is aboard transiently or fortuitously permits us to clarify our case law on this subject. [7]

7 Our decisions in *Thibodaux v. Atlantic Richfield Co., 580 F.2d 841 (5th Cir. 1978)*, and *Boudreaux v. American Workover, Inc., 680 F.2d 1034 (5th Cir. Unit A 1982)* (en banc), were decided before the Supreme Court announced its decision in Director v. Perini and answered most of the questions confronting us at that time.

In *Fontenot v. AWI, Inc., 923 F.2d 1127 (5th Cir. 1991)*, we held that a worker who spent 40% of his worktime on shore, 30% on fixed platforms and 30% on oil exploration [*909] and production vessels, was engaged in maritime employment because he "was injured while on actual navigable waters, in the course of his employment." *Id. at 1130.* Our holding today is entirely consistent with our holding in Fontenot given [**24] the substantial duties Fontenot had on navigable waters.

In *Randall v. Chevron U.S.A., Inc., 13 F.3d 888 (5th Cir. 1994)*, the petitioner's husband was killed while attempting to transfer by swing rope from a fixed platform to a vessel. Mr. Randall was a mechanic who performed all of his work duties on a fixed platform and had no assigned duties on navigable waters. He was simply transported to and from his workstation--a stationary platform--by boat.

The Randall panel read Fontenot to base coverage under the LHWCA solely upon Fontenot's injury on navigable waters without regard to the extent of his duties on navigable waters. It therefore concluded that Fontenot had decided that workers injured while transiently or fortuitously upon navigable waters are covered by the LHWCA. See *id. at 897*. Because the Randall panel found itself bound by what it perceived as this holding in Fontenot, the Randall panel concluded that the claimant was covered by the LHWCA. This court, sitting en banc, of course is not bound by either Fontenot or Randall. As our discussion above indicates, our conclusion that workmen who are [**25] aboard vessels transiently or fortuitously when they sustain injury are not covered by the LHWCA is inconsistent with Randall 's holding. Randall is therefore overruled.

IV.

Judge DeMoss, in his dissent, argues that we ignored the 1984 Amendments to the LHWCA. We did not deal with the amendments, codified at *33 U.S.C. § 902(3)(A)-(F)*, for a reason: They have nothing to do with this case. The amendments exclude from coverage under the Act persons engaged in six separate, narrowly defined types of employment. These include: clerical workers (*Section 902(3)(A)*); workers at camps, restaurants, or retail outlets (*Section 902(3)(B)*); marina workers (*Section 902(3)(C)*); workers employed by vendors or suppliers (*Section 902(3)(D)*); aquaculture workers (*Section 902(3)(E)*); and builders or repairers of recreational vessels (*Section 902(3)(F)*). If a person who would otherwise be covered under the LHWCA does the type of work enumerated by one of these amendments and is covered by a state workman's compensation act, he is not covered by the LHWCA. But Bienvenu's employment as a pumper/gauger does not fit within any of the job descriptions listed in the amendments.

[**26] Both Judge Jones and Judge DeMoss argue in dissent that unless a worker devotes substantial time to longshore duties (Judge DeMoss suggests 30%), he should not be covered under the LHWCA. Adoption of such a rule would create serious problems. First, such a rule is plainly inconsistent with Perini (worker injured on the navigable water in the course of his employment satisfies the status requirement). Indeed, Judge Jones's main point is that Perini was wrongly decided. Second, imposing such a blanket requirement would overrun the detailed provisions of the 1984 amendments. The very detailing of specific job descriptions by Congress belies any speculation that Congress intended by the amendments any such wholesale withdrawal of compensation coverage -- recall that the exclusions under the amendments demand coverage under state workers' compensation. The dissent is silent about workers beyond state territorial waters. Such workers to whom coverage under the LHWCA is not expressly extended by statute (such as the Outer Continental Shelf Lands Act, *43 U.S.C. §§ 1331 et seq.*) presumably will be left without compensation.

Relatedly, Judge DeMoss [**27] argues that our opinion in this case conflicts with this Court's recent opinion in *Green v. Vermilion Corp., 144 F.3d 332 (5th Cir. 1998)*. In Green, we held that a worker in a hunting camp was not covered under the LHWCA. The distinction between the two cases is patent; Green was a "camp" worker expressly excluded from coverage by *Section 902 (3)(B)*; Bienvenu does not fall within any of *Section 902*'s narrowly defined exclusions.

[*910] Judge DeMoss next takes the position that the Supreme Court's conclusion in *Herb's Welding, Inc. v. Gray, 470 U.S. 414, 105 S. Ct. 1421, 84 L. Ed. 2d 406 (1985)*, that the oil field welder in that case was not engaged in maritime employment precludes Bienvenu's recovery under the LHWCA. He refuses to acknowledge the distinction between a worker injured on land and a worker injured on navigable water. The Court made it crystal clear that its denial of coverage to Gray was because he fell outside of the 1972 Amendments' expanded coverage for shore side workers. The Court expressly held: "This view of 'maritime employment' does not preclude benefits for those whose injury would have been covered before 1972 because [**28] it occurred 'on navigable waters.'" *470 U.S. at 424 n. 10, 105 S. Ct. at 1428 n. 10.*

By arguing that workers injured on navigable water only qualify for LHWCA coverage if they perform longshore duties, Judges Jones and DeMoss fail to recognize the long established principle that persons engaged in work aboard vessels are engaged in maritime employment. See Gilmore & Black, The Law of Admiralty at 429-30. That principle underlies the Perini Court's conclusion that workers engaged in the course of their employment satisfy the "status" requirement. *459*

U.S. at 311, 103 S. Ct. at 644. Imposing such a duties test also directly conflicts with the Supreme Court's holding in *Penn. R. Co. v. O'Rourke, 344 U.S. 334, 97 L. Ed. 367, 73 S. Ct. 302 (1953)* (see discussion in text, *supra*), which the Court relied on in Perini. Also, the Dissents' proposed holding that oilfield work aboard a vessel is not maritime employment would mean that the hundreds of oilfield workers working on drilling barges are not maritime employees. In *The Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959)*, and the hundreds of cases that [**29] followed, we held that such workers qualify as seamen and can recover under the Jones Act and the General Maritime law. The Dissenters' reasoning would lead to the anomalous holding that oilfield work aboard a vessel is not maritime work if the employee spends less than 30% of his time performing that work; yet a worker who performs more than 30% of his work aboard a vessel is a seaman, the highest form of maritime worker. See *Seas Shipping Co., Inc. v. Sieracki, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946)* (stevedore elevated to status of seaman for purposes of suing shipowner for unseaworthiness).

The assertion that adopting an inquiry for longshoreman coverage similar to that for seaman status affords a more clear and litigation-dampening standard is both stunning and perverse. It is stunning to those familiar with the huge number of cases spawned in our struggle with that test. It is perverse to place the same hurdle before an injured worker who claims to be a seaman, with the uncapped liability system they enjoy, and an injured worker seeking workers' compensation as a longshoreman. The "logic" of the Dissents' equating what is essentially a tort system [**30] with a workers' compensation scheme turns the fundamental purpose of a no-liability, limited-damage compensation scheme upside down. Finally, an en banc court is not the Congress.

For the reasons stated above, the judgments of the BRB and ALJ are REVERSED and the case is REMANDED to the ALJ for further proceedings.

STOP

DISSENT BY: EDITH H. JONES; DeMOSS

DISSENT

EDITH H. JONES, Circuit Judge, dissenting:

Even though I must agree with the majority opinion that we are bound by Perini's general interpretation of the 1972 amendments to the LHWCA, I disagree with their conclusion that Bienvenu, an oil pumper who spent his entire career maintaining oil and gas equipment on production platforms within Louisiana's three-mile limit, was not "transiently" injured on board the Miss Jackie. The majority's decision to the contrary sets such a low threshold for LHWCA coverage that it is easy to envision increased litigation over LHWCA coverage for other land-based workers who are maritime commuters. Of course, as the Supreme Court said, "there will always be a boundary to coverage, and there will always be people who cross it during their employment." *Herb's Welding, Inc. v. Gray, 470 U.S. 414, 428, 105 S. Ct. 1421, 1429, 84 L. Ed. 2d 406 (1985)* [**31] (citation omitted). The true boundary, in my view, should not lie at the nethermost conceivable [*911] description of maritime commuter-workers, but at the line drawn by Congress's adoption of a maritime employment status test in the 1972 amendments to the LHWCA. [8] This leads me respectfully to disagree with the interpretation of the LHWCA adopted in Perini. Although our lower court may not defy the High Court's ruling, it is useful to observe how interpretation of the statute could be brought more in line with its plain meaning.

8 See Longshoremen's and Harbor Workers' Compensation Act § 2(3), *33 U.S.C. § 902(3)* ("The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . . .").

Because much light has been shed on this debate by both the majority and dissenting opinions, I will frame my views succinctly. [**32] First, I accept that Perini insists upon continued LHWCA coverage, irrespective of the 1972 amendment's definition of maritime employment, for any worker "injured while performing his job upon actual navigable waters." *Perini, 459 U.S. at 299; 103 S. Ct. at 638*. [9] Although it is a close call, I disagree with the majority's conclusion that because Bienvenu voluntarily performed as much as 8.3% of his work duties on the vessel, i.e. repairing or maintaining equipment and tools, he was not merely "transiently" aboard and thus excluded from LHWCA coverage. Perini's significant footnote disclaims any intent to rule on whether LHWCA "coverage extends to a worker injured while transiently or fortuitously upon actual navigable waters . . . ." *459 U.S. 297, 326 n.34, 103 S. Ct.*

MCDERMOTT, INC., PETITIONER v. AMCLYDE AND RIVER DON CASTINGS LTD.

No. 92-1479

SUPREME COURT OF THE UNITED STATES

511 U.S. 202; 114 S. Ct. 1461; 128 L. Ed. 2d 148; 1994 U.S. LEXIS 3122; 62 U.S.L.W. 4241; CCH Prod. Liab. Rep. P13,826; 1994 AMC 1521; 94 Cal. Daily Op. Service 2727; 94 Daily Journal DAR 5248; 8 Fla. L. Weekly Fed. S 50

January 11, 1994, Argued
April 20, 1994, Decided

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

DISPOSITION: *979 F.2d 1068*, reversed and remanded.

SYLLABUS

When petitioner McDermott, Inc., attempted to use a crane purchased from respondent AmClyde to move an offshore oil and gas production platform, a prong of the crane's hook broke, damaging both the platform and the crane itself. The malfunction may have been caused by McDermott's negligent operation of the crane, by AmClyde's faulty design or construction, by a defect in the hook supplied by respondent River Don Castings, Ltd., or by one or more of the three companies that supplied supporting steel slings. McDermott brought suit in admiralty against respondents and the three "sling defendants," but settled with the latter for $ 1 million. The case then went to trial, and the jury assessed McDermott's loss at $ 2.1 million, allocating 32% of the damages to AmClyde, 38% to River Don, and 30% jointly to petitioner and the sling defendants. Among other things, the District Court entered judgment against AmClyde for $ 672,000 (32% of $ 2.1 million) and against River Don for $ 798,000 (38% of $ 2.1 million). Holding that the contract between McDermott and AmClyde precluded any recovery against the latter and that the trial judge had improperly denied respondents' motion to reduce the judgment against them *pro tanto* by the settlement amount, the Court of Appeals reversed the judgment against AmClyde entirely and reduced the judgment against River Don to $ 470,000, which it computed by determining McDermott's full award to be $ 1.47 million ($ 2.1 million minus 30% attributed to McDermott/sling defendants), and then by deducting the $ 1 million settlement.

Held:

The nonsettling defendants' liability should be calculated with reference to the jury's allocation of proportionate responsibility, not by giving them a credit for the dollar amount of the settlement. Pp. 207-221.

(a) Supported by a consensus among maritime nations, scholars, and judges, the Court, in *United States v. Reliable Transfer Co., 421 U.S. 397, 409, 44 L. Ed. 2d 251, 95 S. Ct. 1708,* adopted a rule requiring that damages in an admiralty suit be assessed on the basis of proportionate fault when such an allocation can reasonably be made. No comparable consensus has developed with respect to the issue in this case. Although it is generally agreed that nonsettling joint tortfeasors are entitled to a credit when the plaintiff settles with one of the other defendants, there is a divergence of views about how that credit should be determined. The American Law Institute (ALI) has identified three principal alternatives for doing so: (1) *pro tanto* setoff with a right of contribution against the settling defendant; (2) *pro tanto* setoff without contribution; and (3) the "proportionate share approach," whereby the settlement diminishes the injured party's claim against nonsettling tortfeasors by the amount of the equitable share of the obligation of the settling tortfeasor. Pp. 207-211.

(b) ALI Option 3, the proportionate share approach, best answers the question presented in this case. Option 1 is clearly inferior to the other two alternatives, because it discourages settlement and leads to unnecessary ancillary litigation. As between Options 2 and 3, the proportionate share approach is more consistent with the proportionate fault approach of *Reliable Transfer, supra,* because a litigating defendant ordinarily pays only its proportionate share of the judgment. Conversely, Option 2, even when supplemented with hearings to determine the good faith of the settlement, is likely to lead to inequitable apportionments of liability, contrary to *Reliable Transfer.* Moreover, although Option 2 sometimes seems to better promote settlement than Option 3, it must ultimately be seen to have no clear advantage in that regard, since, under the proportionate share approach, factors such as the parties' desire to avoid litigation costs, to reduce uncertainty, and to maintain ongoing commercial relationships should ensure nontrial dispositions in the vast majority of cases. Similarly, Option 2 has no clear advantage with respect to judicial economy unless it is adopted without the requirement of a good-faith hearing, a course which no party or *amicus* advocates because of the large potential for unfairness to nonsettling defendants, who might have to pay more than their fair share of the damages. Pp. 211-217.

(c) Respondents' argument that the proportionate share approach violates the "one satisfaction rule" -- which, as applied by some courts, reduces a plaintiff's recovery against a nonsettling defendant in order to ensure that the plaintiff does not secure more than necessary to compensate him for his loss -- is rejected, since the law contains no rigid rule against overcompensation, and, indeed, several doctrines, such as the collateral benefits rule, recognize that making tortfeasors pay for the damage they cause can be more important than preventing overcompensation. The argument that the proportionate share approach is inconsistent with *Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 61 L. Ed. 2d 521, 99 S. Ct. 2753,* is also rejected, since *Edmonds* was primarily a statutory construction case, did not address the question at issue here or even involve a settlement, and can be read as merely reaffirming the well-established principle of joint and several liability, which was in no way abrogated by *Reliable Transfer* and is not in tension with the proportionate share approach. Pp. 218-221.

COUNSEL: Arden J. Lea argued the cause for petitioner. With him on the briefs was R. Jeffrey Bridger.

William K. Kelley argued the cause for the United States as amicus curiae urging reversal. With him on the brief were Solicitor General Days, Assistant Attorney General Hunger, Acting Deputy Solicitor General Kneedler, Richard A. Olderman, and David V. Hutchinson.

Robert E. Couhig, Jr., argued the cause for respondents. With him on the brief was Thomas G. O'Brien. *

* Warren B. Daly, Jr., and George W. Healy III filed a brief for the Maritime Law Association of the United States as amicus curiae urging reversal.

JUDGES: STEVENS, J., delivered the opinion for a unanimous Court.

OPINION BY: STEVENS

OPINION

[*204] [*154] [**1463]** JUSTICE STEVENS delivered the opinion of the Court.

[*LEdHR1A]** [1A]A construction accident in the Gulf of Mexico gave rise to this admiralty case. In advance of trial, petitioner, the plaintiff, settled with three of the defendants for $ 1 million. Respondents, however, did not settle, and the case went to trial. A jury assessed petitioner's loss at $ 2.1 million and allocated 32% of the damages to respondent AmClyde and 38% to respondent River Don Castings, Ltd. (River Don). The question presented is whether the liability of the nonsettling defendants should be calculated with reference to the jury's allocation of proportionate responsibility, or by giving the nonsettling defendants a credit for the dollar amount of the settlement. We hold that the proportionate approach is the correct one.

I

Petitioner McDermott, Inc., purchased a specially designed, 5,000-ton crane from AmClyde. [1] When petitioner [*205] first used the crane in an attempt to move an oil and gas production platform -- the "Snapper deck" -- from a barge to a structural-steel base affixed to the floor of the Gulf of Mexico, a prong of the crane's main hook broke, causing massive damage to the deck and to the crane itself. The malfunction may have been caused by petitioner's negligent operation of the crane, by AmClyde's faulty design or construction, by a defect in the hook supplied by River Don, or by one or more of the three companies (the "sling defendants") that supplied the supporting steel slings. [2]

1 "AmClyde," formerly known as "Clyde Iron," is a division of AMCA International, Inc.

2 The three sling defendants, sometimes also described as the "settling defendants," were International Southwest Slings, Inc.; British Ropes, Ltd.; and Hendrik Veder B. V.

Invoking the federal court's jurisdiction under *28 U.S.C. §§ 1332* and *1333(1)*, [3] petitioner brought suit against AmClyde and River Don and the three sling defendants. The complaint sought a recovery for both deck damages and crane damages. On the eve [**1464] of trial, petitioner entered into a settlement with the sling defendants. In exchange for $ 1 million, petitioner agreed to dismiss with prejudice its claims against the sling defendants, to release them from all liability for either deck or crane damages, and to indemnify them against any contribution action. The trial judge later ruled that petitioner's claim for crane damages was barred by *East River S. S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 90 L. Ed. 2d 865, 106 S. Ct. 2295 (1986)*.

3 *Section 1333(1)* provides: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

In its opening statement at trial, petitioner McDermott "accepted responsibility for any part the slings played in causing the damage." [4] *McDermott, Inc. v. Clyde Iron, 979 F.2d 1068, 1070* [*206] *(CA5 1993)*. The jury found that the total damages to the deck amounted to $ 2.1 million and, [***155] in answer to special interrogatories, allocated responsibility among the respective parties: 32% to AmClyde, 38% to River Don, and 30% jointly to McDermott and the sling defendants. [5] The court denied a motion by respondents to reduce the judgment *pro tanto* by the $ 1 million settlement, and entered judgment against AmClyde for $ 672,000 (32% of $ 2.1 million) and against River Don for $ 798,000 (38% of $ 2.1 million). Even though the sum of those judgments plus the settlement proceeds exceeded the total damages found by the jury, the District Court concluded that petitioner had not received a double recovery because the settlement had covered both crane damages and deck damages. [6]

4 McDermott's motive in taking upon itself responsibility for the sling defendant's fault is obscure. Perhaps it thought doing so would prevent a contribution action against the sling defendants and thus relieve McDermott of its indemnity obligation.

5 The special interrogatory treated McDermott and the sling defendants as a single entity and called for a percentage figure that covered them both. This combined treatment reflected McDermott's acceptance of responsibility for the damages caused by the sling defendants.

6 The trial judge also noted that "to hold as the defendants request would result in the settling defendants, who were at the most thirty percent (30%) responsible for the accident (no separate contributory negligence, if any, finding was made as to McDermott), paying One Million Dollars ($ 1,000,000.00) while the defendants who insisted on a trial and were found to be seventy percent (70%) liable would pay Four Hundred and Seventy Thousand Dollars ($ 470,000.00) between them. That is unjust . . . ." App. to Pet. for Cert. A-52 to A-53.

The Court of Appeals held that a contractual provision precluded any recovery against AmClyde and that the trial judge had improperly denied a *pro tanto* settlement credit. It reversed the judgment against AmClyde entirely and reduced the judgment against River Don to $ 470,000. It arrived at that figure by making two calculations. First, it determined that petitioner's "full damage[s] award is $ 1.47 million ($ 2.1 million jury verdict less 30% attributed to McDermott/sling defendants)." *979 F.2d at 1081*. Next, it deducted the "$ 1 million received in settlement to reach [*207] $ 470,000." *Ibid.* It treated this figure as the maximum that could be recovered from the nonsettling defendants. Because it was less than River Don's liability as found by the jury (38% of $ 2.1 million or $ 798,000), it directed the entry of judgment against River Don in that amount. *Ibid.*

Because we have not previously considered how a settlement with less than all of the defendants in an admiralty case should affect the liability of nonsettling defendants, and because the Courts of Appeals have adopted different approaches to this important question, we granted certiorari. *509 U.S. 921 (1993)*.

II

Although Congress has enacted significant legislation in the field of admiralty law, 7 none of those statutes provides us with any "policy guidance" or imposes any limit on our authority to fashion the rule that will best answer the question presented by this case. [**1465] See *Miles v. Apex Marine Corp., 498 U.S. 19, 27, 112 L. Ed. 2d 275, 111 S. Ct. 317 (1990)*. We are, nevertheless, in familiar waters because "the Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime." *United States v. Reliable Transfer Co., 421 U.S. 397, 409, 44 L. Ed. 2d 251, 95 S. Ct. 1708* [***156] *(1975)*.

7 See, *e. g.*, Longshore and Harbor Workers' Compensation Act, *33 U.S.C. §§ 901-950*; Death on the High Seas Act, *46 U.S.C. §§ 761-768*; Public Vessels Act, *46 U.S.C. §§ 781-790*.

In the *Reliable Transfer* case we decided to abandon a rule that had been followed for over a century in assessing damages when both parties to a collision are at fault. We replaced the divided damages rule, which required an equal division of property damage whatever the relative degree of fault may have been, with a rule requiring that damages be assessed on the basis of proportionate fault when such an allocation can reasonably be made. Although the old rule avoided the difficulty of determining comparative degrees of [*208] negligence, we concluded that it was "unnecessarily crude and inequitable" and that "potential problems of proof in some cases hardly require adherence to an archaic and unfair rule in all cases." *Id., at 407*. Thus the interest in certainty and simplicity served by the old rule was outweighed by the interest in fairness promoted by the proportionate fault rule.

[***LEdHR2] [2]Our decision in *Reliable Transfer* was supported by a consensus among the world's maritime nations and the views of respected scholars and judges. See *id., at 403-405*. No comparable consensus has developed with respect to the issue in the case before us today. It is generally agreed that when a plaintiff settles with one of several joint tortfeasors, the nonsettling defendants are entitled to a credit for that settlement. There is, however, a divergence among respected scholars and judges about how that credit should be determined. Indeed, the American Law Institute (ALI) has identified three principal alternatives and, after noting that "each has its drawbacks and no one is satisfactory," decided not to take a position on the issue. *Restatement (Second) of Torts § 886A*, pp. 343-344 (1977). The ALI describes the three alternatives as follows:

> "(1) The money paid extinguishes any claim that the injured party has against the party released and the amount of his remaining claim against the other tortfeasor is reached by crediting the amount received; but the transaction does not affect a claim for contribution by another tortfeasor who has paid more than his equitable share of the obligation." *Id., at 343*.
>
> "(2) The money paid extinguishes both any claims on the part of the injured party and any claim for contribution by another tortfeasor who has paid more than his equitable share of the obligation and seeks contribution." *Ibid.* (As in alternative (1), the amount of the injured party's claim against the other tortfeasors is calculated [*209] by subtracting the amount of the settlement from the plaintiff's damages.)
>
> "(3) The money paid extinguishes any claim that the injured party has against the released tortfeasor and also diminishes the claim that the injured party has against the other tortfeasors by the amount of the equitable share of the obligation of the released tortfeasor." *Id., at 344*. 8

8 The three alternatives sketched by the ALI correspond to three detailed model Acts proposed by the National Conference of Commissioners on

Uniform State Laws. Uniform Contribution Among Tortfeasors Act (1939 Act), 12 U. L. A. 57-59 (1975) (ALI Option 1); Revised Uniform Contribution Among Tortfeasors Act (1955 Revised Act), *id.*, at 63-107 (ALI Option 2); Uniform Comparative Fault Act (1977 Act), 12 U. L. A. 45-61 (1993 Supp.) (ALI Option 3). Although the three ALI options are the most plausible, a number of others are possible. So, for example, in addition to arguing for the *pro tanto* rule, respondents suggest that we consider a rule that allows the nonsettling defendants to elect before trial either the *pro tanto* or the proportionate share rule. Although respondents claim support for their proposal in Texas and New York statutes, those statutes enact regimes quite different from that proposed by respondents. *Texas Civ. Prac. & Rem. Code Ann. § 33.012(b)* (Supp. 1994) (nonsettling defendant can choose *pro tanto* rule or reduction of damages by fixed proportion of total damages without regard to relative fault); *N. Y. Gen. Oblig. Law § 15-108* (McKinney 1989) (*pro tanto* rule or proportionate share rule, whichever favors nonsettling defendants). We are unwilling to consider a rule that has yet to be applied in any jurisdiction.

[***157] [**1466] [***LEdHR1B] [1B]The first two alternatives involve the kind of "*pro tanto*" credit that respondents urge us to adopt. The difference between the two versions of the *pro tanto* approach is the recognition of a right of contribution against a settling defendant in the first but not the second. The third alternative, supported by petitioner, involves a credit for the settling defendants' "proportionate share" of responsibility for the total obligation. Under this approach, no suits for contribution from the settling defendants are permitted, nor are they necessary, because the nonsettling defendants pay no more than their share of the judgment.

[*210] [***LEdHR3A] [3A]The proportionate share approach [9] would make River Don responsible for precisely its share of the damages, $ 798,000 (38% of $ 2.1 million). [10] A simple application of the *pro tanto* approach would allocate River Don $ 1.1 million in damages ($ 2.1 million total damages minus the $ 1 million settlement). [11] The [***158] Court of Appeals, however, made a different [*211] calculation. Because McDermott "accepted responsibility for any part the sling played in causing the damage," *979 F.2d at 1070*, the Court of Appeals treated the 30% of liability apportioned to "McDermott/sling defendants" as if that 30% had been caused solely by McDermott's own negligence. *Id., at 1081*. The Court of Appeals, therefore, gave River Don a double credit, first reducing the total loss by the McDermott/sling defendants' proportionate share and then applying the full *pro tanto* reduction to that amount. This double credit resulted in an award of only $ 470,000 ($ 2.1 million minus 30% of $ 2.1 million minus $ 1 million). [12]

9 In this opinion, we use the phrase "proportionate share approach" to denote ALI Option 3. We have deliberately avoided use of the term "pro rata," which is often used to describe this approach, see, *e. g.*, T. Schoenbaum, Admiralty and Maritime Law § 4-15, p. 153 (1987), because that term is also used to describe an equal allocation among all defendants without regard to their relative responsibility for the loss. See *In re Masters Mates & Pilots Pension Plan and IRAP Litigation, 957 F.2d 1020, 1028 (CA2 1992)*; Silver, Contribution Under the Securities Acts: The Pro Rata Method Revisited, 1992/ 1993 Ann. Survey Am. L. 273. Others have used different terms to describe the approach adopted here. *Ibid.* ("proportionate method"); Kornhauser & Revesz, Settlements Under Joint and Several Liability, *68 N. Y. U. L. Rev. 427, 438 (1993)* ("apportioned share set-off rule"); Polinsky & Shavell, Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis, 33 Stan. L. Rev. 447 (1981) ("claim reduction").

[***LEdHR3B] [3B]

10 It might be thought that, since AmClyde is immune from damages, River Don's liability should be $ 1.47 million (McDermott's $ 2.1 million loss minus 30% of $ 2.1 million, the share of liability attributed to the settling defendants and McDermott). This calculation would make River Don responsible not only for its own 38% share, but also for the 32% of the damages allocated by the jury to AmClyde. This result

could be seen as mandated by principles of joint and several liability and by *Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 61 L. Ed. 2d 521, 99 S. Ct. 2753 (1979)*. See *infra*, at 220-221. Nevertheless, McDermott has not requested that River Don pay any more than its 38% share of the damages. AmClyde is immune from damages because its contract with McDermott provided that free replacement of defective parts "shall constitute fulfillment of all liabilities . . . whether based upon Contract, tort, strict liability or otherwise." *979 F.2d 1068, 1075 (CA5 1993)* (emphasis omitted). The best way of viewing this contractual provision is as a quasi settlement in advance of any tort claims. Viewed as such, the proportionate credit in this case properly takes into account both the 30% of liability apportioned to the settling defendants (and McDermott) and the 32% allocated to AmClyde. This leaves River Don with $ 798,000 or 38% of the damages.

11 For simplicity, we ignore AmClyde, which was found to be immune from damages by the Court of Appeals. *Id., at 1075-1076*. No party appeals that holding. Although AmClyde spent a considerable amount replacing the defective hook, River Don does not argue that that amount should be included in the calculation of its liability.

12 Whether the Court of Appeals correctly applied the *pro tanto* rule in the context of McDermott's acceptance of responsibility for the sling damages is a difficult question. Fortunately, since we adopt the proportionate share approach, we need not answer it.

III

[***LEdHR1C] [1C]In choosing among the ALI's three alternatives, three considerations are paramount: [**1467] consistency with the proportionate fault approach of *United States v. Reliable Transfer, 421 U.S. 397, 44 L. Ed. 2d 251, 95 S. Ct. 1708 (1975)*, promotion of settlement, and judicial economy. ALI Option 1, *pro tanto* setoff with right of contribution against the settling defendant, is clearly inferior to the other two, because it discourages settlement and leads to unnecessary ancillary litigation. It discourages settlement, because settlement can only disadvantage the settling defendant. 13 If a defendant makes a favorable settlement, in [*212] which it pays less than the amount a court later determines is its share of liability, the other defendant (or defendants) can sue the settling defendant for contribution. The settling defendant thereby loses the benefit of its favorable settlement. In addition, the claim for contribution burdens the courts with additional litigation. The plaintiff can mitigate the adverse effect on settlement by promising to indemnify the settling defendant against contribution, as McDermott did here. This indemnity, while removing the disincentive to settlement, adds yet another potential burden on the courts, an indemnity action between the settling defendant and plaintiff.

13 Uniform Contribution Among Tortfeasors Act § 4 (1955 Revised Act), Commissioners' Comment, 12 U. L. A. 99 (1975); Kornhauser & Revesz, *68 N. Y. U. L. Rev., at 474*; Polinsky & Shavell, 33 Stan. L. Rev., at 458-459, 462, 463. This argument assumes, in accordance with the law of most jurisdictions, that a settling defendant ordinarily has no right of contribution against other defendants. See Uniform Contribution Against Tortfeasors Act § 1(d), 12 U. L. A. 63 (1975); Uniform Comparative Fault Act § 4(b), 12 U. L. A. 54 (1993 Supp.); *Restatement (Second) of Torts § 886A(2)* and *Comment f*, pp. 337, 339 (1977).

The choice between ALI Options 2 and 3, between the *pro tanto* rule without contribution against the settling tortfeasor and the proportionate share approach, is less clear. The proportionate share rule is more consistent with *Reliable Transfer*, because a litigating defendant ordinarily pays only its proportionate share of the judgment. Under the *pro tanto* approach, however, a litigating defendant's liability will frequently differ from its equitable share, because a settlement with one defendant for less than its equitable share [***159] requires the nonsettling defendant to pay more than its share. 14 Such deviations from the equitable apportionment [*213] of damages will be common, because settlements seldom reflect an entirely accurate prediction of the outcome of a trial. Moreover, the settlement figure is likely to be significantly less than the settling defendant's equitable share of the loss, because settlement reflects the uncertainty of trial and provides the plaintiff with a "war chest" with which to finance the litigation against the remaining defendants. Courts and legislatures have recognized this potential for unfairness and have required "good-faith hearings" as a remedy. 15 When such hearings are required, the settling defendant is protected against contribution actions only if it shows that the settlement is a fair forecast of its equitable share of the judgment. 16 Nevertheless, [**1468] good-faith hearings cannot fully remove the potential for inequitable allocation of liability. 17 First, to serve their protective function effectively, such hearings would have to be minitrials on the merits, but in practice they are often quite cursory. 18 More fundamentally, even if the judge at a good-faith hearing were able to make a perfect forecast of the allocation of liability at trial, there might still be substantial unfairness when the plaintiff's success [*214] at trial is uncertain. 19 In sum, the *pro tanto* approach, even when supplemented [***160] with good-faith hearings, is likely to lead to inequitable apportionments of liability, contrary to *Reliable Transfer*.

14 Suppose, for example, that a plaintiff sues two defendants, each equally responsible, and settles with one for $ 250,000. At trial, the non-settling defendant is found liable, and plaintiff's damages are assessed at $ 1 million. Under the *pro tanto* rule, the nonsettling defendant would be liable for 75% of the damages ($ 750,000, which is $ 1 million minus $ 250,000). The litigating defendant is thus responsible for far more than its proportionate share of the damages. It is also possible for the *pro tanto* rule to result in the nonsettlor paying less than its apportioned share, if, as in this case, the settlement is greater than the amount later determined by the court to be the settlors' equitable share. For a more complex example illustrating the potential for unfairness under the *pro tanto* rule when the parties are not equally at fault, see Kornhauser & Revesz, *68 N. Y. U. L. Rev., at 455-456* (*pro tanto* rule can lead to defendant responsible for 75% of damages paying only 37.5% of loss, while 25% responsible defendant pays 31.25%).

15 *In re Masters Mates & Pilots Pension Plan and IRAP Litigation, 957 F.2d 1020 (CA2 1992)*; *Miller v. Christopher, 887 F.2d 902, 906-907 (CA9 1989)*; *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985)*; Uniform Contribution Among Tortfeasors Act § 4 (1955 Revised Act), 12 U. L. A. 98 (1975) (enacted as statute law in 19 States, 12 U. L. A. 81 (1993 Supp.)).

16 *Tech-Bilt, Inc., 38 Cal. 3d at 499, 698 P.2d at 166*; *Miller, 887 F.2d at 907*; *In re Masters, 957 F.2d at 1031*; but see *Noyes v. Raymond, 28 Mass. App. 186, 190, 548 N.E.2d 196, 199 (1990)* (judge in good-faith hearing should not scrutinize the settlement amount, but merely look for "collusion, fraud, dishonesty, and other wrongful conduct").

17 *Franklin v. Kaypro Corp., 884 F.2d 1222, 1230 (CA9 1989)*.

18 *Tech-Bilt, 38 Cal. 3d at 500, 698 P.2d at 167* ("The determination of good faith can be made by the court on the basis of affidavits"); *TBG Inc. v. Bendis, 811 F. Supp. 596, 605, n. 17, 608 (Kan. 1992)* (no "mini trial" required; settlement amount is "best available measure of liability").

19 Suppose again, as in footnote 14, that plaintiff sues two equally culpable defendants for $ 1 million and settles with one for $ 250,000. At the good-faith hearing, the settling defendant persuasively demonstrates that the settlement is in good faith, because it shows that its share of liability is 50% and that plaintiff has only a 50% chance of prevailing at trial. The settlement thus reflects exactly the settling defendant's expected liability. If plaintiff prevails at trial, the nonsettling defendant will again be liable for 75% of the judgment even though its equitable share is only 50%. The only way to avoid this inequity is for the judge at the good-faith hearing to disallow any settlement for less than $ 500,000, that is, any settlement which takes into account the uncertainty of recovery at trial. Such a policy, however, carries a grave cost. It would make settlement extraordinarily difficult, if not impossible, in most cases. As a result, every jurisdiction that conducts a good-faith inquiry into the amount of the settlement takes into account the uncertainty of recovery at trial. *Miller, 887 F.2d at 907-908*; *Tech-Bilt, 38 Cal. 3d at 499, 698 P.2d at 166*; *TBG Inc., 811 F. Supp. at 600*.

The effect of the two rules on settlements is more ambiguous. Sometimes the *pro tanto* approach will better promote settlement. 20 This beneficial effect, however, is a consequence [*215] of the inequity discussed above. The rule encourages settlements by giving the defendant that settles first an opportunity to pay less than its fair share of the damages, thereby threatening the nonsettling defendant with the prospect of paying more than its fair share of the loss. By disadvantaging the party that spurns settlement offers, the *pro tanto* rule puts pressure on all defendants to settle. 21 While public policy wisely encourages settlements, such additional pressure to settle is unnecessary. The parties' desire to avoid litigation costs, to reduce uncertainty, and to maintain ongoing [**1469] commercial relationships is sufficient to ensure nontrial dispositions in the vast majority of cases. 22 Under the proportionate share approach, such factors should ensure a similarly high settlement rate. The additional incentive to settlement provided by the *pro tanto* rule comes at too high a price in unfairness. 23 Furthermore, [***161] any conclusion that the *pro tanto* rule generally encourages more settlements requires many simplifying assumptions, such as low litigation costs. Recognition of the reality that a host of practical [*216] considerations may be more significant than stark hypotheticals persuades us that the *pro tanto* rule has no clear advantage in promoting settlements. 24

20 Illustration of the beneficial effects of the *pro tanto* rule requires substantial simplifying assumptions. Suppose, for example, that all parties are risk neutral, that litigation is costless, and that there are only two defendants. In addition, suppose everyone agrees that the damages are $ 100, that if one defendant is found liable, the other one will also be found liable, and that if the defendants are liable, each will be apportioned 50% of the damages. And suppose, as frequently happens, that the plaintiff is more optimistic about his chances of prevailing than the defendants: Plaintiff thinks his chances of winning are 60%, whereas the defendants think the plaintiff's chances are only 50%. In this case, under the proportionate setoff rule, settlement is unlikely, because the plaintiff would be reluctant to accept less than $ 30 (60% times 50% of $ 100) from each defendant, whereas neither defendant would be disposed to offer more than $ 25 (50% times 50% of $ 100). On the other hand, under the *pro tanto* rule, the plaintiff would be willing to accept a $ 25 settlement offer, because he would believe he had a 60% chance of recovering $ 75 ($ 100 minus the $ 25 settlement) at trial from the other defendant. Accepting the $ 25 settlement offer would give the plaintiff an expected recovery of $ 70 ($ 25 plus 60% of $ 75), which is more than the $ 60 (60% of $ 100) the plaintiff would expect if he went to trial against both defendants. For a more thorough discussion of settlement under the *pro tanto* rule, see Kornhauser & Revesz, *68 N. Y. U. L. Rev., at 447-465*.

21 See H. Hovenkamp, Economics and Federal Antitrust Law § 14.6, p. 377 (1985), summarizing Easterbrook, Landes, & Posner, Contribution among Antitrust Defendants: A Legal and Economic Analysis, 23 J. Law & Econ. 331, 353-360 (1980).

22 Less than 5% of cases filed in federal court end in trial. Administrative Office of United States Courts, Annual Report of the Director, 186, 217 (1991) (Of 211,713 civil cases terminated between July 1, 1990, and June 30, 1991, only 11,024 involved trials). Although some of the nontrial terminations are the result of pretrial adjudications, such as summary judgments and contested motions to dismiss, the bulk of the nontrial terminations reflect settlements. Kritzer, Adjudication to Settlement: Shading in the Gray, 70 Judicature 161, 163-164 (1986).

23 *United States v. Reliable Transfer Co., 421 U.S. 397, 408, 44 L. Ed. 2d 251, 95 S. Ct. 1708 (1975)* ("Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations").

24 An excellent discussion of the effect of the various rules on settlement is Kornhauser & Revesz, Settlement Under Joint and Several Liability, *68 N. Y. U. L. Rev. 427 (1993)*. After considering the effects of strategic behavior, litigation costs, and whether the probabilities of the defendants' being found liable at trial are "independent" or "correlated," they conclude that "neither rule is consistently better than the other." *Id., at 492*. In addition, in comparing the *pro tanto* and proportionate share rules, they generally assume that the *pro tanto* rule is implemented without goodfaith hearings. Good-faith hearings, however, "make the pro tanto set-off rule relatively less desirable from the perspective of inducing settlements than the apportioned [*i. e.* proportionate] share set-off rule." *Id., at 476*. Moreover, the *pro tanto* rule contains a unique disincentive to settlement in cases, like this one, in which the settlement covers more items of damage than the litigated judgment. McDermott argued that the settlement covered damage both to the crane and to the deck, whereas the judgment against River Don related only to the deck. The

Court of Appeals refused to apportion the settlement between deck damages and crane damages and to credit River Don only with that portion related to deck damages. *979 F.2d at 1080*. This refusal to apportion will greatly discourage settlement, because parties like McDermott will be unable to recover their full damages if they settle with one party.

The effect of the two rules on judicial economy is also ambiguous. The *pro tanto* rule, if adopted without the requirement of a good-faith hearing, would be easier to administer, because the relative fault [25] of the settling defendant would not have to be adjudicated either at a preliminary hearing or at trial. Nevertheless, because of the large potential for unfairness, no party or *amicus* in this suit advocates the *pro tanto* rule untamed by good-faith hearings. Once the *pro tanto* rule is coupled with a good-faith hearing, however, it is difficult to determine whether the *pro tanto* or proportionate share approach best promotes judicial economy. Under either approach, the relative fault of the parties will have to [*217] be determined. Under the *pro tanto* approach, the settling defendant's share of responsibility will have to be ascertained at a separate, pretrial hearing. Under the proportionate share approach, the allocation will take place at trial. The *pro tanto* approach will, therefore, save judicial time only if the good-faith hearing is quicker than the allocation of fault at trial. Given the cursory nature of most good-faith hearings, this may well be true. On the other hand, there is reason to believe that reserving the apportionment of liability for trial may save more time. First, the remaining defendant (or defendants) may settle before trial, thus making any determination of relative culpability unnecessary. In addition, the apportionment of damages required by the proportionate share rule may require little or no additional trial time. The parties will often need to describe the settling defendant's role in order to provide context for the [**1470] dispute. Furthermore, a defendant will often argue the "empty chair" in the hope of convincing the jury that the settling party was exclusively responsible for the damage. The *pro tanto* rule thus has no clear [***162] advantage with respect to judicial economy. [26]

25 By referring to the relative fault of the parties, we express no disapproval of the lower courts' use of relative "causation" to allocate damages. See *979 F.2d at 1081-1082*.

26 A further cost of the *pro tanto* rule would be incurred in cases in which the settlement covered more items of damage than the judgment. See n. 24, *supra*. To avoid discouraging settlement, the judge would have to figure out what proportion of the settlement related to damages covered by the judgment and what percentage related to damages covered only by the settlement. Presumably this allocation would be done by comparing the settling defendant's liability for the damages to be covered by the judgment to those not so covered. Ascertaining the liability of a settling defendant for damages not otherwise litigated at trial would be at least as difficult as ascertaining an absent defendant's responsibility for damages already the subject of litigation.

In sum, although the arguments for the two approaches are closely matched, we are persuaded that the proportionate share approach is superior, especially in its consistency with *Reliable Transfer*.

[*218] IV

Respondents advance two additional arguments against the proportionate share approach: that it violates the "one satisfaction rule" and that it is inconsistent with *Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 61 L. Ed. 2d 521, 99 S. Ct. 2753 (1979)*.

In the 19th and early 20th centuries, the "one satisfaction rule" barred a plaintiff from litigating against one joint tortfeasor, if he had settled with and released another. [27] This version of the one satisfaction rule has been thoroughly repudiated. [28] Respondents do not ask that the one satisfaction rule be applied with its original strictness, but rather in the milder form in which some courts still invoke it to reduce a plaintiff's recovery against a nonsettling defendant in order to ensure that the plaintiff does not secure more than necessary to compensate him for his loss. [29] As a preliminary matter, it is far from clear that there was any danger of supercompensatory damages here. First, there is the question of the crane damages, which were not covered by the judgment against River Don. In addition, even limiting consideration to deck damages, the jury fixed plaintiff's losses at $ 2.1 million. Plaintiff received $ 1 million in settlement from the sling defendants. Under the proportionate share approach, plaintiff would receive an additional $ 798,000 from River Don. In total, plaintiff would recover only $ 1.798 million, over $ 300,000 less than its damages. The one satisfaction rule comes into play only if one assumes that the percent share of liability apportioned to McDermott and the sling defendants really represented McDermott's contributory [*219] fault, and that it would be overcompensatory for McDermott to receive more than the percentage of the total loss allocated to the defendants, here $ 1.47 million (70% of $ 2.1 million).

27 *Conway v. Pottsville Union Traction Co., 253 Pa. 211, 97 A. 1058 (1916); Rogers v. Cox, 66 N.J.L. 432, 50 A. 143 (1901)*; W. Prosser, Law of Torts § 109, pp. 1105-1111 (1941).
28 W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 49, pp. 333-334 (5th ed. 1984); *Restatement (Second) of Torts § 885(1), Comment b*, at 334.
29 *Rose v. Associated Anesthesiologists, 163 U.S. App. D.C. 246, 501 F.2d 806, 809 (CADC 1974); Sanders v. Cole Municipal Finance, 489 N.E.2d 117, 120 (Ind. App. 1986).*

[***LEdHR4A] [4A]Even if the Court of Appeals were correct in finding that the proportionate share approach would overcompensate McDermott, we would not apply the one satisfaction rule. The law contains no rigid rule [***163] against overcompensation. Several doctrines, such as the collateral benefits rule, [30] recognize that making [**1471] tortfeasors pay for the damage they cause can be more important than preventing overcompensation. In this case, any excess recovery is entirely attributable to the fact that the sling defendants may have made an unwise settlement. It seems probable that in most cases in which there is a partial settlement, the plaintiff is more apt to accept *less* than the proportionate share that the jury might later assess against the settling defendant, because of the uncertainty of recovery at the time of settlement negotiations and because the first settlement normally improves the plaintiff's litigating posture against the nonsettlors. In such cases, the entire burden of applying a proportionate share rule would rest on the plaintiff, and the interest in avoiding overcompensation would be absent. More fundamentally, we must recognize that settlements frequently result in the plaintiff's getting more than he would have been entitled to at trial. Because settlement amounts are based on rough estimates of liability, anticipated savings in litigation costs, and a host of other factors, they will rarely match exactly [*220] the amounts a trier of fact would have set. It seems to us that a plaintiff's good fortune in striking a favorable bargain with one defendant gives other defendants no claim to pay less than their proportionate share of the total loss. In fact, one of the virtues of the proportionate share rule is that, unlike the *pro tanto* rule, it does not make a litigating defendant's liability dependent on the amount of a settlement negotiated by others without regard to its interests.

[***LEdHR4B] [4B]

30 See 4 F. Harper, F. James, & O. Gray, Law of Torts § 25.22 (2d ed. 1986) (injured person can recover full damages from tortfeasor, even when he has already been made whole by insurance or other compensatory payment); *Restatement (Second) of Torts § 920A(2)* (1977). The one satisfaction rule once applied to compensatory payments by nonparties as well; thus preventing or diminishing recovery in many situations in which the collateral benefits rules would now permit full judgment against the tortfeasor. W. Prosser, Law of Torts § 109, pp. 1105-1107 (1941).

[***LEdHR5] [5] [***LEdHR6] [6]Respondents also argue that the proportionate share rule is inconsistent with *Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 61 L. Ed. 2d 521, 99 S. Ct. 2753 (1979)*. In that case, we refused to reduce the judgment against a shipowner by the proportionate fault attributed to a stevedore whose liability was limited by the Longshoremen's and Harbor Workers' Compensation Act. Instead, the Court allowed the plaintiff to collect from the shipowner the entirety of his damages, after adjusting for the plaintiff's own negligence. There is no inconsistency between that result and the rule announced in this opinion. *Edmonds* was primarily a statutory construction case and related to special interpretive questions posed by the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act. Both parties acknowledge that this case must be resolved by judge-made rules of law. Moreover, *Edmonds* did not address the issue in this case, the effect of a settlement on nonsettling defendants. Indeed, there was no settlement in that case. Instead, one can read that opinion as merely reaffirming the well-established principle of joint and several liability. As the Court pointed out, that principle was in no way abrogated by *Reliable* [***164] *Transfer*'s proportionate fault approach. *Edmonds, 443 U.S. at 271-272, n. 30.* In addition, as the Commissioners on Uniform State Laws have noted, there is no tension between joint and several liability and a proportionate share approach to settlements. 31 Joint and several liability applies when there [*221] has been a judgment against multiple defendants. It can result in one defendant's paying more than its apportioned share of liability when the plaintiff's recovery from other defendants is limited by factors beyond the plaintiff's control, such as a defendant's insolvency. When the limitations on the plaintiff's recovery arise from outside forces, joint and several liability makes the other defendants, rather than an innocent plaintiff, responsible for the shortfall. *Ibid.* 32 Unlike the rule in *Edmonds*, the proportionate share rule announced in this opinion applies when there has been a settlement. In such cases, the plaintiff's recovery against the settling defendant has been limited not by outside forces, but by its own agreement to settle. There is no reason to allocate any [**1472] shortfall to the other defendants, who were not parties to the settlement. Just as the other defendants are not entitled to a reduction in liability when the plaintiff negotiates a generous settlement, see *supra*, 511 U.S. at 219-220, so they are not required to shoulder disproportionate liability when the plaintiff negotiates a meager one.

31 Uniform Comparative Fault Act § 2, Comment "Joint and Several Liability and Equitable Shares of the Obligation," 12 U. L. A. 51 (1993 Supp.).

32 See also Uniform Comparative Fault Act § 2 (reallocation of insolvent defendant's equitable share), *id., at 50.*

V

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

I-00036

I-00106

NOTES

Chisolm v. UHP Products Incorporated, 205 F.3d 731 (4th Cir. 2000) concerns an injury to one of the vessel's engineers due to a malfunctioning hose being used aboard the vessel by a tank cleaning company. The plaintiff's action against the vessel was predicated upon negligence, with the action against the tank cleaning company focused upon the warranty of workmanlike performance. The plaintiff settled with the vessel owner and proceeded to trial against the tank cleaning company. The jury awarded monetary losses less than the settlement. The trial court entered a take-nothing judgment, after holding that *McDermott* was inapplicable. The reasoning that proportionate fault between the defendants would not be applied was based upon the two theories of recovery, unseaworthiness and warranty of workmanlike performance, concepts of liability without fault, while *McDermott's* holding would be limited to conduct by joint tortfeasors. The trial court was affirmed by the Fourth Circuit. *Central State Transit v. Jones Boat Yard, Inc.*, 206 F.3d 1373, 1377 (11th Cir. 2000) reached a conclusion contrary to *Chisolm*. The court held that the dispute being in contract as opposed to tort did not preclude the *McDermott* rule. The *McDermott/Reliable Transfer* concept applies to all theories of maritime liability apportionment so long as the parties "operated in concert."

ONDIMAR TRANSPORTES MARITIMOS; LTDA AND IBAIZABAL MANAGEMENT SERVICES SL, Plaintiffs - Appellants v. BEATTY STREET PROPERTIES, INC., IN PERSONAM; M/V BAYOU CITY, HER ENGINES, MACHINERY, TACKLE AND APPURTENANCES, ETC., IN REM, Defendants - Appellees

No. 08-20079

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

555 F.3d 184; 2009 U.S. App. LEXIS 572; 2009 AMC 164

January 9, 2009, Filed

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Southern District of Texas.

Ondimar Transportes Maritimos, Ltda v. Beatty St. Props., 2008 U.S. Dist. LEXIS 28 (S.D. Tex., 2008)

DISPOSITION: AFFIRMED.

COUNSEL: For ONDIMAR TRANSPORTES MARITIMOS,LTDA AND IBAIZABAL MANAGEMENT SERVICES SL, Plaintiff - Appellants: James Patrick Cooney, Houston, TX.

For BEATTY STREET PROPERTIES INC, in personam, M/V BAYOU CITY, her engines, machinery, tackle, and appurtenances, etc, in rem, M/V BAYOU CITY, her engines, machinery, tackle, and appurtenances, etc, in rem, Defendant - Appellees: James Thomas Brown, Jr, Michael John Wray, Paxton N Crew, Legge, Farrow, Kimmit, McGrath & Brown, Houston, TX.

JUDGES: Before DAVIS, STEWART, and DENNIS, Circuit Judges.

OPINION BY: DAVIS

OPINION

[*185] DAVIS, Circuit Judge:

Plaintiffs-Appellants Ondimar Transportes Maritimos LTDA and Ibaizabal Management Services SL (collectively, "Ondimar") appeal from the district court's partial summary judgment dismissing Ondimar's assigned tort claim against Defendants-Appellees Beatty Street Properties, Inc. and MN Bayou City (collectively, "Beatty"). For the reasons set forth below, we affirm.

I. FACTS

On April 12, 2005, the M/T Monte Toledo, a vessel owned and operated by Ondimar, collided with a dock at the Port of Texas City ("the Port"). Ondimar denied liability and asserted (and continues [**2] to assert) that the allision occurred because the M/T Monte Toledo's VHF communications with her attending tugs had been disrupted by the use of reserved communications channels by the crew of the M/V Bayou City, a vessel owned and operated by Beatty. Notwithstanding Ondimar's assertion that Beatty was the party at fault, the Port demanded that Ondimar pay the full amount of the damage, $ 133,608.46, pursuant to U.S. Customs Port Code 5306, Circular No. 4-H ("the Tariff").

The Tariff, which is enforceable as an implied contract pursuant to the Shipping Act of 1984, *46 U.S.C. § 40501(f)* [1], gives the Port rights it would not otherwise have with respect to Port users such as Ondimar. More particularly, Tariff Item 292 provides that if such users of the Port [*186] cause damage to Port property, the Port may demand payment in full "for all costs (including without limitation attorneys' fees, replacement costs and lost revenue) arising from . . . physical damage." If the Port user fails to pay in full within 30 days for any damage it causes to the Port, other Tariff provisions require the Port to deny that vessel's owner the use of Port facilities.

1 Prior to 2006, this statute was codified at *46 U.S.C. app. § 1707(f)*.

Although [**3] Ondimar notified Beatty of the Port's claim against Ondimar, it did not include Beatty in the settlement negotiations. Ondimar paid the claim in full in November 2006 and obtained an assignment from the Port of any claims (except for claims under the Tariff) the Port might have against Beatty. Ondimar concedes that the assigned claim sounds in tort. After settling the Port's claim and obtaining the assignment, Ondimar filed suit against Beatty to recover the full $ 133,608.46 either in contribution, indemnity, or by virtue of the assignment. Ondimar also asserted a claim against Beatty for damage to its own vessel, the M/T Monte Toledo. Beatty filed a motion, which the district court treated as a motion for summary judgment, seeking to dismiss all of Ondimar's claims.

The district court denied the motion with respect to Ondimar's own claims for vessel damage but granted the motion as to all other claims. It dismissed Ondimar's contribution and indemnity claims on the ground that general maritime law's proportionate liability framework precluded such claims where Beatty had not also been released in the settlement with the Port. The court also dismissed Ondimar's claim based on the assignment [**4] from the Port on the ground that the assignment was invalid under maritime law.

Ondimar appeals from the dismissal of the Port's assigned tort claim but does not contest the dismissal of its contribution and indemnity claims. Ondimar argues that (1) the Port's assignment was valid under maritime law, in part because the Tariff imposed a contractual obligation on Ondimar to pay; and (2) Ondimar may pursue the assigned claim through equitable subrogation.

II. JURISDICTION AND STANDARD OF REVIEW

The district court had admiralty and maritime jurisdiction under *28 U.S.C. § 1333*. We have subject matter jurisdiction over this interlocutory order pursuant to *28 U.S.C. § 1292(a)(3)*, which confers appellate jurisdiction for "[i]nterlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed." *See Jensenius v. Texaco, Inc., Marine Dep't., 639 F.2d 1342, 1343 (5th Cir. 1981)* (determining the appealability of an admiralty order under *§ 1292(a)(3)* based on whether it "reach[es] [**5] the merits of the claim and . . . determines, denies, or prejudices any substantive rights of the parties").

III. LAW AND ANALYSIS

A. CLAIM ASSIGNMENT

Ondimar argues first that the district court erred in concluding that the assignment from the Port was invalid. This argument requires us to examine the proportionate liability framework for general maritime tort law announced in *McDermott, Inc. v. AmClyde, 511 U.S. 202, 114 S. Ct. 1461, 128 L. Ed. 2d 148 (1994)*, under which each tortfeasor ultimately is liable only for his proportionate share of fault. *Id. at 208-09*. There, the plaintiff settled with three defendants for $ 1 million but proceeded to trial against the remaining nonsettling defendants. *Id.* [*187] *at 204*. The jury found the plaintiff's total damages to be $ 2.1 million and found the nonsettling defendants to be 70% at fault, and therefore liable to the plaintiff for $ 1,470,000. *Id.*

The issue before the Supreme Court was "whether the liability of the nonsettling defendants should be calculated with reference to the jury's allocation of proportionate responsibility, or by giving the nonsettling defendants a credit for the dollar amount of the settlement." *Id.* The court adopted the proportionate liability approach and [**6] declined to reduce the nonsettling defendants' liability by the $ 1 million paid by the settling defendants. The Supreme Court found "three considerations . . . paramount; consistency with the proportionate fault approach of [earlier case law], promotion of settlement, and judicial economy." *Id. at 211*. Under *McDermott*, a settling tortfeasor is essentially presumed to pay only for his proportionate liability, and the nonsettling defendants get no credit for the amount paid by a settling tortfeasor, even though the plaintiff ultimately may be overcompensated or undercompensated. *Id. at 219-20*.

The court in *McDermott* made it clear that its proportionate liability scheme barred contribution actions by nonsettling tortfeasors against a settling tortfeasor. *Id. at 209*. The Court's reasoning also precludes a settling tortfeasor from seeking contribution from a nonsettling tortfeasor. The Eleventh Circuit made this latter point clear in *Murphy v. Florida Keys Elec. Co-op. Ass'n, Inc., 329 F.3d 1311 (11th Cir. 2003)*. There, the plaintiffs sued one tortfeasor, Florida Keys, but declined to sue the other tortfeasors, the Ashmans. *Id. at 1313*. Florida Keys settled with the plaintiffs and pursued [**7] a contribution claim against the Ashmans. *Id.*

The issue before the Eleventh Circuit was whether a settling tortfeasor may pursue a contribution claim against a nonsettling potential tortfeasor. The court held that such contribution was barred: "An essential tenet of this [*McDermott*] approach is that when a tortfeasor settles a claim against it, but does not obtain a release for the other tortfeasors, it has settled only its proportionate share of the total damages, no more and no less." *Id. at 1314*. Thus, "[n]o suit for contribution will lie against a nonsettling defendant who is not released from liability, because that defendant remains liable for its proportionate share of damages regardless of the terms of the settlement the other defendant made." *Id. at 1315*.

The district court relied on these cases to determine that Ondimar could not obtain contribution or indemnity from Beatty; Ondimar does not dispute that determination on appeal. We also rely on these cases, however, for the main question before us--whether the Port's assignment to Ondimar is valid. We must find the assignment invalid if the assignment of property damage tort claims under these circumstances is either (a) generally [**8] prohibited by law or (b) generally permitted by law but barred by application of *McDermott* and *Murphy* principles.

It is unnecessary for us to determine whether the assignment of property damage tort claims are generally prohibited, although our research suggests that most state courts which have considered the question permit such assignments. 2 [*188] We conclude, however, that even if assignment is generally permitted, there are good reasons for imposing certain limitations in the context of *McDermott*'s proportionate fault framework. The Texas Supreme Court's decision in *Beech Aircraft Corp. v. Jinkins, 739 S.W.2d 19 (Tex. 1987)*, cited by the district court, is a good illustration of such a limitation.

2 We look to the common law as a "guide to interpretation of federal admiralty principles." *Casino Cruises Inv. Co., L.C. v. Ravens Mfg. Co., 60 F. Supp. 2d 1285, 1287 (M.D. Fla. 1999)*. Although at least one common law jurisdiction bars assignment of all tort claims, regardless of nature, *Bolz v. State Farm Mut. Auto. Ins. Co., 274 Kan. 420, 52 P.3d 898, 901 (Kan. 2002)* ("It has long been recognized in Kansas that all choses in action, except torts, are assignable."), and at least one jurisdiction has conflicting [**9] authority, *In re Buildnet, Inc., 2004 Bankr. LEXIS 2383, 2004 WL 1534296, *10 (Bankr. M.D.N.C. 2004)* (discussing uncertain North Carolina precedent), most states permit the assignment of property damage tort claims. *See, e.g., In re Redditt, 2006 Bankr. LEXIS 2989, 2006 WL 3103013, *1 (Bankr. E.D. Mo. 2006)* (citing *State ex rel. Park Nat'l Bank v. Globe Indem. Co., 332 Mo. 1089, 61 S.W.2d 733, 735-36 (Mo.1933))* ("The assignment of an unliquidated claim for property damage, however, is valid under Missouri law."); *Midtown Chiropractic v. Illinois Farmers Ins. Co., 847 N.E. 2d 942, 944-45 (Ind. 2006)* ("However, the assignment of such interests has gained gradual acceptance over time, beginning with those interests based in contract, and later for torts against personal property."); *TMJ Hawaii, Inc. v. Nippon Trust Bank, 113 Haw. 373, 384, 153 P.3d 444 (Haw. 2007)* (permitting, under Hawaii law, the assignment of the "non-personal" tort claims of professional malpractice, breach of fiduciary duty, and fraud); *Larabee v. Potvin Lumber Co., Inc., 390 Mass. 636, 459 N.E.2d 93, 96 (Mass. 1983)* ("Claims for injury to property interests are clearly assignable."); *Canal Indem. Co. v. Greene, 265 Ga. App. 67, 593 S.E.2d 41, 46 (Ga. App. 2003)*; *Ford v. Summertree Lane Ltd. Liability Co., 56 P.3d 1206, 1209 (Colo. App. 2002)* [**10] ("[C]hoses in action in tort for damage to property, such as the fraudulent transfer of land, are transferable and may be assigned."); *Dubina v. Mesirow Realty Development, Inc., 308 Ill. App. 3d 348, 719 N.E.2d 1084, 1088, 241 Ill. Dec. 681 (Ill. App. 1999)* ("[C]auses of action for damage to property are generally assignable in Illinois."); *National Union Fire Ins. Co. of Pittsburgh, Pa. v. KPMG Peat Marwick, 742 So.2d 328, 330 (Fla. App. 1999)* ("A cause of action, which is not based on a personal tort such as malpractice, may be assigned.").

The Beech Aircraft court found that although tort actions generally could be assigned, a plaintiff was prohibited from assigning the action to a joint tortfeasor where each tortfeasor was liable, under Texas law, only for his proportionate fault and none could seek contribution from any other:

> We see no advantage in allowing defendants responsible for the plaintiffs injuries a right to, in effect, buy the plaintiffs claims and prosecute the other jointly responsible parties. It is not apparent that such settlements will result in any significant savings of time or resources. We can, however, envision that the settling defendant's unusual posture as surrogate plaintiff, co-defendant and [**11] cross-plaintiff will confuse a jury and possibly prejudice the remaining parties.

Id.[3]

3 We note that the *Beech Aircraft* court would forbid assignment even where the settling tortfeasor "obtain [ed] a complete release for all other parties allegedly responsible." *739 S.W.2d at 22.* That is probably stricter than *McDermott*, given that *Murphy* would permit contribution against a co-tortfeasor where that co-tortfeasor had also been released. Nevertheless, we use the case merely as an example, and its analysis is otherwise useful. potential tortfeasor is inconsistent with the goals of *McDermott's* proportionate liability framework. We adopt the rule for the general maritime law that the assignment of tort claims from the injured party to one tortfeasor permitting the settling defendant to proceed against a co-tortfeasor is invalid. Accordingly, we must invalidate the assignment of the Port's property damage claim to Ondimar, to the extent that it permits Ondimar to proceed against a co-tortfeasor.

We are persuaded that the *Beech Aircraft* analysis prohibiting an assignment by a plaintiff to a joint tortfeasor is completely consistent with McDermott's reasoning. Permitting such an assignment [**12] would permit an easy end run around *McDermott's* prohibition of contribution claims between a settling defendant and a co-tortfeasor and seriously undermine *McDermott's* proportionate fault approach to dealing with partial settlement.

Moreover, permitting assignment under these circumstances would not further the [*189] primary goals of *McDermott*: "consistency with the proportionate fault approach . . . , promotion of settlement, and judicial economy." *511 U.S. at 211.* As for the first consideration, we stated above how such assignments would undermine *McDermott's* proportionate fault approach. As to the second and third considerations, permitting assignment to a co-tortfeasor would tend to encourage partial settlement and would not encourage total settlement of claims--an important goal of *McDermott*. As Beech *Aircraft* suggests, permitting such assignments will lead to costlier, longer, and more confusing suits, all of which would undermine *McDermott's* goal of promoting judicial economy.

In sum, permitting a co-tortfeasor to settle with the injured party, obtain an assignment from that injured party, and proceed against the nonsettling

Ondimar argues that the prohibition against assignment rule [**13] should not apply to these facts because Ondimar's settlement and assignment agreement with the Port was based on the Tariff's alleged no-fault liability scheme so that Ondimar and Beatty are not joint tortfeasors. Although the Port may have made its demand in part under the Tariff, the basis for that claim was a maritime allision, a classic maritime tort. Under longstanding maritime law, "[w]hen a moving vessel collides with a stationary object, the moving vessel [here, Ondimar's M/T Monte Toledo] is presumed to be at fault." *Brunet v. United Gas Pipeline Co., 15 F.3d 500, 503 (5th Cir. 1994)* (citing, *inter alia*, *The Oregon, 158 U.S. 186, 192-93, 15 S. Ct. 804, 39 L. Ed. 943 (1895)).* Ondimar concedes that the assigned claim sounds in tort, not contract. Even without the concession, this is clear under the express language of the written assignment in which the Port excluded from its assignment "all claims against third-parties relating to the Incident arising under or pursuant to a contract or [the Tariff] or any other tariff or circular of the Port of Texas City."

The fact that the Port may have had an additional contract claim against Ondimar, which Ondimar settled along with the tort claim, is irrelevant. The [**14] fact remains that Ondimar settled a tort claim with the Port and argues that Beatty's fault caused or contributed to the allision. Ondimar concedes that it cannot seek contribution from Beatty on this tort claim. The fact that the Port had a potential contract claim against Ondimar does not affect this result; the Port assigned only a tort claim, which we hold is invalid under maritime law on these facts. The district court therefore correctly dismissed Ondimar's claim predicated on the assignment from the Port.

B. EQUITABLE SUBROGATION

As an alternative to its claim based on the assignment from the Port, Ondimar asserts for the first time on appeal that it was equitably subordinated to the Port's claim against Beatty. "Our inquiry . . . is limited to the summary judgment record and the plaintiffs may not advance on appeal new theories or raise new issues not properly before the district court to obtain reversal of the summary judgment." *Little v. Liquid Air Corp., 37 F.3d 1069, 1071 (5th Cir. 1994)* (en banc) (citing *Topalian v. Ehrman, 954 F.2d 1125, 1132 n. 10 (5th Cir. 1992)).* "[A] doctrine [*190] cannot be asserted 'by implication,'" much less one that was "'not even identified by name, [**15] much less advocated'" at the district court. *Vogel v. Veneman, 276 F.3d 729, 733 (5th Cir. 2002)* (quoting *In re Fairchild Aircraft Corp., 6 F.3d 1119, 1128 (5th Cir. 1993)).*

Although we may review "claims raised for the first time on appeal . . . involving purely legal questions where our failure to consider them would result in a 'miscarriage of justice,' *id.*, equitable subrogation, as its name suggests, is not a purely a legal question. It is difficult to see how the inherently fact-intensive application of an equitable doctrine could ever be considered a purely legal question, much less when the factual record necessary for such a claim is so poorly developed. Ondimar has waived any equitable subordination claim.

CONCLUSION

For the above reasons, the district court's grant of partial summary judgment is affirmed.

AFFIRMED.

COMBO MARITIME, INC., Plaintiff v. U.S. UNITED BULK TERMINAL, LLC; U.S. UNITED BARGE LINE, LLC; UNITED MARITIME GROUP, LLC, in personam; MARLENE ELLIS M/V, its engines, tackle, apparel, etc., in rem; BRENDA KOESTLER M/V, its engines, tackle, apparel, etc., in rem, Defendants - Appellants v. CARNIVAL CORPORATION / FANTASY M/V, Third Party, Defendants - Appellees

No. 09-30592

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

615 F.3d 599; 2010 U.S. App. LEXIS 17644; 2010 AMC 2196

August 23, 2010, Filed

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Eastern District of Louisiana.
Combo Mar., Inc. v. U.S. United Bulk Terminal, , LLC, 626 F. Supp. 2d 635, 2009 U.S. Dist. LEXIS 46783 (E.D. La., 2009).

COUNSEL: For U.S. UNITED BULK TERMINAL, L.L.C., U.S. UNITED BARGE LINE, L.L.C., UNITED MARITIME GROUP, L.L.C., in personam, MARLENE ELLIS M/V, its engines, tackle, apparel, etc., in rem, Defendant - Appellants: Robert Taylor Lemon, II, Esq., Christopher S. Mann, Jones Walker, L.L.P., New Orleans, LA; Michael William McMahon, Sr., Esq., Daigle Fisse & Kessenich, P.L.C., Madisonville, LA.

For CARNIVAL CORP, FANTASY M/V, Third Party Defendant - Appellees: Alanson T. Chenault, IV, Shelley R. Miller, Antonio Jose Rodriguez, Esq., Fowler Rodriguez Valdes-Fauli, New Orleans, LA.

JUDGES: Before JOLLY and GARZA, Circuit Judges, and MILLER *, District Judge. EMILIO M. GARZA, Circuit Judge, dissenting.

* District Judge of the Southern District of Texas, sitting by designation.

OPINION BY: MILLER

OPINION

[*601] MILLER, District Judge:

In this barge breakaway case, the appellant-third party plaintiff, U.S. United Bulk Terminal, LLC and its related entitites and vessels (collectively "United"), appeals the district court's order granting appellee-third party defendant's, Carnival Corp. and its vessel FANTASY (collectively "Carnival"), motion for summary judgment on [**2] United's claims for contribution and indemnity, and property damage.

I. Facts

Combo Maritime, Inc. ("Combo") sued United for damages sustained when a number of barges broke free of their moorings at United's barge fleeting facility and drifted downstream, alliding with Combo's vessel, the M/V ALKMAN, which lay at anchor nearby. United filed a third-party complaint against Carnival, alleging that the barge breakaway was caused by the negligent navigation of Carnival's cruise ship FANTASY when it navigated too close to the fleeting facility under full speed. United brought claims against Carnival for (1) contribution and indemnity, and (2) damage to United's fleeting [*602] equipment and barges. [1] United additionally proffered Carnival as a defendant under *Rule 14(c) of the Federal Rules of Civil Procedure*.

1 At oral argument, United expressly disclaimed any right to indemnity or claim for 1 damage to its barges and fleeting equipment, claiming solely a right of contribution from Carnival.

Carnival moved for partial summary judgment on United's complaint based on the Supreme Court's decision in *THE LOUISIANA, 70 U.S. 164, 3 Wall. (70 U.S.) 164, 173, 18 L.Ed. 85 (1866)*. The *LOUISIANA* Rule creates the rebuttable [**3] presumption that in collisions or allisions involving a drifting vessel, the drifting vessel is at fault. *See, e.g., James v. River Parishes Co., 686 F.2d 1129, 1131-32 (5th Cir. 1982)*. After reviewing the submitted evidence, the district court granted Carnival's motion for partial summary judgment. It further ordered that at trial between Combo and United, United could not present evidence that Carnival's alleged negligence contributed to the barge breakaway. Later, on a motion for reconsideration, the district court also ordered that United's thirdparty complaint against Carnival be dismissed with prejudice.

After the district court entered judgment for Carnival, United settled with Combo. As part of the settlement agreement, Combo specifically released all of its claims against all parties by name, including Carnival. Combo also assigned all of its claims against Carnival to United. United then filed the instant appeal of the district court's order on summary judgment and judgment on United's third-party claims. At this court's request, the parties submitted supplemental letter briefs regarding whether the appeal is moot in light of United's settlement with Combo. For the following [**4] reasons, we reverse and remand.

II. Mootness

As an initial matter, we must address whether the appeal before us is moot. "Whether an appeal is moot is a jurisdictional matter, since it implicates the Article III requirement that there be a live case or controversy." *Bailey v. Southerland, 821 F.2d 277, 278 (5th Cir. 1987)*. "[A]ny set of circumstances that eliminates actual controversy after the commencement of a lawsuit renders that action moot." *Ctr. for Individual Freedom v. Carmouche, 449 F.3d 655, 661 (5th Cir. 2006)*.

"In admiralty cases, federal courts allocate damages based upon the parties' respective degrees of fault." *In re Omega Protein, Inc., 548 F.3d 361, 370 (5th Cir. 2008)* (citing *United States v. Reliable Transfer Co., 421 U.S. 397, 411, 95 S. Ct. 1708, 44 L. Ed. 2d 251 (1975)*). "Damages are apportioned among the tortfeasors themselves through the application of the doctrin[e] of contribution." THOMAS J. SCHOENBAUM, 1 ADMIRALTY & MARITIME LAW § 5-18 (4th ed.). The right of contribution in admiralty collision claims is of ancient lineage. *Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106, 110, 94 S. Ct. 2174, 40 L. Ed. 2d 694 (1974)* (citing *THE NORTH STAR, 106 U.S. 17, 1 S. Ct. 41, 27 L. Ed. 91 (1882)*) (tracing the right of contribution [**5] in collision cases back to the Laws of Oleron in the 12th century); *Hardy v. Gulf Oil Corp., 949 F.2d 826, 829-30 (5th Cir. 1992)*. "Contribution is defined as the 'tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault.'" *United States v. Atlantic Research Corp., 551 U.S. 128, 139, 127 S. Ct. 2331, 168 L. Ed. 2d [*603] 28 (2007)* (quoting BLACK'S LAW DICTIONARY 353 (8th ed. 2004)). "The right of contribution exists only in favor of a tortfeasor who has discharged the entire claim for the harm by paying more than his equitable share of the common liability." *RESTATEMENT (SECOND) OF TORTS § 886(A)* (1979). Therefore, contribution requires that the claimant have paid more than he owes, and have discharged the entire claim.

As one commentator puts it, "[d]ifficult and interesting contribution questions arise where one or more tortfeasors settle before trial." SCHOENBAUM, *supra*, § 5-18. In *McDermott, Inc. v. Am Clyde, 511 U.S. 202, 114 S. Ct. 1461, 128 L. Ed. 2d 148 (1994)*, the Supreme Court addressed a part of this question and held that when one defendant of many settles with a plaintiff, the liability of the [**6] remaining non-settling defendants is calculated based on their proportionate responsibility for the plaintiff's injuries without regard to the amount of the settlement. *Id. at 221*. In a companion case to *McDermott* issued the same day, the Supreme Court also held that when one defendant settles its claim with the plaintiff, "actions for contribution against settling defendants are neither necessary nor permitted."

Boca Grande Club, Inc. v. Fla Power & Light Co., 511 U.S. 222, 222, 114 S. Ct. 1472, 128 L. Ed. 2d 165 (1994) (citing *Am Clyde, 511 U.S. at 202*).

Likewise, we have held that *Am Clyde's* proportionate liability scheme bars a settling tortfeasor from seeking contribution from a non-settling tortfeasor. *Ondimar Transportes Maritimos v. Beatty St. Props., Inc., 555 F.3d 184, 187 (5th Cir. 2009)*. Nor may a settling tortfeasor seek recovery from a non-settling tortfeasor based on an assignment of the property damage claim by the plaintiff. *Lexington Ins. Co. v. S.H.R.M. Catering Servs., Inc., 567 F.3d 182, 185 (5th Cir. 2009)*; *Ondimar, 555 F.3d at 189*. However, in both *Ondimar* and *Lexington*, we indicated that when a settling tortfeasor obtains a full release [2] from the plaintiff for all parties, an action for contribution [**7] might not conflict with *Am Clyde*. We now make explicit what we have previously implied and hold that *Am Clyde* does not prevent an action for contribution for a settling tortfeasor who obtains, as part of its settlement agreement with the plaintiff, a full release for all parties.

2 For the purposes of this opinion, "full release" indicates that the plaintiff has released 2 all potential tortfeasors from liability, regardless of whether the potential tortfeasor is a party to the settlement giving rise to the full release.

As discussed above, in order to bring a claim for contribution, the settling tortfeasor must have (1) paid more than he owes to the plaintiff, and (2) have discharged the plaintiff's entire claim. The *Am Clyde* court held that a litigating defendant could not pursue a settling defendant for contribution, because the litigating defendant would, under the proportionate share rule, pay only his share of the judgment. *Am Clyde, 511 U.S. at 221*. Because a right of contribution requires that a defendant pay more than he owes, and the proportionate share rule dictates that a defendant pays only his share of the judgment-no more, no less-a litigating defendant could never have [**8] a contribution claim, by definition. By extension, the amount a settling defendant, who obtains only a release for himself, pays represents only his share of the judgment, regardless of the actual dollar amount. *Id.; Murphy v. Fla. Keys Elec. Coop. Assoc., 329 F.3d 1311, 1314 (11th Cir. 1314)*. Therefore, he too has no claim for contribution as long as the settlement represents only his portion of the damages.

Where the settling tortfeasor takes an assignment of the plaintiff's claim, then the [*604] settling tortfeasor essentially steps into the plaintiff's shoes and pursues the plaintiff's claim. In that scenario, the plaintiff's claim is not extinguished. And, as we discussed in *Ondimar*, allowing assignment of a claim undermines the goals of *Am Clyde*. *Ondimar, 555 F.3d at 188-89*. Further, there are strong policy reasons for not allowing a settling defendant to take an assignment of a tort claim under these circumstances. *Id. at 188* (citing *Beech Aircraft Corp. v. Jinkins, 739 S.W.2d 19, 22 (Tex. 1987)*).

If, however, the settling defendant discharges the plaintiff's entire claim as evidenced by a total release of all potential joint tortfeasors, then the settling defendant has met the requirements [**9] for a contribution claim. Because he is responsible for only his portion of the damages, and he paid the entire amount, he has paid more than he owes. And, because he has obtained a release of all other potential joint tortfeasors, he has extinguished the plaintiff's claim. Therefore, he may bring a claim for contribution against the non-settling potential tortfeasors.

In the instant case, United settled with Combo. As part of the settlement agreement, Combo released both United and Carnival, among others, from liability for damages to the M/V ALKMAN. Additionally, Combo assigned all of its rights, claims, and causes of action for damage to the M/V ALKMAN to United. Therefore, we find that although the assignment is invalid under *Ondimar* and *Lexington*, United may bring a claim for contribution against Carnival. Accordingly, this appeal is not moot. Therefore, the court will proceed to the merits of the appeal.

STOP

III. The Rule of THE LOUISIANA

1. Standard of Review

"We review a grant of summary judgment de novo, applying the same standard as the district court." *QBE Ins. Corp. v. Brown & Mitchell, Inc., 591 F.3d 439, 442 (5th Cir. 2009)*. Summary judgment is appropriate "if the pleadings, the [**10] discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *FED. R. CIV. P. 56(c)*.

2. Awash in Maritime Presumptions

"Liability in collision and allision cases has always

DAMAGES ISSUES INCLUDING RECOVERY FOR WRONGFUL DEATH

In 1970, the *HARRISBURG* decision was overruled by the Supreme Court in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). *Moragne* allowed recovery for wrongful death based upon negligence and unseaworthiness pursuant to the general maritime law. It was no longer necessary for the decedent's survivors to rely upon the fortuity of the adjoining state's remedy.[1] Justice Harlan's decision in *Moragne* did not set forth the types of monetary losses recoverable under this new cause of action or of the classes of beneficiaries entitled to recover, but rather delegated such issues to future litigation in the lower courts. He also suggested that the Death on the High Seas Act (DOHSA) and the Wrongful Death Statute of the various states would provide guidelines for future decisions on the monetary loss issues. *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. ____, 121 S. Ct. 1927, 150 L. Ed. 2d 34 (2001) recognized the negligence concept as a predicate for liability for a maritime death that is not within the scope of the Jones Act; in other words, there can be a general maritime law theory of liability based upon negligence and unseaworthiness without reliance upon either the Jones Act or the Death on the High Seas Act (DOHSA). 46 USC § 30301.[2] DOHSA is the general maritime law cause of action in the event the casualty occurs within that statute's geographical jurisdiction.

Only four years after *Moragne* was decided, the Supreme Court, rather than accept "the sifting process" of the lower federal courts, took the opportunity to define the damage issues in a *Moragne* cause of action for wrongful death pursuant to the general maritime law. In *Sea-Land Serv., Inc. v. Gaudet*, 414 U.S. 573 (1974), a longshore worker was injured and received $140,000.00 by way of judgment based upon a recovery for disability, wages, pain, and suffering. The judgment was satisfied, but the longshoreman later died as a result of the injuries. His widow subsequently brought a wrongful death action under the general maritime law theory as advanced by *Moragne*. The Supreme Court distinguished the damages recovered by the decedent from those sought by the widow. Quoting *The Sea Gull*, 21 F. Cas. 909 (No. 12,578) (C.C.D. Md. 1865), and recognizing the liberal aspects of admiralty law, Justice Brennan held that the widow's cause of action was not precluded by her husband's earlier recovery. The Court then decided to enumerate the items of recovery for the survivors even though these issues were not "sifted" by either the trial court or the Fifth Circuit. The decision not only allowed recovery of the widow's monetary losses (such as loss of services and funeral expenses), but also of non-pecuniary items such as loss of society. Survivor's grief was specifically omitted as a recoverable item, although this exclusion was made on a narrow basis.[3]

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[1] It should be noted that a negligence cause of action for death has been available to seamen since the enactment of the Jones Act. Also, any party could seek a recovery for death under the general maritime law and/or unseaworthiness if death occurred more than three miles from the shores of a state pursuant to the Death on the High Seas Act. Contrary to *Moragne*, neither of these actions permits the recovery of non-pecuniary losses.

[2] Justice Scalia's opinion contains remarks that further remedies that assert "new claims" beyond those permitted by statute should be subject to further developments by Congress. Justice Ginsburg, joined by Justices Souter and Breyer, disagreed with this observation by concluding that the development of maritime remedies is a "shared venture."

[3] Neither the district court nor the circuit court opinions dealt with the issue of recoverable items of losses available to the decedent's survivors. These courts limited consideration to whether Mrs. Gaudet had a cause of action due to her husband having made a recovery from the defendant as a result of prior litigation prior to his death.

The geographical scope of the general maritime wrongful death actions was further defined in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978). As established in *Moragne*, and subsequently extended by *Law v. Sea Drilling Corp.*, 510 F.2d 242 (5th Cir. 1975), the non-pecuniary losses available under general maritime wrongful death actions extended to the high seas. As recovery under DOHSA is restricted to pecuniary damages, a certain tension exited between the statutory and general maritime law. In *Higginbotham*, the Supreme Court held that in a conflict between statutory and general maritime law, the statute prevails. It should be noted that DOHSA is applied to a cause of action arising outside U.S. waters (three miles) and within the territory of a foreign country. *Howard v. Crystal Cruises, Inc.*, 41 F.3d 527, 529-30 (9th Cir. 1993); *Cormier v. William/Sedco/Horn Constructors*, 460 F. Supp. 1010 (E.D. La. 1978).

Tension between state and federal statutes also complicates an analytical approach to problems in this area. In *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986), the Supreme Court reviewed a Fifth Circuit decision that permitted recovery for non-pecuniary items under the Louisiana wrongful death statute on the theory of the state statute supplementing DOHSA. The facts focused upon a fatal helicopter crash 35 miles off the Louisiana coast. Reversing the Fifth Circuit, the Supreme Court held in a 5-4 opinion that Louisiana law was preempted by the terms of DOHSA. While the Fifth Circuit had placed great reliance upon (then) Section 7 of the Act, (now 46 U.S.C. § 30308) construing the section to specifically mandate application of state wrongful death statutes to the high seas, the Supreme Court held that Section 7 was merely a jurisdictional savings clause (similar to the savings to suitors clause discussed in the admiralty jurisdiction section, *supra*) allowing the respective states to apply their own wrongful death remedies within their own territorial waters and permitting a DOHSA action to be filed in a state court. However, DOHSA preempts state wrongful death statutes with respect to ~~new~~ pecuniary damages, and limits recovery for a wrongful death occurring outside territorial waters to pecuniary losses only.

The pecuniary recovery available under the Jones Act, DOHSA, and the general maritime law includes: loss of support, *Davis v. Parkhill-Goodloe Co.*, 302 F.2d 489 (5th Cir. 1962); loss of nurture for minors, *Soloman v. Warren*, 540 F.2d 777 (5th Cir. 1976); loss of services, *Dennis v. Central Gulf Steamship Corp.*, 323 F. Supp. 943 (E.D. La. 1971), *aff'd*, 453 F.2d 137 (5th Cir.), *cert. denied*, 409 U.S. 948 (1972); and loss of inheritance. Non-pecuniary losses are not permitted under either statute. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986) (DOHSA), and *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). At one time there was a lack of uniformity on the issue of whether loss of consortium is recoverable for injury/death of non-seamen in a state's territorial waters. *Usher v. M/V OCEAN WAVE*, 27 F.3d 370 (9th Cir. 1994); *Kelly v. Panama Canal Commission*, 26 F.3d 597 (5th Cir. 1994); and *Walker v. Braus*, 995 F.2d 77, 81 (5th Cir. 1993). The Supreme Court in a unanimous opinion held that non-pecuniary losses as permitted by the particular state are permissible if the injury/death occurs in state territorial waters and the decedent was **not** a maritime worker. *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996). It is submitted that the *Yamaha* decision adds to the lack of a uniform approach to maritime death actions. This point was demonstrated in the context of an airplane crash over international waters, with the Supreme Court rejecting an application of the Warsaw Convention in favor of DOHSA. The estates could not recover non-pecuniary losses, with the pecuniary losses being the sole criterion for a monetary recover. *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217 (1996). *In Re Amtrak "Sunset Limited Train Crash"*, 121 F.3d 1421 (11th Cir. 1997), *cert. denied*, 522 U.S. 1110 (1998) later held that *Yamaha* should not be interpreted as requiring an uncritical acceptance of state remedies in a local matter involving non-maritime workers. State remedies may be rejected as being fundamentally inconsistent with maritime law. It is submitted that these two decisions lack consistency. The Eleventh Circuit expanded upon this view by discussing the developments from *Moragne* to *Yamaha*; this court concluded that *Yamaha* in no way modified the prohibition of non-pecuniary losses in the context of federal maritime law, but stated the proposition that DOHSA did not displace the application of state law in territorial waters. *Tucker v. Fearn*, 333 F.3d 1216 (11th Cir. 2003).

Loss of society covers only the loss of love, affection, care, attention, companionship, comfort, and protection the dependents of the decedent have experienced, *Miles*, 882 F.2d at 987

Discrepancies also exist between the statutes and the general maritime law in regard to the beneficiaries who are in a position to claim a recovery. Under the Jones Act, beneficiaries include the spouse and children, and only if none exist, then the next of kin, *Mobil Oil Corp. v. Higginbotham*. DOHSA beneficiaries include the spouse, parents, children and dependent relatives on an equal basis. The general maritime law lacks definition in this area, although the Supreme Court in *Gaudet* referred frequently to dependency as a criterion. *But see Thompson v. Offshore Co.*, 440 F. Supp. 752 (S.D. Tex. 1977).

One interesting anomaly of state/federal interaction (or lack thereof) is the question of a survival action as opposed to a wrongful death action. The survival action is focused upon the right to recover for the decedent's conscious pain and suffering, together with lost wages, during the period between the accident and death. As the Supreme Court's decisions in *Higginbotham* and *Tallentire* demonstrate, there is not only a maritime cause of action for wrongful death, but there is little, if any, interplay with the wrongful death remedy of a state. Surprisingly, there is no survival action permitted under DOHSA. It has now been held that the general maritime law cannot supplement the statute even if the statute does not cover the subject. *Dooley v. Korean Air Lines Co., Ltd.*, 524 U.S. 116 (1998). Also, a state's survival action cannot be used as a supplement for DOHSA to give a remedy for the decedent's pre-death pain and suffering. *Jacobs v. Northern King Shipping Co., Ltd.*, 180 F.3d 713 (5th Cir. 1999).

The effect of *Dooley* and *Zicherman* in limiting the recovery of the survivors to DOHSA as the sole remedy for an air crash outside the territorial limit of a U.S. state was negated by an amendment to DOHSA in 2000, 46 U.S.C. § 30307. If the "commercial aviation accident" occurs more than 12 nautical miles from the shore of this country, the survivors can seek "non-pecuniary damages" but not punitive damages. If the "commercial aviation accident" occurs within the 12 nautical mile limit of the country's shore, DOHSA will not apply. The rules applicable under federal, state and other appropriate law will govern the recoveries of the survivors. 46 U.S.C. § 30307. This amendment to DOHSA was enacted on April 5, 2000, with it being retroactive to aircraft casualties on the high seas subsequent to July 16, 1996 (the crash of TWA Flight 880 that killed 230 passengers eight nautical miles off the coast of Long Island occurred on July 17, 1996). In summation, 46 U.S.C. 30307 removes commercial aviation casualties occurring within twelve nautical miles from the shore of any state from DOHSA coverage. Accidents involving aircraft on the high seas more than twelve nautical miles from the shore of a state permit recoveries for non-pecuniary losses ("loss of care, comfort and companionship") but not punitive damages.

A DOHSA action can be brought in either federal or state court. If it is brought in federal court it must be brought on the admiralty docket and be a non-jury trial, unless there is diversity jurisdiction--then it can be a jury trial on the federal docket. *Baris v. Sulpicio Lines Inc.*, 932 F.2d 1540 (5th Cir. 1991).

Brown v. Eurocopter, S.A., 111 F.S. 2d 859 (S.D. Tex. 2000) concerned a helicopter that crashed into a fixed structure and sank 25 miles off the Texas coast. The casualty occurred subsequent to the aviation amendment to DOHSA. The survivors of the Pilot initially sought a recovery pursuant to the OCSLA, but the court rejected this proposition by concluding that DOHSA was applicable. The plaintiff's motion seeking non-pecuniary losses was sustained since a helicopter used as a taxi service for offshore workers constituted a "commercial aviation accident" more than 12 miles from the shore of the United States. Punitive damages did not constitute an item of damages.

Admiralty jurisdiction is not a prerequisite to the maintenance of a DOHSA action. *Motts v. M/V GREEN WAVE*, 210 F.3d 565 (5th Cir. 2000) states: "So even if the two tiered test of admiralty jurisdiction has not been met, DOHSA confers federal admiralty jurisdiction where the injury or accident resulting in death occurred while the decedent was at sea." The sole fact that an accident occurred on navigable waters is sufficient. The fact that the negligent acts occurred ashore is of no importance. The controlling factor is that the accident occurred on navigable waters more than three miles from the shore of the United States. Mr. Motts was injured on the high seas but died in a New Orleans hospital following the accident. The survivors sought non-pecuniary losses on the basis of DOHSA being inapplicable since erroneous medical decisions were made ashore while the decedent remained aboard the vessel. The Fifth Circuit reversed the trial court by holding that the shoreside negligent conduct was not determinative in determining the application of DOHSA, a remedial statute that preempted state and general maritime laws.

Norfolk Shipbuilding *& Drydock Corp. v. Garris*, 532 U.S. 811 121 S. Ct. 1927, 150 L. Ed. 2d 34 (2001) concluded that the general maritime recognizes a death action predicated upon negligence for accidents that do not come within the scope of DOHSA or the Jones Act. The death occurred in the harbor at Norfolk, Virginia.

Tucker v. Fearn, 333 F.3d 1216 (11th Cir. 2003) involves a death action arising from a boating collision in the territorial waters of Alabama. His action was predicated upon the general maritime law, and one item of damages was loss of society in the non-dependent father/son relationship. In the course of the opinion the court stated:

> One problem for Tucker, however, is that the Supreme Court since has limited the applicability of *Gaudet* to its facts. In *Miles*, the Supreme Court stated that "[t]he holding of *Gaudet* applies only in territorial waters, and it applies only to *longshoremen*. *Miles*, 498 U.S. at 31, 111 S. Ct. 317 (emphasis added). In fact, the Supreme Court in *Miles* indicated that *Gaudet* was no longer even applicable on its facts, in view of amendments made to the Longshore and

> Harbor Workers' Compensation Act in 1972. *Miles*, 498 U.S. at 30 n. 1, 111 S. Ct. 317. Consequently, as the Sixth Circuit stated in *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1459 (6th Cir. 1993), "[*Gaudet*] has therefore been condemned to a kind of legal limbo: limited to its facts, inapplicable on its facts, yet not overruled.

Despite contrary indications within the *Tallentire* and *Miles* decisions that the *Gaudet* non-pecuniary measure of damages is no longer viable due to the 1972 Amendments to the Longshore Act, the Fifth Circuit adopts the view that the death of a longshore worker within a state's territorial waters sets forth a geographical area for the recovery of non-pecuniary losses pursuant to the general maritime law. *Randall v. Chevron U.S.A., Inc.*, 13 F.3d 888, 903 (5th Cir. 1994); *Moore v. M/V ANGELA*, 353 F.3d (5th Cir. 2003). However, the court has since limited recovery to those who are financially dependent on the decedent. *In re American River Transport Co. v. U.S. Maritime Services, Inc.*, 490 F3d 351 (5th Cir. 2007).

An issue that affects death recovery under the Jones Act, DOHSA, and the general maritime law is the effect of taxation and inflation on damages. Wrongful death awards are not taxable income, as per Section 124(a)(2) of the Internal Revenue Code. *In Norfolk & Western R. Co. v. Liepelt*, 444 U.S. 490 (1980), the Supreme Court held that a jury was entitled to instruction on the non-taxable nature of the recovery.

The effects of inflation on a wrongful death recovery were discussed by the Fifth Circuit in *Johnson v. Penrod Drilling Co.*, 510 F.2d 234 (5th Cir. 1975), *cert. denied*, 423 U.S. 490, (1975), which held inflation to be too speculative a factor to be considered by the court or the jury in determining damages. This rule was followed in numerous decisions until 1982, when the Fifth Circuit overruled *Penrod*, and held that some aspects of inflation must be considered in assessing damages for future wage loss. *Culver v. Slater Boat Co.*, 688 F.2d 280 (5th Cir. 1982). The *Culver I* decision reviews at length (44 pages) the interrelationship between inflation and the discount factor.

Inflation was once again at issue in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983). The case involved the application of the "Alaska rule" to a Section 905(b) LHWCA damage recovery. Under the "Alaska rule," future inflation is presumed to equal future interest rates. In other words, the award is neither increased nor decreased to account for inflation or future interest that is earned on the recovery, because the two are assumed to cancel each other out. After examining how the circuit courts and the highest courts of other countries treated inflation in computing damages, the Supreme Court ruled that since market interest rates have been historically greater than inflation, district courts may choose a "real interest rate" of between one and three percent. To put it another way, the district court can assume that future interest rates have a built in inflation factor. Therefore, the inflation factor should be removed for the purpose of reaching a conclusion of "real interest" to use as a discount rate. Although this decision was confined by the Court to actions under Section 905(b) of the LHWCA, it pertains to damages in other areas of maritime personal injury law. The decision categorically states that state rules are not to be used in a maritime cause of action.

In 1984, the Fifth Circuit seized upon the Supreme Court's admonition in *Pfeifer* that trials should not be converted "into a graduate seminar on economic forecasting" and reconsidered their 1982 decision in *Culver I*. Attempting to simplify the methodologies used in the computation of damages, the Fifth Circuit in *Culver II* abandoned a case by case analysis of adjusting damage awards for inflation and held that the fact finder in a Jones Act trial must adjust future inflationary effects on damage awards by the "below-market discount method." *Culver v. Slater Boat Co.*, 722 F.2d 114 (5th Cir. 1984), *cert. denied*, 467 U.S. 1252 (1984).

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"§ 30106. Time limit on bringing maritime action for personal injury or death

"Except as otherwise provided by law, a civil action for damages for personal injury or death arising out of a maritime tort must be brought within 3 years after the cause of action arose.

"CHAPTER 303—DEATH ON THE HIGH SEAS

"Sec.
"30301. Short title.
"30302. Cause of action.
"30303. Amount and apportionment of recovery.
"30304. Contributory negligence.
"30305. Death of plaintiff in pending action.
"30306. Foreign cause of action.
"30307. Commercial aviation accidents.
"30308. Nonapplication.

"§ 30301. Short title

"This chapter may be cited as the 'Death on the High Seas Act'.

"§ 30302. Cause of action

"When the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. The action shall be for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative.

"§ 30303. Amount and apportionment of recovery

"The recovery in an action under this chapter shall be a fair compensation for the pecuniary loss sustained by the individuals for whose benefit the action is brought. The court shall apportion the recovery among those individuals in proportion to the loss each has sustained.

"§ 30304. Contributory negligence

"In an action under this chapter, contributory negligence of the decedent is not a bar to recovery. The court shall consider the degree of negligence of the decedent and reduce the recovery accordingly.

"§ 30305. Death of plaintiff in pending action

"If a civil action in admiralty is pending in a court of the United States to recover for personal injury caused by wrongful act, neglect, or default described in section 30302 of this title, and the individual dies during the action as a result of the wrongful act, neglect, or default, the personal representative of the decedent may be substituted as the plaintiff and the action may proceed under this chapter for the recovery authorized by this chapter.

"§ 30306. Foreign cause of action

"When a cause of action exists under the law of a foreign country for death by wrongful act, neglect, or default on the high seas, a civil action in admiralty may be brought in a court of the United States based on the foreign cause of action, without abatement of the amount for which recovery is authorized.

"§ 30307. Commercial aviation accidents

"(a) DEFINITION.—In this section, the term 'nonpecuniary damages' means damages for loss of care, comfort, and companionship.

"(b) BEYOND 12 NAUTICAL MILES.—In an action under this chapter, if the death resulted from a commercial aviation accident occurring on the high seas beyond 12 nautical miles from the shore of the United States, additional compensation is recoverable for nonpecuniary damages, but punitive damages are not recoverable.

"(c) WITHIN 12 NAUTICAL MILES.—This chapter does not apply if the death resulted from a commercial aviation accident occurring on the high seas 12 nautical miles or less from the shore of the United States.

"§ 30308. Nonapplication

"(a) STATE LAW.—This chapter does not affect the law of a State regulating the right to recover for death.

"(b) INTERNAL WATERS.—This chapter does not apply to the Great Lakes or waters within the territorial limits of a State.

"CHAPTER 305—EXONERATION AND LIMITATION OF LIABILITY

"Sec.
"30501. Definition.
"30502. Application.
"30503. Declaration of nature and value of goods.
"30504. Loss by fire.
"30505. General limit of liability.
"30506. Limit of liability for personal injury or death.
"30507. Apportionment of losses.
"30508. Provisions requiring notice of claim or limiting time for bringing action.
"30509. Provisions limiting liability for personal injury or death.
"30510. Vicarious liability for medical malpractice with regard to crew.
"30511. Action by owner for limitation.
"30512. Liability as master, officer, or seaman not affected.

"§ 30501. Definition

"In this chapter, the term 'owner' includes a charterer that mans, supplies, and navigates a vessel at the charterer's own expense or by the charterer's own procurement.

"§ 30502. Application

"Except as otherwise provided, this chapter (except section 30503) applies to seagoing vessels and vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters.

"§ 30503. Declaration of nature and value of goods

"(a) IN GENERAL.—If a shipper of an item named in subsection (b), contained in a parcel, package, or trunk, loads the item as freight or baggage on a vessel, without at the time of loading giving to the person receiving the item a written notice of the true character and value of the item and having that information entered on the bill of lading, the owner and master of the vessel are not liable as carriers. The owner and master are not liable beyond the value entered on the bill of lading.

"(b) ITEMS.—The items referred to in subsection (a) are precious metals, gold or silver plated articles, precious stones, jewelry, trinkets, watches, clocks, glass, china, coins, bills, securities, printings,

[398 US 375]

PETSONELLA MORAGNE, etc., Petitioner,

v

STATES MARINE LINES, Inc., et al.

398 US 375, 26 L Ed 2d 339, 90 S Ct 1772

[No. 175]

Argued March 4, 1970. Decided June 15, 1970.

OPINION OF THE COURT

Mr. Justice Harlan delivered the opinion of the Court.

We brought this case here to consider whether The Harrisburg, 119 US 199, 30 L Ed 358, 7 S Ct 140, in which this Court held in 1886 that maritime law does not afford a cause of action

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for wrongful death, should any longer be regarded as acceptable law.

The complaint sets forth that Edward Moragne, a longshoreman, was killed while working aboard the vessel Palmetto State in navigable waters within the State of Florida. Petitioner, as his widow and representative of his estate, brought this suit in a state court against respondent States Marine Lines, Inc., the owner of the vessel, to recover damages for wrongful death and for the pain and suffering experienced by the decedent prior to his death. The claims were predicated upon both negligence and the unseaworthiness of the vessel.

States Marine removed the case to the Federal District Court for the Middle District of Florida on the basis of diversity of citizenship, see 28 USC §§ 1332, 1441, and there filed a third-party complaint against respondent Gulf Florida Terminal Company, the decedent's employer, asserting that Gulf had contracted to perform stevedoring services on the vessel in a workmanlike manner and that any negligence or unseaworthiness causing the accident resulted from Gulf's operations.

Both States Marine and Gulf sought dismissal of the portion of petitioner's complaint that requested damages for wrongful death on the basis of unseaworthiness. They contended that maritime law provided no recovery for wrongful death within a State's territorial waters, and that the statutory right of action for death under Florida law, Fla Stat § 768.01 (1965), did not encompass unseaworthiness as a basis of liability. The District Court dismissed the challenged portion of the complaint on this ground, citing this Court's decision in The Tungus v Skovgaard, 358 US 588, 3 L Ed 2d 524, 79 S Ct 503, 71 ALR 2d 1280 (1959), and cases construing the state statute, but made the certification necessary under 28 USC § 1292(b) to allow petitioner an interlocutory appeal to the Court of Appeals for the Fifth Circuit.

[398 US 377]

The Court of Appeals took advantage of a procedure furnished by state law, Fla Stat § 25.031 (1965), to certify to the Florida Supreme Court the question whether the state wrongful-death statute allowed recovery for unseaworthiness as that concept is understood in maritime law. After reviewing the history of the Florida Act, the state court answered this question in the negative. 211 So 2d 161 (1968). On return of the case to the Court of Appeals, that court affirmed the District Court's order, rejecting petitioner's argument that she was entitled to reversal under federal maritime law without regard to the scope of the state statute. 409 F2d 32 (1969). The court stated that its disposition was compelled by our decision in The Tungus. We granted certiorari, 396 US 900, 24 L Ed 2d 176, 90 S Ct 212 (1969), and invited the United States to participate as amicus curiae, id., at 952, 24 L Ed 2d at 418, 90 S Ct 423, to reconsider the important question of remedies under federal maritime law for tortious deaths on state territorial waters.

In The Tungus this Court divided on the consequences that should flow from the rule of maritime law that "in the absence of a statute there is no action for wrongful death," first announced in The Harrisburg. All members of the Court agreed that where a death on state territorial waters is left remediless by the general maritime law and by federal statutes, a remedy may be provided under any applicable state law giving a right of action for death by wrongful act. However, four Justices dissented from the Court's further holding that "when admiralty adopts a State's right of action for wrongful death, it must enforce the right as an integrated whole, with whatever conditions and limitations the creating State has attached." 358 US, at 592, 3 L Ed 2d at 528, 71 ALR2d 1280. The dissenters would have held that federal maritime law could utilize the state law to "supply a remedy" for breaches of federally imposed duties, without regard

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to any substantive limitations contained in the state law. Id., at 597, 599, 3 L Ed 2d at 531, 532, 71 ALR2d 1280.

[1-3] The extent of the role to be played by state law under The Tungus has been the subject of substantial debate and uncertainty in this Court, see Hess v United States, 361 US 314, 4 L Ed 2d 305, 80 S Ct 341 (1960); Goett v Union Carbide Corp., 361 US 340, 4 L Ed 2d 341, 80 S Ct 357 (1960), with opinions on both sides of the question acknowledging the shortcomings in the present law. See 361 US, at 314-315, 338-339, 4 L Ed 2d at 305, 308, 321, 80 S Ct 341. On fresh consideration of the entire subject, we have concluded that the primary source of the confusion is not to be found in The Tungus, but in The Harrisburg, and that the latter decision, somewhat dubious even when rendered, is such an unjustifiable anomaly in the present maritime law that it should no longer be followed. We therefore reverse the judgment of the Court of Appeals.

[398 US 379]

I

The Court's opinion in The Harrisburg acknowledged that the result reached had little justification except in primitive English legal history—a history far removed from the American law of remedies for maritime deaths.

[398 US 380]

That case, like this, was a suit on behalf of the family of a maritime worker for his death on the navigable waters of a State. Following several precedents in the lower federal courts, the trial court awarded damages against the ship causing the death, and the circuit court affirmed, ruling that death by maritime tort "may be complained of as an injury, and the wrong redressed under the general maritime law." 15 F 610, 614 (1883). This Court, in reversing, relied primarily on its then-recent decision in Insurance Co. v Brame, 95 US 754, 24 L Ed 580 (1878), in which it had held that in American common law, as in English, "no civil action lies for an injury which results in . . . death." Id., at 756, 24 L Ed at 582. In The Harrisburg, as in Brame, the Court did not examine the justifications for this common-law rule; rather, it simply noted that "we know of no country that has adopted a different rule on this subject for the sea from that which it maintains on the land," and concluded, despite contrary decisions of the lower federal courts both before and after Brame, that the rule of Brame should apply equally to maritime deaths. 119 US, at 213, 30 L Ed at 362.

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Our analysis of the history of the common-law rule indicates that it was based on a particular set of factors that had, when The Harrisburg was decided, long since been thrown into discard even in England, and that had never existed in this country at all. Further, regardless of the viability of the rule in 1886 as applied to American land-based affairs, it is difficult to discern an adequate reason for its extension to admiralty, a system of law then already differentiated in many respects from the common law.

One would expect, upon an inquiry into the sources of the common-law rule, to find a clear and compelling justification for what seems a striking departure from the result dictated by elementary principles in the law of remedies. Where existing law imposes a primary duty, violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be nonactionable simply because it was serious enough to cause death. On the contrary, that rule has been criticized ever since its inception, and described in such terms as "barbarous."

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 Pollock, supra, at 52–57; Holdsworth, The Origin of the Rule in Baker v Bolton, 32 LQ 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 (KB 1677); Higgins v Butcher, Yel 89, 80 Eng Rep 61 (KB 1606). The 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 historical justification marshaled for the rule in England never existed in this country. In limited instances American law did adopt a vestige of the felony-merger doctrine, to the effect that a civil action was delayed until after the criminal trial. However, in this country the felony punishment did not include forfeiture of property; therefore, there was nothing, even in those limited instances, to bar a subsequent civil suit. E. g., Grosso v Delaware, Lackawanna & West. R. Co., 50 NJL 317, 319–320, 13 A

233, 234 (1888); Hyatt v Adams, 16 Mich 180, 185–188 (1867); see W. Prosser, Law of Torts 8, 920–924 (3d ed 1964). Nevertheless, despite some early cases in which the rule was rejected as "incapable of vindication," e. g., Sullivan v Union Pac. R. Co., 23 F Cas 368, 371 (No. 13,599) (CC Neb 1874); Shields v Yonge, 15 Ga 349 (1854); cf. Cross v Guthery, 2 Root 90, 92 (Conn 1794), American courts generally adopted the English rule as the common law of this country as well. Throughout the period of this adoption, culminating in this Court's decision in Brame,

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the courts failed to produce any satisfactory justification for applying the rule in this country.

Further, even after the decision in Brame, it is not apparent why the Court in The Harrisburg concluded that there should not be a different rule for admiralty from that applied at common law. Maritime law had always, in this country as in England, been a thing apart from the common law. It was, to a large extent, administered by different courts; it owed a much greater debt to the civil law;[5] and, from its focus on a particular

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subject matter, it developed general principles unknown to the common law. These principles included a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages. See generally G. Gilmore & C. Black, The Law of Admiralty 1–11, 253 (1957); P. Edelman, Maritime Injury and Death 1 (1960). These factors suggest that there might have been no anomaly in adoption of a different rule to govern maritime relations, and that the common-law rule, criticized as unjust in its own domain, might wisely have been rejected as incompatible with the law of the sea. This was the conclusion reached by Chief Justice Chase, prior to The Harrisburg, sitting on circuit in The Sea Gull, 21 F Cas 909 (No. 12,578) (CC Md 1865). He there remarked that "There are cases, indeed, in which it has been held that in a suit at law, no redress can be had by the surviving representative for injuries occasioned by the death of one through the wrong of another; but these are all common-law cases, and the common law has its peculiar rules in relation to this subject, traceable to the feudal system and its forfeitures . . . and certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." Id., at 910.

Numerous other federal maritime cases, on similar reasoning, had reached the same result. E. g., The Columbia, 27 F 704 (DC SD NY 1886); The Manhasset, 18 F 918 (DC ED Va 1884); The E. B.

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Ward, Jr., 17 F 456 (CC ED La 1883); The Garland, 5 F 924 (DC ED Mich 1881); Holmes v O. & C. R. Co., 5 F 75 (DC Ore 1880); The To-

5. The Court in The Harrisburg acknowledged that, at least according to the courts of France, the civil law did allow recovery for the injury suffered by dependents of a person killed. It noted, however, that the Louisiana courts took a different view of the civil law, and that English maritime law did not seem to differ in this regard from English common law. 119 US at 205, 212–213, 5 L Ed at 242, 244. See Generally Grigsby v Coast Marine Service, 412 F2d 1011, 1023–1029 (CA5th Cir 1969); 1 E. Benedict, Law of American Admiralty 2 (6th ed Knauth 1940); 4 id., at 358.

wanda, 24 F Cas 74 (No. 14,109) (CC ED Pa 1877); Plummer v Webb, 19 F Cas 894 (No. 11,234) (DC Maine 1825); Hollyday v The David Reeves, 12 F Cas 386 (No. 6,625) (DC Md 1879). Despite the tenor of these cases, some decided after Brame, the Court in The Harrisburg concluded that "the admiralty judges in the United States did not rely for their jurisdiction on any rule of the maritime law different from that of the common law, but [only] on their opinion that the rule of the English common law was not founded in reason, and had not become firmly established in the jurisprudence of this country." 119 US, at 208, 30 L Ed at 360. Without discussing any considerations that might support a different rule for admiralty, the Court held that maritime law must be identical in this respect to the common law.

II

We need not, however, pronounce a verdict on whether The Harrisburg, when decided, was a correct extrapolation of the principles of decisional law then in existence. A development of major significance has intervened, making clear that the rule against recovery for wrongful death is sharply out of keeping with the policies of modern American maritime law. This development is the wholesale abandonment of the rule in most of the areas where it once held sway, quite evidently prompted by the same sense of the rule's injustice that generated so much criticism of its original promulgation.

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In the United States, every State today has enacted a wrongful-death statute. See Smith, supra, 44 NCL Rev 402. The Congress has created actions for wrongful deaths of railroad employees, Federal Employers' Liability Act, 45 USC §§ 51-59; of merchant seamen, Jones Act, 46 USC § 688; and of persons on the high seas, Death on the High Seas Act, 46 USC §§ 761, 762.[8] Congress has also, in the Federal Tort Claims Act, 28 USC § 1346(b), made the United States subject to liability in certain circumstances for negligently caused wrongful death to the same extent as a private person. See, e. g., Richards v United States, 369 US 1, 7 L Ed 2d 492, 82 S Ct 585 (1962).

[4] These numerous and broadly applicable statutes, taken as a whole, make it clear that there is no present public policy against allowing recovery for wrongful death. The statutes evidence a wide rejection by the legislatures of whatever justifications may once have existed for a general refusal to allow such recovery. This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our

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law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law. We must, therefore, analyze with care the congressional enactments that have abrogated the common-law rule in the maritime field, to

8. See also National Parks Act, 16 USC §457; Outer Continental Shelf Lands Act, 43 USC §§ 1331-1343 (making state wrongful-death statutes applicable to particular areas within federal jurisdiction). Cf. n. 16, infra.

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determine the impact of the fact that none applies in terms to the situation of this case. See Part III, infra. However, it is sufficient at this point to conclude, as Mr. Justice Holmes did 45 years ago, that the work of the legislatures has made the allowance of recovery for wrongful death the general rule of American law, and its denial the exception. Where death is caused by the breach of a duty imposed by federal maritime law, Congress has established a policy favoring recovery in the absence of a legislative direction to except a particular class of cases.

III

[5] Our undertaking, therefore, is to determine whether Congress has given such a direction in its legislation granting remedies for wrongful deaths in portions of the maritime domain. We find that Congress has given no affirmative indication of an intent to preclude the judicial allowance of a remedy for wrongful death to persons in the situation of this petitioner.

[6, 7] From the date of The Harrisburg until 1920, there was no remedy for death on the high seas caused by breach of one of the duties imposed by federal maritime law. For deaths within state territorial waters, the federal law accommodated the humane policies of state wrongful-death statutes by allowing recovery whenever an applicable state statute favored such recovery. Congress acted in 1920 to furnish the remedy denied by the courts for deaths beyond the jurisdiction of any State by passing

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two landmark statutes. The first of these was the Death on the High Seas Act, 41 Stat 537, 46 USC § 761 et seq. Section 1 of that Act provides that:

"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, . . . 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 the death had not ensued."

Section 7 of the Act further provides:

"The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this [Act]. Nor shall this [Act] apply to the Great Lakes or to any waters within the territorial limits of any State . . . ."

The second statute was the Jones Act, 41 Stat 1007, 46 USC § 688, which, by extending to seamen the protections of the Federal Employers' Liability Act, provided a right of recovery against their employers for negligence resulting in injury or death. This right follows from the seaman's employment status and is not limited to injury or death occurring on the high seas.[11]

[7] 11. In 1927 Congress passed the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat 1424, 33 USC § 901 et seq., granting to longshoremen the right to receive workmen's compensation benefits from their employers for accidental injury or death arising out of their employment. These benefits are made exclusive of any other liability for employers who comply with the Act. The Act does not, however, affect the longshoreman's remedies against persons other than his employer, such as a shipowner, and therefore does not bear on the problem before us except perhaps to serve as yet another example of congressional action to allow recovery for death in circumstances where recovery is allowed for nonfatal injuries.

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The United States, participating as amicus curiae, contended at oral argument that these statutes, if construed to forbid recognition of a general maritime remedy for wrongful death within territorial waters, would perpetuate three anomalies of present law. The first of these is simply the discrepancy produced whenever the rule of The Harrisburg holds sway: within territorial waters, identical conduct violating federal law (here the furnishing of an unseaworthy vessel) produces liability if the victim is merely injured, but frequently not if he is killed. As we have concluded, such a distinction is not compatible with the general policies of federal maritime law.

The second incongruity is that identical breaches of the duty to provide a seaworthy ship, resulting in death, produce liability outside the three-mile limit—since a claim under the Death on the High Seas Act may be founded on unseaworthiness, see Kernan v American Dredging Co., 355 US 426, 430 n. 4, 2 L Ed 2d 382, 387, 78 S Ct 394 (1958)—but not within the territorial waters of a State whose local statute excludes unseaworthiness claims. The United States argues that since the substantive duty is federal, and federal maritime jurisdiction covers navigable waters within and without the three-mile limit, no rational policy supports this distinction in the availability of a remedy.

The third, and assertedly the "strangest" anomaly is that a true seaman—that is, a member of a ship's company, covered by the Jones Act—is provided no remedy for death caused by unseaworthiness within territorial waters, while a longshoreman, to whom the duty of seaworthiness was extended only because he performs work

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traditionally done by seamen, does have such a remedy when allowed by a state statute.[12]

[8] There is much force to the United States' argument that these

12. A joint contributor to this last situation, in conjunction with the rule of The Harrisburg, is the decision in Gillespie v United States Steel Corp., 379 US 148, 13 L Ed 2d 199, 85 S Ct 308 (1964), where the Court held that the Jones Act, by providing a claim for wrongful death based on negligence, precludes any state remedy for wrongful death of a seaman in territorial waters—whether based on negligence or unseaworthiness. The Court's ruling in Gillespie was only that the Jones Act, which was "intended to bring about the uniformity in the exercise of admiralty jurisdiction required by the Constitution, . . . necessarily supersedes the application of the death statutes of the several States." Id., at 155, 13 L Ed 2d at 205. The ruling thus does not disturb the seaman's rights under general maritime law, existing alongside his Jones Act claim, to sue his employer for injuries caused by unseaworthiness, see McAllister v Magnolia Petroleum Co., 357 US 221, 2 L Ed 2d 1272, 78 S Ct 1201 (1958), or for death on the high seas caused by unseaworthiness, see Kernan v American Dredging Co., 355 US 426, 430 n. 4, 2 L Ed 2d 382, 387, 78 S Ct 394 (1958); Doyle v Albatross Tanker Corp., 367 F2d 465 (CA2d Cir 1966); cf. Pope & Talbot, Inc. v Hawn, 346 US 406, 98 L Ed 143, 74 S Ct 202 (1953). Likewise, the remedy under general maritime law that will be made available by our overruling today of The Harrisburg seems to be beyond the preclusive effect of the Jones Act as interpreted in Gillespie. The existence of a maritime remedy for deaths of seamen in territorial waters will further, rather than hinder, "uniformity in the exercise of admiralty jurisdiction"; and, of course, no question of preclusion of a *federal* remedy was before the Court in Gillespie or its predecessor, Lindgren v United States, 281 US 38, 74 L Ed 686, 50 S Ct 207 (1930), since no such remedy was thought to exist at the time those cases were decided. See Gilmore & Black, supra, at 304; but cf. Kernan v American Dredging Co., 355 US, at 429–430, 2 L Ed 2d at 386, 387.

distinctions are so lacking in any apparent justification that we should not, in the absence of compelling evidence, presume that Congress affirmatively intended to freeze them into maritime law. There should be no presumption that Congress has removed this Court's traditional responsibility to vindicate the policies of maritime law by ceding that function exclusively to the

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States. However, respondents argue that an intent to do just that is manifested by the portions of the Death on the High Seas Act quoted above.

The legislative history of the Act suggests that respondents misconceive the thrust of the congressional concern. Both the Senate and House Reports consist primarily of quoted remarks by supporters of the proposed Act. Those supporters stated that the rule of The Harrisburg, which had been rejected by "[e]very country of western Europe," was "a disgrace to a civilized people." "There is no reason why the admiralty law of the United States should longer depend on the statute laws of the States. . . . Congress can now bring our maritime law into line with the laws of those enlightened nations which confer a right of action for death at sea." The Act would accomplish that result "for deaths on the high seas, leaving unimpaired the rights under State statutes as to deaths on waters within the territorial jurisdiction of the States. . . . This is for the purpose of uniformity, as the States can not properly legislate for the high seas." S Rep No. 216, 66th Cong, 1st Sess, 3, 4 (1919); HR Rep No. 674, 66th Cong, 2d Sess, 3, 4 (1920). The discussion of the bill on the floor of the House evidenced the same concern that a cause of action be provided "in cases where there is now no remedy," 59 Cong Rec 4486, and at the same time that "the power of the States to create actions for wrongful death in no way be affected by enactment of the federal law." The Tungus v Skovgaard, 358 US, at 593, 3 L Ed 2d at 529, 71 ALR2d 1280.

[9] Read in light of the state of maritime law in 1920, we believe this legislative history indicates that Congress intended to ensure the continued availability of a remedy, historically provided by the States, for deaths in territorial waters; its failure to extend the Act to cover such deaths primarily reflected the lack of necessity for coverage by a federal statute, rather than an affirmative

[398 US 398]

desire to insulate such deaths from the benefits of any federal remedy that might be available independently of the Act. The void that existed in maritime law up until 1920 was the absence of any remedy for wrongful death on the high seas. Congress, in acting to fill that void, legislated only to the three-mile limit because that was the extent of the problem.[13] The express provision that state remedies in territorial waters were not disturbed by the Act ensured that Congress' solution of one problem would not create another by inviting the courts to find that the Act pre-empted the entire field, destroying the state remedies that had previously existed.

13. Similarly, when Parliament abrogated the English common-law rule by passing Lord Campbell's Act, it provided that "nothing therein contained shall apply to that Part of the United Kingdom called *Scotland*." 9 & 10 Vict, c. 93, § 6 (1846). The decisional law of Scotland had long recognized a right to recover for wrongful death; thus the mischief at which the statute aimed could be cured without disturbing Scottish law. The Act "excluded Scotland from its operation because a sufficient remedy already existed there when in England none existed at all." Admiralty Commissioners v S. S. Amerika, [1917] AC, at 52.

The beneficiaries of persons meeting death on territorial waters did not suffer at that time from being excluded from the coverage of the Act. To the contrary, the state remedies that were left undisturbed not only were familiar but also may actually have been more generous than the remedy provided by the new Act. On the one hand, the primary basis of recovery under state wrongful-death statutes was negligence. On the other hand, the substantive duties imposed at that time by general maritime law were vastly different from those that presently exist. "[T]he seaman's right to recover damages for injuries caused by unseaworthiness of the ship was an obscure and relatively little used remedy," perhaps largely because prior to this Court's decision in Mahnich v Southern S. S. Co., 321 US 96, 88 L Ed 561, 64 S Ct 455 (1944),

[398 US 399]

the shipowner's duty was only to use due diligence to provide a seaworthy ship. Gilmore & Black, supra, at 315, 361; Tetreault, Seamen, Seaworthiness, and the Rights of Harbor Workers, 39 Cornell LQ 381, 392-393, 396 (1954). Nonseamen on the high seas could generally recover for ordinary negligence, but even this was virtually denied to seamen under the peculiar maritime doctrine of The Osceola, 189 US 158, 175, 47 L Ed 760, 764, 23 S Ct 483 (1903). Congress in 1920 thus legislated against a backdrop of state laws that imposed a standard of behavior generally the same as—and in some respects perhaps more favorable than—that imposed by federal maritime law.

Since that time the equation has changed drastically, through this Court's transformation of the shipowner's duty to provide a seaworthy ship into an absolute duty not satisfied by due diligence. See, e. g., Mahnich v Southern S. S. Co., supra; Mitchell v Trawler Racer, Inc. 362 US 539, 4 L Ed 2d 941, 80 S Ct 926 (1960). The unseaworthiness doctrine has become the principal vehicle for recovery by seamen for injury or death, overshadowing the negligence action made available by the Jones Act, see Gilmore & Black, supra, at 315-332; and it has achieved equal importance for longshoremen and other harbor workers to whom the duty of seaworthiness was extended because they perform work on the vessel traditionally done by seamen. Seas Shipping Co. v Sieracki, 328 US 85, 90 L Ed 1099 66 S Ct 872 (1946). The resulting discrepancy between the remedies for deaths covered by the Death on the High Seas Act and for deaths that happen to fall within a state wrongful-death statute not encompassing unseaworthiness could not have been foreseen by Congress. Congress merely declined to disturb state remedies at a time when they appeared adequate to effectuate the substantive duties imposed by general maritime law. That action cannot be read as an instruction to the federal courts that deaths in territorial waters, caused by breaches of the

[398 US 400]

evolving duty of seaworthiness, must be damnum absque injuria unless the States expand their remedies to match the scope of the federal duty.

To put it another way, the message of the Act is that it does not by its own force abrogate available state remedies; no intention appears that the Act have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law.

[10, 11] That our conclusion is wholly consistent with the congressional purpose is confirmed by the passage of the

[398 US 401]

Jones Act almost simultaneously with the Death on the High Seas Act. As we observed in Gillespie v United States Steel Corp. 379 US 148, 155, 13 L Ed 2d 199, 204, 85 S Ct 308 (1964), the Jones Act was intended to achieve "uniformity in the exercise of admiralty jurisdiction" by giving seamen a federal right to recover from their employers for negligence regardless of the location of the injury or death. That strong concern for uniformity is scarcely consistent with a conclusion that Congress intended to *require* the present nonuniformity in the effectuation of the duty to provide a seaworthy ship. Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. E. g., Hess v United States, 361 US 314, 4 L Ed 2d 305, 80 S Ct 341 (1960); Goett v Union Carbide Corp. 361 US 340, 4 L Ed 2d 341, 80 S Ct 357 (1960) Such uniformity

[398 US 402]

not only will further the concerns of both of the 1920 Acts but also will give effect to the constitutionally based principle that federal admiralty law should be "a system of law coextensive with, and operating uniformly in, the whole country." The Lottawanna, 21 Wall 558, 575, 22 L Ed 654, 662 (1875).

[12, 13] We conclude that the Death on the High Seas Act was not intended to preclude the availability of a remedy for wrongful death under general maritime law in situations not covered by the Act. Because the refusal of maritime

[398 US 403]

law to provide such a remedy appears to be jurisprudentially unsound and to have produced serious confusion and hardship, that refusal should cease unless there are substantial countervailing factors that dictate adherence to The Harrisburg simply as a matter of stare decisis. We now turn to a consideration of those factors.

V

The one aspect of a claim for wrongful death that has no precise counterpart in the established law governing nonfatal injuries is the determination of the beneficiaries who are entitled to recover. General maritime law, which denied any recovery for wrongful death, found no need to specify which dependents should receive such recovery. On this question, petitioner and the United States argue that we may look for guidance to the expressions of Congress, which has spoken on this

[398 US 407]

subject in the Death on the High Seas Act, the Jones Act, and the Longshoremen's and Harbor Workers' Compensation Act. Though very similar, each of these provisions differs slightly in the naming of dependent relatives who may recover and in the priority given to their claims.

[15-18] The United States contends that, of the three, the provision that should be borrowed for wrongful-death actions under general maritime law is that of the Death on the High Seas Act. It is the congressional enactment that deals specifically and exclusively with actions for wrongful death, and that simply provides a remedy —for deaths on the high seas—for breaches of the duties imposed by

general maritime law. In contrast, the beneficiary provisions of the Jones Act are applicable only to a specific class of actions—claims by seamen against their employers—based on violations of the special standard of negligence that has been imposed under the Federal Employers' Liability Act. That standard appears to be unlike any imposed by general maritime law. Further, although the Longshoremen's and Harbor Workers' Compensation Act is applicable to longshoremen such as petitioner's late husband, its principles of recovery are wholly foreign to those of general maritime law—like most workmen's compensation laws, it deals only with the responsibilities of employers for death or injury to their employees, and provides standardized amounts of compensation regardless of fault on the part of the employer.

The only one of these statutes that applies not just to a class of workers but to any "person," and that bases liability on conduct violative of general maritime

[398 US 408]

law, is the Death on the High Seas Act.[23] The borrowing of its schedule of beneficiaries, argues the United States, will not only effectuate the expressed congressional preferences in this area but will also promote uniformity by ensuring that the beneficiaries will be the same for identical torts, rather than varying with the employment status of the decedent. There is no occasion, according to this argument, to borrow from the law of the relevant coastal State, since the underlying duties to be effectuated are entirely federal and Congress has expressed its preference of beneficiaries for violations of maritime law.

We do not determine this issue now, for we think its final resolution should await further sifting through the lower courts in future litigation. For present purposes we conclude only that its existence affords no sufficient reason for not coming to grips with The Harrisburg. If still other subsidiary issues should require resolution, such as particular questions of the measure of damages, the courts will not be without persuasive analogy for guidance. Both the Death on the High Seas Act and the numerous state wrongful-death acts have been implemented with success for decades. The experience thus built up counsels that a suit for wrongful death raises no problems unlike those that have long been grist for the judicial mill.

In sum, in contrast to the torrent of difficult litigation that has swirled about The Harrisburg, The Tungus, which followed upon it, and the problems of federal-state accommodation they occasioned, the recognition of a remedy for wrongful death under general maritime law can be expected to bring more placid waters. That prospect indeed makes for, and not against, the discarding of The Harrisburg.

[398 US 409]

[19] We accordingly overrule The Harrisburg, and hold that an action does lie under general maritime law for death caused by violation of maritime duties. The judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

Mr. Justice Blackmun took no part in the consideration or decision of this case.

23. 46 USC § 761.

[414 US 573]

SEA-LAND SERVICES, Inc., Petitioner,

v

HELEN STEIN GAUDET, Administratrix of the Estate of Awtrey C. Gaudet, Sr.

414 US 573, 39 L Ed 2d 9, 94 S Ct 806

[No. 72-1019]

Argued November 7, 1973. Decided January 21, 1974.

OPINION OF THE COURT

[414 US 574]

Mr. Justice Brennan delivered the opinion of the Court.

[1] Moragne v States Marine Lines, 398 US 375, 26 L Ed 2d 339, 90 S Ct 1772 (1970), overruling The Harrisburg, 119 US 199, 30 L Ed 358, 7 S Ct 140 (1886), held that an action for wrongful death based on unseaworthiness is maintainable under federal maritime law, but left the shaping of the new nonstatutory action to future cases. The question in this case is whether the widow of a longshoreman may maintain such an action for the wrongful death of her husband—alleged to have resulted from injuries suffered by him while aboard a vessel in navigable waters—after the decedent recovered damages in his lifetime for his injuries.

Respondent's husband suffered severe injuries while working as a longshoreman aboard petitioner's vessel, the S.S. Claiborne, in Louisiana navigable waters. He recovered $140,000 for his permanent disability, physical agony, and loss of earnings in an action based on unseaworthiness, but died shortly after the action was terminated. Respondent brought this wrongful-death action in the District Court for the Eastern District of Louisiana for damages suffered by her. Based on her husband's recovery, the District Court dismissed the widow's suit on grounds of res judicata and failure to state a claim. The Court of Appeals for the Fifth Circuit reversed, holding that Moragne gave "Mrs. Gaudet . . . a compensable

[414 US 575]

cause of action for Mr. Gaudet's death wholly apart from and not extinguished by the latter's recovery for his personal injuries . . . ." 463 F2d 1331, 1332 (1972). We granted certiorari, 411 US 963, 36 L Ed 2d 683, 93 S Ct 2141 (1973), and now affirm.

I

[1, 5-8] Petitioner, Sea-Land Services, Inc. (Sea-Land), argues that the wrongful-death remedy should recognize no loss independent of the decedent's claim for his personal injuries, and therefore that respondent had a wrongful-death remedy only "in the event Gaudet failed to prosecute [his own claim] during his lifetime." Brief for Petitioner 6. But Moragne had already implicitly rejected that argument;

[414 US 576]

for we there recognized that a single tortious act might result in two distinct, though related harms, giving rise to two separate causes of action: "in the case of mere injury, the person physically harmed is made whole for his harm, while in the case of death, those closest to him—usually spouse and children—seek to recover for their total loss of one on whom they depended." 398 US, at 382, 26 L Ed 2d 339. Thus, Moragne created a true wrongful-death remedy—founded upon the death itself and independent of any action the decedent may have had for his own personal injuries. Because the respondent's suit involves a different cause of action, it is not precluded by res judicata.

[9] To be sure, a majority of courts interpreting state and federal wrongful-death statutes have held that an action for wrongful death is barred by the decedent's recovery for injuries during his lifetime. But the bar does not appear to rest in those cases so much upon principles of res judicata or public policy as upon statutory limitations on the wrongful-death action. As one authority has noted, "[t]he fact that all civil remedies for wrongful death derive from statute has important consequences. Since the right was unknown to common law, the legislatures which created the right were free to impose restrictions upon it." 2 F. Harper & F. James, The Law of Torts § 24.1, p 1285 (1956). Thus, England's Lord Campbell's Act, the first wrongful-death statute, permits

[414 US 580]

recovery "whensoever the Death of a Person shall be caused by [the] wrongful Act . . . [of another] and the Act . . . is such as would (if Death had not ensued) have entitled the Party injured to maintain an Action and recover Damages in respect thereof . . . ." Early English cases interpreting the Act held that this language conditioned wrongful-death recovery upon the existence of an actionable cause of the decedent at his death, if

[414 US 581]

the deceased had reduced his claim to judgment, settled with or released his tortfeasor, and therefore up to the time he died could not have maintained a further action for his injuries, his dependents could have no cause of action for his wrongful death. Since Lord Campbell's Act became the prototype of American wrongful-death statutes, most state statutes contained nearly identical language and have been similarly interpreted by state

[414 US 582]

courts. Though the federal wrongful-death statutes do not contain the same controversial language, the FELA, at least, has been held to be "essentially identical with" Lord Campbell's Act, Michigan C. R. Co. v Vreeland, 227 US 59, 69, 57 L Ed 417, 33 S Ct 192 (1913), and therefore similar restrictions have been placed on FELA wrongful-death recovery. Mellon v Goodyear, 277 US 335, 345, 72 L Ed 906, 48 S Ct 541 (1928).

[414 US 583]

[10, 11] Moragne, on the other hand, requires that the shape of the new maritime wrongful-death remedy (not a statutory creation but judge-made, see The Tungus v Skovgaard, 358 US 588, 611, 3 L Ed 2d 524, 79 S Ct 503, 71 ALR2d 1280 (1959) (opinion of Brennan, J.) be guided by the principle of maritime law that "certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules," The Sea Gull, 21 F Cas 909 (No. 12,578) (CC Md 1865) quoted in Moragne, 398 US, at 387, 26 L Ed 2d 339. Since the policy underlying the remedy is to insure compensation of the dependents for *their* losses resulting from the decedent's death, the remedy should not be precluded merely because the decedent, during his lifetime, is able to obtain a judgment for his own personal injuries. No

statutory language or "established and inflexible rules" of maritime law require a contrary conclusion.[10]

II

[12] Sea-Land argues that, if dependents are not prevented from bringing a separate cause of action for wrongful death in cases where the decedent has already received a judgment for his personal injuries, then necessarily it

[414 US 584]

will be subject to double liability. In order to evaluate this argument it is necessary first to identify the particular harms suffered by the dependents, for which the maritime wrongful-death remedy permits recovery of damages. In identifying these compensable harms, we are not without useful guides; for in Moragne we recognized that with respect to "particular questions of the measure of damages, the courts will not be without persuasive analogy for guidance. Both the Death on the High Seas Act and the numerous state wrongful-death acts have been implemented with success for decades. The experience thus built up counsels that a suit for wrongful death raises no problems unlike those that have long been grist for the judicial mill." 398 US, at 408, 26 L Ed 2d 339. Our review of those authorities, and the policies of maritime law, persuade us that, under the maritime wrongful-death remedy, the decedent's dependents may recover damages for their loss of support, services, and society, as well as funeral expenses.

[13, 14] Recovery for loss of support has been universally recognized, and includes all the financial contributions

[414 US 585]

that the decedent would have made to his dependents had he lived. Similarly, the overwhelming majority of state wrongful-death acts and courts interpreting the Death on the High Seas Act have permitted recovery for the monetary value of services the decedent provided and would have continued to provide but for his wrongful death. Such services include, for example, the nurture, training, education, and guidance that a child would have received had not the parent been wrongfully killed. Services the decedent performed at home or for his spouse are also compensable.

10. Significantly, the Death on the High Seas Act, 46 USC § 761 [46 USCS § 761], the only federal statute "that deals specifically and exclusively with actions for wrongful death . . . for breaches of the duties imposed by general maritime law," Moragne v States Marine Lines, 398 US 395, at 407, 26 L Ed 2d 339 (1970), has not been interpreted, as the FELA has been, to bar wrongful-death recovery in cases where the decedent has already recovered during his lifetime for his personal injuries.

[15] Compensation for loss of society, however, presents a closer question. The term "society" embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection.[17] Unquestionably, the deprivation of these

[414 US 586]

benefits by wrongful death is a grave loss to the decedent's dependents. Despite this fact, a number of early wrongful-death statutes were interpreted by courts to preclude recovery for these losses on the ground that the statutes were intended to provide compensation only for "pecuniary loss," and that the loss of society is not such an economic loss.[18] Other wrongful-death statutes contain express language limiting recovery to pecuniary losses; for example, the Death on the High

[414 US 587]

Seas Act limits recovery to "a fair and just compensation for the *pecuniary* loss sustained by the persons for whose benefit the suit is brought . . . ," 46 USC § 762 [46 USCS § 762] (emphasis added), and consequently has been construed to exclude recovery for the loss of society.

[16] A clear majority of States, on the other hand, have rejected such a narrow view of damages, and, either by express statutory provision or by judicial construction, permit recovery for loss of society. This expansion of damages recoverable under wrongful-death statutes to include loss of society has led one commentator to observe that "[w]hether such damages are classified as 'pecuniary,' or recognized and allowed as nonpecuniary, the recent trend is unmistakably in favor of permitting such recovery." S. Speiser, Recovery for Wrongful

[15] 17. Loss of society must not be confused with mental anguish or grief, which are 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 nonpecuniary 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." Speiser § 3.45, p 223 (emphasis in original) (footnotes omitted).

18. Lord Campbell's Act, which, by its terms, allows the jury to award "such damages as they may think proportional to the injury," was interpreted to permit recovery only for "pecuniary losses," Blake v Midland R. Co., 18 QB (Ad & E, NS)* 93, 118 Eng Rep 35 (1852). Most American courts, interpreting similar wrongful-death statutes, followed suit, see e. g., Michigan C. R. Co. v Vreeland, supra, at 70, 57 L Ed 417. See also Speiser § 3.1.

Death 218 (1966). Thus, our decision to permit recovery for loss of society aligns the maritime wrongful-death remedy with a majority of state

[414 US 588]

wrongful-death statutes.[22] But in any event, our decision is compelled if we are to shape the remedy to comport with the humanitarian policy of the maritime law to show "special solicitude" for those who are injured within its jurisdiction.

[17] Objection to permitting recovery for loss of society often centers upon the fear that such damages are somewhat speculative and that factfinders will return

[414 US 589]

excessive verdicts. We were not unaware of this objection in Moragne, where we said,

"[O]ther courts have recognized that calculation of the loss sustained by dependents or by the estate of the deceased, which is required under most present wrongful-death statutes . . . does not present difficulties more insurmountable than assessment of damages for many nonfatal personal injuries." 398 US, at 385, 26 L Ed 2d 339.

For example, juries are often called upon to measure damages for pain and suffering, mental anguish in disfigurement cases, or intentional infliction of emotional harm. In fact, since the 17th century, juries have assessed damages for loss of consortium—which encompasses loss of society—in civil actions brought by husbands whose wives have been negligently injured.

[16] 22. We recognize, of course, that our decision permits recovery of damages not generally available under the Death on the High Seas Act. Traditionally, however, "Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law," Fitzgerald v United States Lines Co., 374 US 16, 20, 10 L Ed 2d 720, 83 S Ct 1646 (1963). The scope and content of the general maritime remedy for wrongful death established in Moragne is no exception. After combing the legislative history of the Death on the High Seas Act, we concluded on Moragne that Congress expressed "no intention . . . of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law." 398 US, at 400, 26 L Ed 2d 339. Nothing in the legislative history of the Act suggests that Congress intended the Act's statutory measure of damages to pre-empt any additional elements of damage for a maritime wrongful-death remedy which this Court might deem "appropriate to effectuate the policies of general maritime law." To the contrary, Congress' insistence that the Act not extend to territorial waters, see S Rep No. 216, 66th Cong, 1st Sess, 3 (1919); HR Rep No. 674, 66th Cong, 2d Sess, 3 (1920); 59 Cong Rec 4482-4486 (1920), indicates that Congress was not concerned that there be a uniform measure of damages for wrongful deaths occurring within admiralty's jurisdiction, for in many instances state wrongful-death statutes extending to territorial waters provided a more liberal measure of damages than the Death on the High Seas Act. See Greene v Vantage S. S. Corp., 466 F2d 159 (CA4 1972).

[414 US 590]

More recently, juries have been asked to measure loss of consortium suffered by wives whose husbands have been negligently harmed. Relying on this history, the Florida Supreme Court recognized as early as 1899 that the damages for loss of society recovered by a wife for the wrongful death of her husband were "no more fanciful or speculative than the frugality, industry, usefulness, attention and tender solicitude of a wife [all of which a husband might recover at common law in an action for consortium], and the one can be compensated [as easily], by that simple standard of pecuniary loss . . . as the other." Florida C. & P. R. Co. v Foxworth, 41 Fla 1, 73, 25 So 338, 348.

[18] We are confident that the measure of damages for loss of society in a maritime wrongful-death action can "be left to turn mainly upon the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is a just compensation for the injuries inflicted." The "City of Panama," 101 US 453, 464, 25 L Ed 1061 (1880). As in all damages awards for tortious injury, "[i]nsistence on mathematical precision would be illusory and the judge or juror must be allowed a fair latitude to make reasonable approximations guided by judgment and practical experience." Whitaker v Blidberg Rothchild Co. 296 F2d 554, 555 (CA4 1961). Moreover, appellate tribunals have amply demonstrated their ability to control excessive awards, see, e.g., Moore-McCormack Lines, Inc. v Richardson, 295 F2d 583 (CA2 1961); Dugas v National Aircraft Corp. 438 F2d 1386 (CA3 1971).

[414 US 591]

[12] Finally, in addition to recovery for loss of support, services, and society, damages for funeral expenses may be awarded under the maritime wrongful-death remedy in circumstances where the decedent's dependents have either paid for the funeral or are liable for its payment.

Turning now to Sea-Land's double-liability argument, we note that, in contrast to the elements of damages which we today hold may be recovered in a maritime wrongful-death action, the decedent recovered damages only for his loss of past and future wages, pain and suffering, and medical and incidental expenses. Obviously, the decedent's recovery did not include damages for the dependents' loss of services, society, and funeral expenses. Indeed, these losses—unique to the decedent's dependents—

[414 US 592]

could not accrue until the decedent's death. Thus, recovery of damages for these losses in the maritime wrongful-death action will not subject Sea-Land to double liability or provide the dependents with a windfall.

[19] There is, however, an apparent overlap between the decedent's recovery for loss of future wages and the dependents' subsequent claim for support. In most instances, the dependents' support will derive, at least in part, from the decedent's wages. But, when a tortfeasor has already fully compensated the decedent, during his lifetime, for his loss of future wages, the tort feasor should not be required to make further compensation in a subsequent wrongful-death suit for any

portion of previously paid wages. Any potential for such double liability can be eliminated by the application of familiar principles of collateral estoppel to preclude a decedent's dependents from attempting to relitigate the issue of the support due from decedent's future wages.[30] And while the general rule is that nonparties to the first action are not bound by a judgment or resulting determination of issues, see Blonder-Tongue v University Foundation, 402 US 313, 320–327, 28 L Ed 2d 788, 91 S Ct 1434 (1971), several exceptions exist. The pertinent exception here is that nonparties may be collaterally estopped from relitigating issues necessarily decided in a suit brought by a party who acts as a fiduciary representative for the beneficial interest of the nonparties

[12] Under the prevailing American rule, a tort victim suing for damages for permanent injuries is permitted to base his recovery "on his prospective earnings for the balance of his life expectancy at the time of his injury *undiminished by any shortening of that expectancy as a result of the injury*," 2 F. Harper & F. James, The Law of Torts § 24.6, pp 1293–1294 (1956) (emphasis in original). Thus, when a decedent brings his own personal-injury action during his lifetime and recovers damages for his lost wages he acts in a fiduciary capacity to the extent that he represents his dependents' interest in that portion of his prospective earnings which, but for his wrongful death, they had a reasonable expectation of his providing for their support. Since the decedent's recovery of any future wages will normally be dependent upon his fully litigating that issue, we need not fear that

[414 US 595]

applying principles of collateral estoppel to preclude the decedent's dependents' claim for a portion of those future wages will deprive the dependents of their day in court.

The judgment of the Court of Appeals is

Affirmed.

STOP

30. If the dependents' total support received from the decedent exceeds the future wages paid to the decedent by the tortfeasor, the dependents will have an actionable cause for support against the tortfeasor for the difference. In that circumstance, if a special verdict was not rendered in the decedent's action specifying the amount of damages awarded for future wages, it may become necessary in the dependents' action to determine what portion of the decedent's lump-sum recovery for his injuries was attributable to future wages. This in no way conflicts with our holding that the dependents will be estopped from relitigating the amount of future wages; it is merely an acknowledgment that the amount of the wage recovery in the first action may have to be clarified in the second.

[436 US 618]

MOBIL OIL CORPORATION, Petitioner,

v

FRANCES NELL HIGGINBOTHAM, Administratrix of the Estate of Marshall K. Higginbotham, et al.

436 US 618, 56 L Ed 2d 581, 98 S Ct 2010, reh den (US) 58 L Ed 2d 200, 99 S Ct 232

[No. 76-1726]

Argued January 10-11, 1978. Decided June 5, 1978.

OPINION OF THE COURT

Mr. Justice Stevens delivered the opinion of the Court.

[1a] This case involves death on the high seas. The question is whether, in addition to the damages authorized by federal statute, a decedent's survivors may also recover damages under general maritime law. The United States Court of Appeals for the Fifth Circuit, disagreeing with the First Circuit, held

[436 US 619]

that survivors may recover for their "loss of society," as well as for their pecuniary loss.[1] We reverse.

Petitioner used a helicopter in connection with its oil drilling operations in the Gulf of Mexico about 100 miles from the Louisiana shore. On August 15, 1967, the helicopter crashed outside Louisiana's territorial waters, killing the pilot and three passengers. In a suit brought by the passengers' widows, in their representative capacities, the District Court accepted admiralty jurisdiction[2] and found that the deaths were caused by petitioner's negligence. The court awarded damages equal to the pecuniary losses suffered by the families of two passengers.[3] Although the court valued the two families' loss of society at $100,000 and $155,000, it held that the law did not authorize recovery for this loss.[4] The Court of Appeals reversed, holding that the plaintiffs were entitled to claim

[436 US 620]

damages for loss of society. We granted certiorari limited to this issue. 434 US 816,

1. Compare Barbe v Drummond, 507 F2d 794, 800-802 (CA1 1974), with Higginbotham v Mobil Oil Corp., 545 F2d 422 (CA5 1977). The members of the Higginbotham panel expressed their agreement with Barbe, supra, but considered the issue foreclosed in their Circuit by Law v Sea Drilling Corp., 510 F2d 242, on rehearing, 523 F2d 793 (CA5 1975). In that case, another Fifth Circuit panel stated that the statutory remedy provided by the Death on the High Seas Act was no longer needed. Id., at 798. See also n 16, infra.

2. 357 F Supp 1164, 1167 (WD La 1973). The District Court bottomed admiralty jurisdiction on a finding that the helicopter was the functional equivalent of a crewboat. The ruling has not been challenged in this Court. Cf. Executive Jet Aviation, Inc. v Cleveland, 409 US 249, 271-272, 34 L Ed 2d 454, 93 S Ct 493.

3. 360 F Supp 1140 (WD La 1973). One family received $362,297, the other $163,400. The District Court held that the third passenger's family could claim benefits only under the Longshoremen's and Harbor Workers' Compensation Act. 33 USC §§ 901 et seq. [33 USCS §§ 901 et seq.]. The Court of Appeals reversed this ruling. 545 F2d, at 431-433.

4. The former figure included $50,000 for one widow and $50,000 for her only daughter. The latter figure included $25,000 for the second widow and for each of two minor children, as well as $20,000 for each of four older children. 360 F Supp, at 1144-1148.

In Moragne the Court left various subsidiary questions concerning the nonstatutory death remedy—such as the schedule of beneficiaries and the limitations period—for "further sifting through the lower courts in future litigation." Id., at 408, 26 L Ed 2d 339, 90 S Ct 1772. A few years later, in Sea-Land Services, Inc. v Gaudet, 414 US 573, 39 L Ed 2d 9, 94 S Ct 806, the Court confronted some of these questions. Among the issues addressed in Gaudet was the measure of survivors' damages. The Court held that awards could include compensation for loss of support and services, for funeral expenses, and for loss of society, but not for mental anguish or grief. Id., at 583–591, 39 L Ed 2d 9, 94 S Ct 806. The Court recognized that DOHSA, which compensates only for pecuniary losses, did not allow awards for loss of society. But the accident in Gaudet, like that in Moragne, took place in territorial waters, where DOHSA does not apply. The Court chose not to adopt DOHSA's pecuniary-loss standard; instead it followed the "clear majority of States" and "the humanitarian policy of the maritime law," both of which favored recovery for loss of society. 414 US, at 587–588, 39 L Ed 2d 9, 94 S Ct 806. In sum, the Court made a policy determination in Gaudet which differed from the choice made by Congress when it enacted the Death on the High Seas Act.

II

[1b] The Gaudet opinion was broadly written. It did not state that the place where death occurred had an influence on its

[436 US 623]

analysis. Gaudet may be read, as it has been, to replace entirely the Death on the High Seas Act.[16] Its holding, however, applies only to coastal waters. We therefore must now decide which measure of damages to apply in a death action arising on the high seas—the rule chosen by Congress in 1920 or the rule chosen by this Court in Gaudet.

As the divergence of views among the States discloses, there are valid arguments both for and against allowing recovery for loss of society. Courts denying recovery cite two reasons: (1) that the loss is "not capable of measurement by any material or pecuniary standard," and (2) that an award for the loss "would obviously include elements of passion, sympathy and similar matters of improper character." 1 S. Speiser, Recovery for Wrongful Death § 3:49 (2d ed 1975). Courts allowing the award counter: (1) that the loss is real, however intangible it may be, and (2) that problems of measurement should not justify denying all relief. See generally Sea-Land Services, Inc. v Gaudet, supra, at 588–590, 39 L Ed 2d 9, 94 S Ct 806.

In this case, however, we need not pause to evaluate the opposing policy arguments. Congress has struck the balance for us. It has limited survivors to recovery of their pecuniary losses. Respondents argue that Congress does not have the

[436 US 624]

last word on this issue—that admiralty courts have traditionally undertaken to

16. As Chief Judge Brown put it in Law v Sea Drilling Corp. 523 F2d 793 (CA5 1975), "It is time that the dead hand of The Harrisburg—whether in the courts or on the elbow of the congressional draftsmen of DOHSA—follow the rest of the hulk to an honorable rest in the briney deep. . . . No longer does one need . . . DOHSA as a remedy. There is a federal maritime cause of action for death on navigable waters—any navigable waters—and it can be enforced in any court." Id., at 798.

supplement maritime statutes and that such a step is necessary in this case to preserve the uniformity of maritime law. Neither argument is decisive.

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. Damages aside, none of the issues on which DOHSA is explicit have been settled to the contrary by this Court in either Moragne or Gaudet. Nor are other disparities likely to develop. As Moragne itself implied,[19] DOHSA should be the courts' primary guide as they refine the nonstatutory death remedy, both because of the interest in uniformity and because Congress' considered judgment has great force in its own right. It is true that the measure of damages in coastal waters will differ from that on the high seas, but even if this difference proves significant,[20] a desire for uniformity cannot override the statute.

[436 US 625]

[2] We realize that, because Congress has never enacted a comprehensive maritime code, admiralty courts have often been called upon to supplement maritime statutes. The Death on the High Seas Act, however, announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages. See nn 6–10, supra. The Act does not address every issue of wrongful-death law, see, e.g., n 15, supra, 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.

In Moragne, the Court recognized a wrongful-death remedy that supplements federal statutory remedies. But that holding depended on our conclusion that Congress withheld a statutory remedy in coastal waters in order to encourage and preserve supplemental remedies. 398 US, at 397–398, 26 L Ed 2d 339, 90 S Ct 1772. Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of nonpecuniary supplements. See generally Barbe v Drummond, 507 F2d 794, 801 n 10 (CA1 1974); Wilson v Transocean Airlines, 121 F Supp 85 (ND Cal 1954). There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically en-

19. Moragne recognized that the courts would need to devise a limitations period and a schedule of beneficiaries for the new death remedy. The Court considered several alternative solutions to these problems. Only DOHSA, however, figured prominently in the discussion of both issues. 398 US, at 405–408, 26 L Ed 2d 339, 90 S Ct 1772.

20. It remains to be seen whether the difference between awarding loss-of-society damages under Gaudet and denying them under DOHSA has a great practical significance. It may be argued that the competing views on awards for loss of society, see supra, at 623, 56 L Ed 2d, at 586, can best be reconciled by allowing an award that is primarily symbolic, rather than a substantial portion of the survivors' recovery. We have not been asked to rule on the propriety of the large sums that the District Court would have awarded for loss of society in this case. See n 4, supra.

Similarly, there may be no great disparity between DOHSA and Gaudet on the issue of funeral expenses. Gaudet awards damages to dependents who have paid, or will pay, for the decedent's funeral, evidently on the theory that, but for the wrongful death, the decedent would have accumulated an estate large enough to pay for his own funeral. 414 US, at 591, 39 L Ed 2d 9, 94 S Ct 806. On that theory, the cost of the funeral could also be considered a pecuniary loss suffered by the dependent as a result of the death.

acted. In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries. Perhaps the wisdom we possess

[436 US 626]

today would enable us to do a better job of repudiating The Harrisburg than Congress did in 1920, but even if that be true, we have no authority to substitute our views for those expressed by Congress in a duly enacted statute.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Mr. Justice Brennan took no part in the consideration or decision of this case.

SEPARATE OPINION

Mr. Justice Marshall, with whom Mr. Justice Blackmun joins, dissenting.

Just a few years ago, in Sea-Land Services, Inc. v Gaudet, 414 US 573, 39 L Ed 2d 9, 94 S Ct 806 (1974), this Court held that, "under the maritime wrongful-death remedy, [a] decedent's dependents may recover damages for their loss of . . . society . . . ." Id., at 584, 39 L Ed 2d 9, 94 S Ct 806. The fact that the injury there occurred within three miles of shore, in the territorial waters of a State, had no bearing on the decision at the time it was rendered, as the majority today recognizes, ante, at 622-623, 56 L Ed 2d, at 585. Nor did we place any emphasis on the situs of injury when we first upheld the maritime wrongful-death remedy, as a matter of "general maritime law," in Moragne v States Marine Lines, Inc., 398 US 375, 409, 26 L Ed 2d 339, 90 S Ct 1772 (1970). Today the Court takes a narrow and unwarranted view of these cases, limiting them to their facts and making the availability of recovery for loss of society turn solely on a ship's distance from shore at the time of the injury causing death.

A unanimous Court concluded in Moragne that the distance of a ship from shore is a fortuity unrelated to the reasons for allowing a seaman's family to recover damages upon his death. See id., at 395-396, 405, 26 L Ed 2d 339, 90 S Ct 1772. These reasons are rooted in the traditions of maritime law, which has always shown "a special solicitude for the welfare of those men who under-t[ake] to

[436 US 627]

venture upon hazardous and unpredictable sea voyages." Id., at 387, 26 L Ed 2d 339, 90 S Ct 1772. See also Gaudet, supra, at 588, 39 L Ed 2d 9, 94 S Ct 806 ("humanitarian policy of the maritime law"). In light of this "special solicitude," Mr. Justice Harlan examined in Moragne a number of "anomalies," 398 US, at 395-396, 26 L Ed 2d 339, 90 S Ct 1772, that had resulted from the earlier rule of The Harrisburg, 119 US 199, 30 L Ed 358, 7 S Ct 140 (1886), under which the availability of a cause of action for wrongful death at sea depended entirely on the existence of a statutory remedy.

The "anomaly" most relevant for present purposes was that "identical breaches of the duty to provide a seaworthy ship, resulting in death, produce[d] liability outside the three-mile limit—since a claim under the Death on the High Seas Act may be founded on unseaworthiness . . .—but not within the territorial waters of a State whose local statute exclude[d] unseaworthiness claims." 398 US, at 395, 26 L Ed 2d 339, 90 S Ct 1772. The Moragne Court found "much force" in the argument of the United States (appearing as amicus curiae) that this difference in treatment based on location of the injury could not be supported by any "rational policy," especially since the underlying duty to furnish a seaworthy vessel is a federal one. Id., at 395–396, 26 L Ed 2d 339, 90 S Ct 1772. Accordingly, because of this anomaly and others, the Court in Moragne declined to adhere any longer to "a rule unjustified in reason, which produces different results for breaches of duty in situations that cannot be differentiated in policy." Id., at 405, 26 L Ed 2d 339, 90 S Ct 1772.

The Court today establishes a rule that, like the pre-Moragne rule, "produces different results . . . in situations that cannot be differentiated in policy." When death arises from injuries occurring within a State's territorial waters, dependents will be able to recover for loss of society under the "humanitarian" rule of Gaudet. 414 US, at 588, 39 L Ed 2d 9, 94 S Ct 806. But once a vessel crosses the imaginary three-mile line, the seaman's dependents no longer have a remedy for an identical loss, occasioned by an identical breach of duty. Instead, they may recover only pecuniary losses, which are allowed them by the Death on the High Seas Act (DOHSA), 46 USC § 762 [46 USCS § 762].

[436 US 628]

The irony implicit in the Court's result is readily apparent. As in the pre-Moragne situation, the benefits available to a seaman's dependents will once again vary depending on whether the injury causing death occurs in state territorial waters or on the high seas. Now, however, more generous benefits will be available if the injury occurs in state waters. We have thus come full circle from Moragne, which was designed to eliminate reliance on an artificial three-mile line as the basis for disparate treatment of dependents of similarly situated seamen. There is undoubtedly a certain symmetry in the Court's return to the pre-Moragne anomalies, but it is a symmetry that is both patently unfair to a seaman's dependents and flatly inconsistent with the spirit of Moragne and Gaudet.

[477 US 207]

OFFSHORE LOGISTICS, INC., et al., Petitioners

v

BETH A. TALLENTIRE et al.

477 US 207, 91 L Ed 2d 174, 106 S Ct 2485

[No. 85-202]

Argued February 24, 1986. Decided June 23, 1986.

[477 US 209]

Justice **O'Connor** delivered the opinion of the Court.

[1a, 2a, 3a] Respondents' husbands were killed when petitioner Air Logistic's helicopter, in which the decedents were traveling, crashed into the high seas. The issue presented is whether the Death on the High Seas Act (DOHSA), 41 Stat 537, 46 USC § 761 et seq. [46 USCS §§ 761 et seq.], provides the exclusive remedy by which respondents may recover against petitioner for the wrongful death of their husbands, or whether they may also recover the measure of damages provided by the Louisiana wrongful death statute, La Civ Code Ann, Art 2315 (West Supp 1986), applying either of its own force or as surrogate federal law under the Outer Continental Shelf Lands Act (OCSLA), 67 Stat 462, as amended, 43 USC § 1331 et seq. [43 USCS §§ 1331 et seq.].

I

The husbands of respondents Corrine Taylor and Beth Tallentire worked on drilling platforms in the Gulf of Mexico, off the coast of Louisiana. On August 6, 1980, respondents' husbands were killed while being transported in a helicopter owned and operated by petitioner Air Logistics, (hereafter petitioner), a Division of Offshore Logistics, Inc., from a drilling platform to Houma, Louisiana. The crash occurred approximately 35 miles off the coast of Louisiana, well over the 3-mile limit that separates Louisiana's territorial waters from the high seas for purposes of DOHSA.

Respondents each filed wrongful death suits in United States District Court, raising claims under DOHSA, OCSLA, and the law of Louisiana. These actions were later consolidated in the Eastern District of Louisiana. Upon petitioner's pretrial motion for partial summary judgment, the District Court ruled that DOHSA provides the exclusive remedy for death on the high seas, and it therefore dismissed respondents' claims based upon the Louisiana wrongful death statute. Petitioner admitted liability and the trial was limited to the question of damages. Because DOHSA limits recovery to "fair and just compensation for . . . pecuniary loss,"

[477 US 210]

the District Court's awards to respondents did not include damages for nonpecuniary losses. 46 USC § 762 [46 USCS § 762].

Respondents appealed the District Court's dismissal of their OCSLA and state law wrongful death claims, contending that they were entitled to nonpecuniary damages under the Louisiana wrongful death statute. See La Civ Code Ann, Art 2315(B) (West Supp 1986) (permitting recovery for both pecuniary and nonpecuniary damages, "includ[ing] loss of consortium, service, and society"). They argued that the Louisiana statute applied to this helicopter crash on the high seas, either of its own force by virtue of the saving provision in § 7 of DOHSA, 46 USC § 767 [46 USCS § 767], or as adopted federal law through OCSLA. See 43 USC § 1333(a)(2)(A) [43 USCS

§ 1333(a)(2)(A)]. The Court of Appeals for the Fifth Circuit reversed the District Court's denial of benefits recoverable under Louisiana law, with one judge specially concurring and another judge dissenting. See 754 F2d 1274 (1985).

The Court of Appeals first observed that even if OCSLA did apply to this action, OCSLA adopts state law as surrogate federal law only "[t]o the extent [the state laws] are . . . not inconsistent with . . . other Federal laws." 43 USC § 1333(a)(2)(A) [43 USCS § 1333(a)(2)(A)]. Because the precedent of the Fifth Circuit held that DOHSA applies to a helicopter crash on the high seas, the court concluded that Louisiana law could not be applied through OCSLA as the Louisiana wrongful death scheme was inconsistent with DOHSA. Accordingly, the court turned to the question whether state law could apply of its own force by virtue of § 7 of DOHSA, which provides:

"The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone." 46 USC § 767 [46 USCS § 767].

After examining the legislative history of § 7, the Court of Appeals concluded that that section was intended to preserve

[477 US 211]

the applicability of state wrongful death statutes on the high seas. It further held that Louisiana had legislative jurisdiction to extend its wrongful death statute to remedy deaths on the high seas and that Louisiana in fact intended its statute to have that effect. In reaching its result, the court acknowledged that the disunity that its decision would create was "profoundly unsettling," 754 F2d, at 1284, but ultimately concluded that "[o]ur desire for a uniform, consistent, scheme of maritime death remedies cannot justify a refusal to follow" the perceived legislative will. Id., at 1288.

Judge Jolly filed a special concurrence, observing that although the court's result was compelled by § 7, it would create "significant problems in the field of maritime law because it defies reason, runs contrary to principles of the general precedent in the field, and creates all sorts of internal inconsistencies in the prosecution of cases dealing with death on the high seas." Id., at 1289. Judge Garza dissented, arguing that § 7 was intended to preserve state wrongful death actions only in territorial waters and echoing the view of the Court of Appeals for the Ninth Circuit that the application of state law to wrongful death actions arising on the high seas would be "'as damaging to uniformity in wrongful death actions as it is illogical'" Ibid. (quoting Nygaard v Peter Pan Seafoods, Inc. 701 F2d 77, 80 (CA9 1983)).

[1b, 2b, 3b] Because the Fifth Circuit's decision creates the potential for disunity in the administration of wrongful death remedies for causes of action arising from accidents on the high seas and is in conflict with the prevailing view in other courts that DOHSA pre-empts state law wrongful death statutes in the area of its operation, we granted certiorari. 474 US 816, 88 L Ed 2d 48, 106 S Ct 60 (1985). We now hold that neither OCSLA nor DOHSA requires or permits the application of Louisiana law in this case, and accordingly reverse the judgment of the Court of Appeals for the Fifth Circuit.

[477 US 212]

II

In 1920, Congress enacted DOHSA, in which it finally repudiated the rule of The Harrisburg for maritime deaths occurring beyond state territorial waters by providing for a federal maritime remedy for wrongful deaths more than
[477 US 215]
three miles from shore.[1] DOHSA limits the class of beneficiaries to the decedent's "wife, husband, parent, child, or dependent relative," 46 USC § 761 [46 USCS § 761], establishes a 3-year statute of limitations period, § 763a, allows a suit filed by the victim to continue as a wrongful death action if the victim dies of his injuries while suit is pending, § 765, provides that contributory negligence will not bar recovery, § 766, and declares that "recovery . . . shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought. . . ." § 762.

As this Court explained in Mobil Oil Corp. v Higginbotham, 436 US 618, 621-622, 56 L Ed 2d 581, 98 S Ct 2010 (1978):

> "In the half century between 1920 and 1970, deaths on the high seas gave rise to federal suits under DOHSA, while those in territorial waters were largely governed by state wrongful-death statutes, [the primary exception being survivor's suits for wrongful death under the Jones Act, which gives a remedy no matter where the wrong takes place.] DOHSA brought a measure of uniformity and predictability to the law on the high seas, but in territorial waters, where The Harrisburg made state law the only source of a wrongful-death remedy, the continuing impact of that decision produced uncertainty and incongruity. The reasoning of The Harrisburg, which was dubious at best in 1886, became less and less satisfactory as the years passed.
>
> "In 1970, therefore, the Court overruled The Harrisburg. In Moragne v States Marine Lines, Inc. 398
> [477 US 216]
> US 375 [26 L Ed 2d 339, 90 S Ct 1772], the Court held that a federal remedy for wrongful death does exist under general maritime law. The case concerned a death in Florida's territorial waters. The defendant argued that Congress, by limiting DOHSA to the high seas, had evidenced an intent to preclude federal judicial remedies in territorial waters. The Court concluded, however, that the reason Congress confined DOHSA to the high seas was to prevent the Act from abrogating, by its own force, the state remedies then available in state waters. Id., at 400 [26 L Ed 2d 339, 90 S Ct 1772]." (Footnotes omitted.)

Subsequently, the Court confronted some of the various subsidiary questions concerning the Moragne federal death remedy in Sea-Land Services, Inc. v Gaudet, 414 US 573, 39 L Ed 2d 9, 94 S Ct 806 (1974), in which it was held that awards in a Moragne-based suit

1. [4b] DOHSA does not include a survival provision authorizing recovery for pain and suffering before death. We do not address the issue whether the DOHSA recovery for the beneficiaries' pecuniary loss may be "supplemented" by a recovery for the decedent's pain and suffering before death under the survival provision of some conceivably applicable state statute that is intended to apply on the high seas. See generally Barbe v Drummond, 507 F2d 794, 797-798 (CA1 1974); Dugas v National Aircraft Corp. 438 F2d 1386 (CA3 1971).

could include compensation for loss of support and services, for funeral expenses, and for loss of society, but not for mental anguish. Finally, in Higginbotham, the Court ruled that the nonpecuniary loss standard provided by DOHSA controlled on the high seas, and could not be supplemented by the measure of damages recognized in Gaudet for Moragne causes of action. In so doing, the Court concluded:

"We realize that, because Congress has never enacted a comprehensive maritime code, admiralty courts have often been called upon to supplement maritime statutes. The Death on the High Seas Act, however, 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." 436 US, at 625, 56 L Ed 2d 581, 98 S Ct 2010.

With this background, we now proceed to the question at hand: whether the DOHSA measure of recovery may be supplemented

[477 US 217]

by the remedies provided by state law, through either OCSLA or § 7 of DOHSA.

III

[1c, 5] As explained above, DOHSA is intended to provide a maritime remedy for deaths stemming from wrongful acts or omissions "occurring on the high seas." 46 USC § 761 [46 USCS § 761]. OCSLA, by contrast, provides an essentially nonmaritime remedy and controls only on "the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures" erected thereon. 43 USC § 1333(a)(2)(A) [43 USCS § 1333(a)(2)(A)]. By its terms, OCSLA must be "construed in such a manner that the character of the waters above the outer Continental Shelf as high seas . . . shall not be affected." § 1332(2). Within the area covered by OCSLA, federal law controls but the law of the adjacent State is adopted as surrogate federal law to the extent that it is not inconsistent with applicable federal laws or regulations. § 1333(a)(2)(A).

The intent behind OCSLA was to treat the artificial structures covered by the Act as upland islands or as federal enclaves within a landlocked State, and not as vessels, for purposes of defining the applicable law because maritime law was deemed inapposite to these fixed structures. See Rodrigue v Aetna Casualty & Surety Co. 395 US 352, 361-366, 23 L Ed 2d 360, 89 S Ct 1835 (1969). This Court endorsed the congressional assumption that admiralty law generally would not apply to the lands and structures covered by OCSLA in Rodrigue, noting that accidents on the artificial islands covered by OCSLA "had no more connection with the ordinary stuff of admiralty than do accidents on piers." Id., at 360, 23 L Ed 2d 360, 89 S Ct 1835. See also Herb's Welding, Inc. v Gray, 470 US 414, 422, 84 L Ed 2d 406, 105 S Ct 1421 (1985). Thus, in Rodrigue, the Court held that an admiralty action under DOHSA does not apply to accidents "actually occurring" on these artificial islands, and that DOHSA therefore does not preclude the application of state law as adopted federal law through OCSLA to wrongful death actions arising from accidents

[477 US 218]

on offshore platforms. Rodrigue v Aetna Casualty Co., supra, at 366, 23 L Ed 2d 360, 89 S Ct 1835.

Respondents argue that because the decedents were platform workers being transported from work to the mainland, OCSLA, not DOHSA, governs their cause of action. They contend that in Rodrigue and Gulf Offshore Co. v Mobil Oil Corp. 453 US 473, 69 L Ed 2d 784, 101 S Ct 2870 (1981), the Court recognized the applicability of state law through OCSLA to accidents that resulted in deaths or injuries not on platforms, but on boats in the waters immediately adjacent to the platforms. This, they state, evidences the Court's assumption that OCSLA applies to traditionally maritime locales on the high seas, beyond the confines of the platform, when the decedent is a platform worker. In support of their apparent assumption that it is the decedent's status as a platform worker that controls, they note that it was the "special relationship between the men working on these artificial islands and the adjacent shore to which they commute to visit their families" that moved Congress to treat drilling platforms as upland federal enclaves rather than vessels. Rodrigue v Aetna Casualty Co. 395 US, at 365, 23 L Ed 2d 360, 89 S Ct 1835.

[1d, 6] We cannot accept respondents' attempt to rewrite OCSLA. The extension of OCSLA far beyond its intended locale to the accident in this case simply cannot be reconciled with either the narrowly circumscribed area defined by the statute or the statutory prescription that the Act not be construed to affect the high seas which cover the Continental Shelf. Nor can the extension of OCSLA to this case be reconciled with the operative assumption underlying the statute: that admiralty jurisdiction generally should not be extended to accidents in areas covered by OCSLA. See, e.g., id., at 361, 23 L Ed 2d 360, 89 S Ct 1835. Here, admiralty jurisdiction is expressly provided under DOHSA because the accidental deaths occurred beyond a marine league from shore. See 46 USC § 761 [46 USCS § 761]. Even without this statutory provision, admiralty jurisdiction is appropriately invoked here under traditional principles because

[477 US 219]

the accident occurred on the high seas and in furtherance of an activity bearing a significant relationship to a traditional maritime activity. See Executive Jet Aviation, Inc. v City of Cleveland, 409 US 249, 34 L Ed 2d 454, 93 S Ct 493 (1972). Although the decedents were killed while riding in a helicopter and not a more traditional maritime conveyance, that helicopter was engaged in a function traditionally performed by waterborne vessels: the ferrying of passengers from an "island," albeit an artificial one, to the shore. Id., at 271, and n 20, 34 L Ed 2d 454, 93 S Ct 493.

In the circumstances presented, then, the conclusion is inescapable that the remedies afforded by DOHSA, not OCSLA, govern this action. Thus, respondents may secure the nonpecuniary damages made available by Louisiana's wrongful death statute only if it is found that DOHSA preserves, or does not pre-empt, state remedies on the high seas.

IV

[2c] Respondents argue that the first sentence of § 7 of DOHSA was intended to ensure the applicability of state wrongful death statutes to deaths on the high seas. We conclude that that provision will not bear respondents' reading when evaluated

[477 US 221]

in light of the language of the Act as a whole, the legislative history of § 7, the congressional purposes underlying the Act, and the importance of uniformity of admiralty law. See Mastro Plastics Corp. v NLRB, 350 US 270, 285, 100 L Ed 309, 76 S Ct 349 (1956) ("'In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy'") (quoting United States v Heirs of Boisdore, 8 How 113, 122, 12 L Ed 1009 (1849)). These references persuade us that the first sentence of § 7 was intended only to serve as a jurisdictional saving clause, ensuring that state courts enjoyed the right to entertain causes of action and provide wrongful death remedies both for accidents arising on territorial waters and, under DOHSA, for accidents occurring more than one marine league from shore.

The first sentence of § 7 of DOHSA, as originally drafted, provided that "the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this act as to causes of action accruing within the territorial limits of any State." See 59 Cong Rec 4482 (1920). During the House debate, Representative Mann proposed an amendment deleting the words "as to causes of action accruing within the territorial limits of any state." Although at first blush the language of the amended § 7 seems to support respondents' position, a closer comparison of the language of § 7, both before and after its amendment, with the language of § 4 of the Act belies respondents' facial argument.

[9] The only other amendment made to the bill as originally submitted was the addition of § 4, which provides:

"Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is

[477 US 222]

authorized, any statute of the United States to the contrary notwithstanding." 46 USC § 764 [46 USCS § 764].

Section 4 indicates that when Congress wanted to preserve the right to recover under the law of another sovereign for whatever measure of damages that law might provide, regardless of any inconsistency with the measure of damages provided by DOHSA, it did so expressly. We are reluctant to read the much more ambiguous language of § 7, which states only that state law "remedies" or "rights of action" would not be "affected" and which makes no provision for reconciling potentially conflicting state and federal measures of recovery, to have the same substantive effect as the explicit command of § 4. Normal principles of statutory construction require that we give effect to the subtleties of language that Congress chose to employ, particularly where, as here, Congress isolated only these sections for special consideration by way of amendment while it was considering DOHSA.

Thus, a natural reading of § 7 is that a state statute providing a wrongful death right of action traditionally unavailable at common law, would not be "affected" by DOHSA in the sense of being rendered an incompetent means of invoking state jurisdiction, but the state statute's substantive provisions would not, by virtue of the saving provision, "extend as a conduct-governing enactment on the high seas" if in conflict with DOHSA's provisions. Safir v Compagnie Generale Transatlantique, 241 F Supp 501, 508 (EDNY 1965) (interpreting § 7). The legislative history of § 7, as originally proposed and as amended, supports this construction of the section's language.

We conclude that Representative Mann's amendment extended the jurisdictional saving clause to the high seas but in doing so, it did not implicitly sanction the operation of state wrongful death statutes on the high seas in the same manner as the saving clause did in territorial waters. Under the prevailing "uniformity" doctrine expressed most forcefully in Southern Pacific Co. v Jensen, 244 US, at 215-216, 61 L Ed 1086, 37 S Ct 524, to the extent Congress provided a federal remedy for wrongful death on the high seas, the federal substantive law would clearly have pre-empted conflicting state wrongful death statutes, as was recognized by various Members during the debates on DOHSA.

Although Representative Mann's discussion may reflect a broader intent, we believe his references to state court jurisdiction should be read to mean only the ability of state courts to entertain maritime actions based on DOHSA, not the legislative ability to supply a different standard of recovery. As has been explained, even at the time that DOHSA was being considered it was understood that where Congress had spoken, or where general federal maritime law controlled, the States exercising concurrent jurisdiction over maritime matters could not apply conflicting state substantive law.

[2d, 11] In sum, the language of § 7 and its legislative history, as well as the congressional purposes underlying DOHSA, mandate

[477 US 232]

that § 7 be read not as an endorsement of the application of state wrongful death statutes to the high seas, but rather as a jurisdictional saving clause. Viewed in this light, § 7 serves not to destroy the uniformity of wrongful death remedies on the high seas but to facilitate the effective and just administration of those remedies. The recognition of concurrent state jurisdiction to hear DOHSA actions makes available to DOHSA beneficiaries a convenient forum for the decision of their wrongful death claims.

[3c] Once it is determined that § 7 acts as a jurisdictional saving clause, and not as a guarantee of the applicability of state substantive law to wrongful deaths on the high seas, the conclusion that the state statutes are pre-empted by DOHSA where it applies is inevitable. As we held in Higginbotham, Congress has "struck the balance for us" in determining that survivors should be restricted to the recovery of their pecuniary losses, and when DOHSA "does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." 436 US, at 625, 56 L Ed 2d 581, 98 S Ct 2010.

[477 US 233]

[3d] Admittedly, in the circumstances of this case, the recognition of a state damages remedy for loss of society would bring respondents' DOHSA recovery into line with the damages available to a beneficiary of a federal Moragne maritime cause of action arising from a death on territorial waters. See Sea-Land Services, Inc. v Gaudet, 414 US 573, 39 L Ed 2d 9, 94 S Ct 806 (1974) (holding that awards under the general federal maritime cause of action for wrong-

ful death could include compensation for loss of society). However, the questionable practical significance of this difference in recovery, see Mobil Oil Corp. v Higginbotham, supra, at 624, and n 20, 56 L Ed 2d 581, 98 S Ct 2010, is far overshadowed by the potential for serious conflicts between DOHSA and state substantive law in such areas as limitations periods, classes of beneficiaries, and the definition of potential defenses. We defer to Congress' purpose in making a uniform provision for recovery for wrongful deaths on the high seas, an area where the federal interests are primary.

The judgment of the Court of Appeals for the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice Powell, with whom Justice Brennan, Justice Marshall, and Justice Stevens join, concurring in part, and dissenting in part.

The Court today holds that § 7 of the Death on the High Seas Act (DOHSA), 41 Stat 538, 46 USC § 767 [46 USCS § 767], forecloses application of state remedies for wrongful deaths on the high seas. Thus, the Court confines state courts to the adjudication of causes of action brought under DOHSA. Because I believe that the Court's reading of § 7 is at odds with the language of the statute and its legislative history, I dissent.[1]

1. I agree with the Court's conclusion that the Outer Continental Shelf Lands Act, 67 Stat 462, as amended, 43 USC § 1331 et seq. [43 USCS §§ 1331 et seq.], does not govern this action, and therefore join Part III of the Court's opinion.

[477 US 234]

I

As the Court correctly observes: "§ 7, as originally proposed, ensured that [DOHSA] saved to survivors of those killed on territorial waters the ability to pursue a state wrongful death remedy in state court." Ante, at 225, 91 L Ed 2d, at 191.

Had the bill passed in that form, the resolution of this case would be clear—the federal statute would preclude application of state law for respondents' cause of action. During the floor debate in the House of Representatives, however, Representative Mann from Illinois successfully offered an amendment striking from § 7 the concluding phrase, "as to causes of action accruing within the territorial limits of any State." Thus, although the original § 7 preserved state-law rights of action within territorial waters, the ultimately enacted § 7 preserved these rights of action without geographic qualification. Although § 7 is plainly intended to save state remedies for death on the high seas, the Court today ignores the section's language and holds that it is a jurisdictional saving clause.

II

The starting point in statutory construction is, of course, the language of the statute itself. Blue Chip Stamps v Manor Drug Stores, 421 US 723, 756, 44 L Ed 2d 539, 95 S Ct 1917 (1975) (Powell, J., concurring). See Consumer Product Safety Comm'n v GTE Sylvania, Inc. 447 US 102, 64 L Ed 2d 766, 100 S Ct

2051 (1980). The language of § 7, given scant attention by the Court, reads as codified:

"§ 767. Exceptions from operation of chapter

"The provisions of any State statute *giving or regulating rights of action or remedies for death* shall not be affected

[477 US 237]

by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone." 46 USC § 767 [46 USCS § 767] (emphasis added).

The terms of the provision are clear. The provision preserves state rights of action and state remedies for wrongful death without any territorial qualification. It encompasses not only jurisdiction, but also "rights of action" and "remedies." The geographic reach of these traditional rights of action is therefore undiminished by DOHSA.

The congressional debate and other legislative history cast no doubt on the plain meaning of § 7. It is true, as the Court states, that the debate on the Mann Amendment was "exceedingly confused and often ill-informed." In this circumstance, an attempt to discern the congressional intent from the conflicting statements by participants in the debate is hopeless. It is also unnecessary in light of the clear language of the statute. Absent a clearly-expressed legislative intention to the contrary, the plain words of the statute must ordinarily be regarded as controlling." 754 F2d 1274, 1280-1282 (1985).

[477 US 238]

Despite the confusion of the debate, it *is* clear that the Mann Amendment removed the clause that expressly limited state remedies "to causes of action accruing within the territorial limits of any State." Accordingly, § 7, once confined to territorial waters, on its face extends to the high seas as well. Today's holding, by barring state rights of action for deaths occurring on the high seas, limits § 7 in a manner that Congress expressly rejected.

III

The Court concedes that the original version of § 7 preserved both state-law remedies for wrongful death occurring within territorial waters and state jurisdiction over those remedies. Ante, at 224, 225, 91 L Ed 2d, at 191 ("§ 7, as originally proposed, ensured that the Act saved to survivors of those killed on territorial waters the ability to pursue a state wrongful death remedy in state court"). The Court then asserts, however, that the Mann Amendment "extended the jurisdictional saving clause to the high seas but in doing so, it did not implicitly sanction the operation of state wrongful death statutes on the high seas in the same manner as the saving clause did in territorial waters." Ante, at 227, 91 L Ed 2d, at 192.

It is not easy to understand how § 7 was transformed from a provision that preserved both state jurisdiction and state rights of action in territorial waters, into a mere "jurisdictional saving clause" with no power to preserve state rights of action on the high seas. The Mann Amendment did nothing more than remove a territorial restriction; all other clauses of § 7 remained intact.

IV

The Court argues that preserving state rights of action for death on the high seas, in accordance with the plain language of § 7, would undermine a uniform federal remedy and conflict with the exclusive, federal character of most aspects of admiralty law. I agree that such a result undercuts a federal uniformity that seems desirable here, but it is not the role of this Court to reconsider the wisdom of a policy choice that Congress has already made. Congress enacted the Mann Amendment to remove the territorial restriction from § 7's preservation of state-law rights of action for wrongful death.

[477 US 241]

The Court now holds that those rights of action may not be enforced on the high seas, and thereby imposes an *exclusive* federal remedy that Congress declined to enact. We should respect the outcome of the legislative process and preserve State rights of action for wrongful death on the high seas until Congress legislates otherwise. Accordingly, I dissent.

[498 US 19]

MERCEDEL W. MILES, individually and as administratrix of the succession of LUDWICK ADAM TORREGANO, Petitioner

v

APEX MARINE CORPORATION et al.

498 US 19, 112 L Ed 2d 275, 111 S Ct 317

[No. 89-1158]

Argued October 3, 1990. Decided November 6, 1990.

OPINION OF THE COURT

[498 US 21]

Justice O'Connor delivered the opinion of the Court.

[1a, 2a] We decide whether the parent of a seaman who died from injuries incurred aboard respondents' vessel may recover under general maritime law for loss of society, and whether a claim for the seaman's lost future earnings survives his death.

I

Ludwick Torregano was a seaman aboard the vessel M/V Archon. On the evening of July 18, 1984, Clifford Melrose, a fellow crew member, stabbed Torregano repeatedly, killing him. At the time, the ship was docked in the harbor of Vancouver, Washington.

Mercedel Miles, Torregano's mother and administratrix of his estate, sued Apex Marine Corporation and Westchester Marine Shipping Company, the vessel's operators, Archon Marine Company, the charterer, and Aeron Marine Company, the Archon's owner (collectively Apex), in United States District Court for the Eastern District of Louisiana. Miles alleged negligence under the Jones Act, 41 Stat 1007, as amended, 46 USC App § 688 [46 USCS Appx § 688], for failure to prevent the assault on her son, and breach of the warranty of seaworthiness under general maritime law for hiring a crew member unfit to serve. She sought compensation for loss of support

[498 US 22]

and services and loss of society resulting from the death of her son, punitive damages, and compensation to the estate for Torregano's pain and suffering prior to his death and for his lost future income.

At trial, the District Court granted Apex's motion to strike the claim for punitive damages, ruled that the estate could not recover Torregano's lost future income, and denied Miles' motion for a directed verdict as to negligence and unseaworthiness. The court instructed the jury that Miles could not recover damages for loss of society if they found that she was not financially dependent on her son.

The jury found that Apex was negligent and that Torregano was 7% contributorily negligent in causing his death, but that the ship was seaworthy. After discounting for Torregano's contributory negligence, the jury awarded Miles $7,254 for the loss of support and services of her son and awarded the estate $130,200 for Torregano's pain and suffering. The jury also found that Miles was not financially dependent on her son and therefore not entitled to damages for loss of society. The District Court denied both parties' motions for judgment notwithstanding the verdict and entered judgment accordingly.

The United States Court of Appeals for the Fifth Circuit affirmed in part, reversed in part, and remanded. 882 F2d 976 (1989). The court affirmed the judgment of negligence on the part of Apex, but held that there was insufficient evidence to support the contributory negligence finding. Id., at 983-985. Miles was therefore entitled to the full measure of $7,800 for loss of support and services, and the estate was entitled to $140,000 for Torregano's pain and suffering. The court also found that Melrose's extraordinarily violent disposition demonstrated that he was unfit and therefore that the Archon was unseaworthy as a matter of law. Id., at 983. Because this ruling revived Miles' general maritime claim, the court considered two questions concerning the scope of damages under general maritime law. The court reaffirmed

[498 US 23]

its prior decision in Sistrunk v Circle Bar Drilling Co., 770 F2d 455 (CA5 1985), holding that a nondependent parent may not recover for loss of society in a general maritime wrongful death action. 882 F2d, at 989. It also held that general maritime law does not permit a survival action for decedent's lost future earnings. Id., at 987.

We granted Miles' petition for certiorari on these two issues, 494 US 1003, 108 L Ed 2d 472, 110 S Ct 1295 (1990), and now affirm the judgment of the Court of Appeals.

II

We rely primarily on Moragne v States Marine Lines, Inc., 398 US 375, 26 L Ed 2d 339, 90 S Ct 1772 (1970).

Apex contends that Moragne's holding, creating a general maritime wrongful death action, does not apply in this case because Moragne was a longshoreman, whereas Torregano was a true seaman. Apex is correct that Moragne does not apply on its facts, but we decline to limit Moragne to its facts.

Historically, a shipowner's duty of seaworthiness under general maritime law ran to seamen in the ship's employ.

[498 US 28]

See Sieracki, 328 US, at 90, 90 L Ed 1099, 66 S Ct 872. In Sieracki, we extended that duty to stevedores working aboard ship but employed by an independent contractor. Id., at 95, 90 L Ed 1099, 66 S Ct 872. As this was Moragne's situation, Moragne's widow was able to bring an action for unseaworthiness under general maritime law. In a narrow sense, Moragne extends only to suits upon the death of longshoremen like Moragne, so-called Sieracki seamen. Torregano was a true seaman, employed aboard the Archon. Were we to limit Moragne to its facts, Miles would have no general maritime wrongful death action. Indeed, were we to limit Moragne to its facts, that case would no longer have any applicability at all. In 1972, Congress amended the Longshore and Harbor Workers' Compensation Act (LHWCA), 86 Stat 1251, as amended, 33 USC §§ 901-950 [33 USCS §§ 901-950], to bar any recovery from shipowners for the death or injury of a longshoreman or harbor worker resulting from breach of the duty of seaworthiness. See 33 USC § 905(b) [33 USCS § 905(b)]; American Export Lines, Inc. v Alvez, 446 US 274, 282, n 9, 64 L Ed 2d 284, 100 S Ct 1673 (1980). If Moragne's widow brought her action today, it would be foreclosed by statute.

Apex asks us not to extend Moragne to suits for the death of true seamen. This limitation is warranted, they say, because true seamen, unlike longshoremen, are covered under the Jones Act. The Jones Act provides a cause of action against the seaman's employer for wrongful death resulting from negligence that Apex contends is preclusive of any recovery for death from unseaworthiness. See 46 USC App § 688 [46 USCS Appx § 688].

Moragne addressed the question explicitly. The Court explained there that the preclusive effect of the Jones Act established in Lindgren and Gillespie extends only to state remedies and not to a general maritime wrongful death action. See Moragne, 398 US, at 396, n 12, 26 L Ed 2d 339, 90 S Ct 1772.

The Jones Act provides an action in negligence for the death or injury of a seaman. It thereby overruled The Osceola, 189 US 158, 47 L Ed 760, 23 S Ct 483 (1903), which established that seamen could recover under general maritime law for injuries resulting from unseaworthiness, but not negligence. The Jones Act evinces no general hostility to recovery under maritime law. It does not disturb seamen's general maritime claims for injuries resulting from unseaworthiness, Pacific S.S. Co. v Peterson, 278 US 130, 139, 73 L Ed 220, 49 S Ct 75 (1928), and it does not preclude the recovery for wrongful death due to unseaworthiness created by its companion statute, DOHSA. Kernan v American Dredging Co. 355 US 426, 430, n 4, 2 L Ed 2d 382, 78 S Ct 394 (1958). Rather, the Jones Act establishes a uniform system of seamen's tort law parallel to that available to employees of interstate railway carriers under FELA. As the Court concluded in Moragne, the extension of the DOHSA wrongful death action to territorial waters furthers rather than hinders uniformity

[498 US 30]

in the exercise of admiralty jurisdiction. Moragne, supra, at 396, n 12, 26 L Ed 2d 339, 90 S Ct 1772.

There is also little question that Moragne intended to create a general maritime wrongful death action applicable beyond the situation of longshoremen. For one thing, Moragne explicitly overruled The Harrisburg. Moragne, supra, at 409, 26 L Ed 2d 339, 90 S Ct 1772. The Harrisburg involved a true seaman. The Harrisburg, 119 US, at 200, 30 L Ed 358, 7 S Ct 140. In addition, all three of the "anomalies" to which the Moragne cause of action was directed involved seamen. The "strangest" anomaly—that recovery was available for the wrongful death in territorial waters of a longshoreman, but not a true seaman—could only be remedied if the Moragne wrongful death action extended to seamen. It would be strange indeed were we to read Moragne as not addressing a problem that in large part motivated its result. If there has been any doubt about the matter, we today make explicit that there is a general maritime cause of action for the wrongful death of a seaman, adopting the reasoning of the unanimous and carefully crafted opinion in Moragne.

IV

[1b] Moragne did not set forth the scope of the damages recoverable under the maritime wrongful death action. The Court first considered that question in Sea-Land Services, Inc. v Gaudet, 414 US 573, 39 L Ed 2d 9, 94 S Ct 806 (1974). Respondent brought a general maritime action to recover for the wrongful death of her husband, a longshoreman. The Court held that a dependent plaintiff

in a maritime wrongful death action could recover for the pecuniary losses of support, services, and funeral expenses, as well as for the nonpecuniary loss of society suffered as the result of the death. Id., at 591, 39 L Ed 2d 9, 94 S Ct 806. Gaudet involved the death of a longshoreman in territorial waters.[1]

[498 US 31]

Consequently, the Court had no need to consider the preclusive effect of DOHSA for deaths on the high seas or the Jones Act for deaths of true seamen.

We considered DOHSA in Mobil Oil Corp. v Higginbotham, 436 US 618, 56 L Ed 2d 581, 98 S Ct 2010 (1978). That case involved death on the high seas and, like Gaudet, presented the question of loss of society damages in a maritime wrongful death action. The Court began by recognizing that Gaudet, although broadly written, applied only in territorial waters and therefore did not decide the precise question presented. 436 US, at 622-623, 56 L Ed 2d 581, 98 S Ct 2010. Congress made the decision for us. DOHSA, by its terms, limits recoverable damages in wrongful death suits to "*pecuniary* loss sustained by the persons for whose benefit the suit is brought." 46 USC App § 762 [46 USCS Appx § 762] (emphasis added). This explicit limitation forecloses recovery for nonpecuniary loss, such as loss of society, in a general maritime action.

[9] Respondents argued that admiralty courts have traditionally undertaken to supplement maritime statutes. The Court's answer in Higginbotham is fully consistent with those principles we have here derived from Moragne: Congress has spoken directly to the question of recoverable damages on the high seas, and "when it does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." Higginbotham, supra, at 625, 56 L Ed 2d 581, 98 S Ct 2010. Moragne involved gap filling in an area left open by statute; supplementation was entirely appropriate. But in an "area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries." Higginbotham, supra, at 625, 56 L Ed 2d 581, 98 S Ct 2010.

[1c] The logic of Higginbotham controls our decision here. The holding of Gaudet applies only in territorial waters, and it applies only to longshoremen. Gaudet did not consider the

[498 US 32]

preclusive effect of the Jones Act for deaths of true seamen. We do so now.

Unlike DOHSA, the Jones Act does not explicitly limit damages to any particular form. Enacted in 1920, the Jones Act makes applicable to seamen the substantive recovery provisions of the older FELA. See 46 USC App § 688 [46 USCS Appx § 688]. FELA recites only that employers shall be liable in "damages" for the injury or death of one protected under the Act. 45 USC § 51 [45 USCS § 51]. In Michigan Central R. Co. v Vreeland, 227 US 59, 57 L Ed 417, 33 S Ct 192 (1913), however, the Court explained that the language of the FELA wrongful death provision is essentially identi-

1. As with Moragne, the 1972 amendments to LHWCA have rendered Gaudet inapplicable on its facts. See supra, at 28, 112 L Ed 2d, at 288; 33 USC § 905(b) [33 USCS § 905(b)]. Suit in Gaudet was filed before 1972. Gaudet v Sea-Land Services, Inc., 463 F2d 1331, 1332 (CA5 1972).

cal to that of Lord Campbell's Act, 9 & 10 Vict ch 93 (1846), the first wrongful death statute. Lord Campbell's Act also did not limit explicitly the "damages" to be recovered, but that Act and the many state statutes that followed it consistently had been interpreted as providing recovery only for pecuniary loss. Vreeland, 227 US, at 69-71, 57 L Ed 417, 33 S Ct 192. The Court so construed FELA. Ibid.

[1d, 10] When Congress passed the Jones Act, the Vreeland gloss on FELA, and the hoary tradition behind it, were well established. Incorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well. We assume that Congress is aware of existing law when it passes legislation. See Cannon v University of Chicago, 441 US 677, 696-697, 60 L Ed 2d 560, 99 S Ct 1946 (1979). There is no recovery for loss of society in a Jones Act wrongful death action.

[1e] The Jones Act also precludes recovery for loss of society in this case. The Jones Act applies when a seaman has been killed as a result of negligence, and it limits recovery to pecuniary loss. The general maritime claim here alleged that Torregano had been killed as a result of the unseaworthiness of the vessel. It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of

[498 US 33]

death resulting from negligence. We must conclude that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman.

Our decision also remedies an anomaly we created in Higginbotham. Respondents in that case warned that the elimination of loss of society damages for wrongful deaths on the high seas would create an unwarranted inconsistency between deaths in territorial waters, where loss of society was available under Gaudet, and deaths on the high seas. We recognized the value of uniformity, but concluded that a concern for consistency could not override the statute. Higginbotham, supra, at 624, 56 L Ed 2d 581, 98 S Ct 2010. Today we restore a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law.

V

[2b, 11a] We next must decide whether, in a general maritime action surviving the death of a seaman, the estate can recover decedent's lost future earnings. Under traditional maritime law, as under common law, there is no right of survival; a seaman's personal cause of action does not survive the seaman's death. Cortes v Baltimore Insular Line, Inc. 287 US 367, 371, 77 L Ed 368, 53 S Ct 173 (1932); Romero v International Terminal Operating Co. 358 US 354, 373, 3 L Ed 2d 368, 79 S Ct 468 (1959); Gillespie, 379 US, at 157, 13 L Ed 2d 199, 85 S Ct 308.

[11b] Congress and the States have changed the rule in many instances. The Jones Act, through its incorporation of FELA, provides that a seaman's right of action for injuries due to negligence survives to the seaman's personal representative. See 45 USC § 59 [45 USCS § 59]; Gillespie, supra, at 157, 13 L Ed 2d 199, 85 S Ct 308. Most States have survival statutes applicable to tort actions generally, see 1 S. Speiser, Recovery for Wrongful Death 2d § 3.2 (1975 and Supp 1989), 2 id., §§ 14.1, 14.3, App, and admiralty courts have applied these state statutes in many

instances to preserve suits for injury at sea. See, e.g., Just v Chambers, 312 US 383, 391, 85 L Ed 903, 61 S Ct 687 (1941). See also Kernan v American

[498 US 34]

Dredging Co. 355 US, at 430, n 4, 2 L Ed 2d 382, 78 S Ct 394; Kossick v United Fruit Co. 365 US 731, 739, 6 L Ed 2d 56, 81 S Ct 886 (1961); Gillespie, supra, at 157, 13 L Ed 2d 199, 85 S Ct 308; Comment, Application of State Survival Statutes in Maritime Causes, 60 Colum L Rev 534, 535, n 11 (1960); Nagy, The General Maritime Law Survival Action: What are the Elements of Recoverable Damages?, 9 U Haw L Rev 5, 27 (1987). Where these state statutes do not apply,[2] however, or where there is no state survival statute, there is no survival of unseaworthiness claims absent a change in the traditional maritime rule.

Several Courts of Appeals have relied on Moragne to hold that there is a general maritime right of survival. See Spiller v Thomas M. Lowe, Jr., & Assocs. Inc. 466 F2d 903, 909 (CA8 1972); Barbe v Drummond, 507 F2d 794, 799-800 (CA1 1974); Law v Sea Drilling Corp. 523 F2d 793, 795 (CA5 1975); Evich v Connelly, 759 F2d 1432, 1434 (CA9 1985). As we have noted, Moragne found that congressional and state abrogation of the maritime rule against wrongful death actions demonstrated a strong policy judgment, to which the Court deferred. Moragne, 398 US, at 388-393, 26 L Ed 2d 339, 90 S Ct 1772. Following this reasoning, the lower courts have looked to the Jones Act and the many state survival statutes and concluded that these enactments dictate a change in the general maritime rule against survival. See, e.g., Spiller, supra, at 909; Barbe, supra, at 799-800, and n 6.

Miles argues that we should follow the Courts of Appeals and recognize a general maritime survival right. Apex urges us to reaffirm the traditional maritime rule and overrule these decisions. We decline to address the issue, because its resolution is unnecessary to our decision on the narrow question presented: whether the income decedent would have earned but for his death is recoverable. We hold that it is not.

[498 US 35]

[12a] Recovery of lost future income in a survival suit will, in many instances, be duplicative of recovery by dependents for loss of support in a wrongful death action; the support dependents lose as a result of a seaman's death would have come from the seaman's future earnings. Perhaps for this reason, there is little legislative support for such recovery in survival. In only a few States can an estate recover in a survival action for income decedent would have received but for death.[3] At the federal level, DOHSA contains no survival provision. The Jones Act incorporates FELA's survival provision, but, as in most States, recovery is limited to losses suffered during the decedent's lifetime. See 45 USC § 59 [45 USCS § 59]; Van Beeck v Sabine Towing Co. 300 US 342, 347, 81 L Ed 685, 57 S Ct 452 (1937); St. Louis, I. M. & S. R. Co. v Craft, 237 US 648, 658, 59 L Ed 1160, 35 S Ct 704 (1915).

2. In Offshore Logistics, Inc. v Tallentire, 477 US 207, 215, n 1, 91 L Ed 2d 174, 106 S Ct 2485 (1986), we declined to approve or disapprove the practice of some courts of applying state survival statutes to cases involving death on the high seas.

3. See Mich Comp Laws §§ 600.2921, 600.2922 (1986); Olivier v Houghton County St. R. Co. 134 Mich 367, 368-370, 96 NW 434, 435 (1903); 42 Pa Cons Stat § 8302 (1988); Incollingo v Ewing, 444 Pa 263, 307-308, 282 A2d 206, 229 (1971); Wash Rev Code § 4.20.060 (1989); Balmer v Dilley, 81 Wash 2d 367, 370, 502 P2d 456, 458 (1972). See generally 2 S. Speiser, Recovery for Wrongful Death 2d, § 14.7, App A (1975 and Supp 1989). Speiser explains that many States do not allow any recovery of lost earnings in survival, and that among those that do, recovery is generally limited to earnings lost from the time of injury to the time of death. Ibid.

[2c] This state and federal legislation hardly constitutes the kind of "wholesale" and "unanimous" policy judgment that prompted the Court to create a new cause of action in Moragne. See Moragne, supra, at 388, 389, 26 L Ed 2d 339, 90 S Ct 1772. To the contrary, the considered judgment of a large majority of American legislatures is that lost future income is not recoverable in a survival action. Were we to recognize a right to such recovery under maritime law, we would be adopting a distinctly minority view.

This fact alone would not necessarily deter us, if recovery of lost future income were more consistent with the general principles of maritime tort law. There are indeed strong

[498 US 36]

policy arguments for allowing such recovery. See, e.g., R. Posner, Economic Analysis of Law 176-181 (3d ed 1986) (recovery of lost future income provides efficient incentives to take care by ensuring that the tortfeasor will have to bear the total cost of the victim's injury or death). Moreover, Miles reminds us that admiralty courts have always shown a special solicitude for the welfare of seamen and their families. "[C]ertainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy." Moragne, supra, at 387, 26 L Ed 2d 339, 90 S Ct 1772, quoting Chief Justice Chase in The Sea Gull, 21 F Cas 909, 910 (No. 12,578) (CC Md 1865). See also Gaudet, 414 US, at 583, 39 L Ed 2d 9, 94 S Ct 806.

We are not unmindful of these principles, but they are insufficient in this case. We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them. Congress has placed limits on recovery in survival actions that we cannot exceed. Because this case involves the death of a seaman, we must look to the Jones Act.

[2d, 12b] The Jones Act/FELA survival provision limits recovery to losses suffered during the decedent's lifetime. See 45 USC § 59 [45 USCS § 59]. This was the established rule under FELA when Congress passed the Jones Act, incorporating FELA, see St. Louis, I. M. & S. R. Co. supra, at 658, 59 L Ed 1160, 35 S Ct 704, and it is the rule under the Jones Act. See Van Beeck, supra, at 347, 81 L Ed 685, 57 S Ct 452. Congress has limited the survival right for seamen's injuries resulting from negligence. As with loss of society in wrongful death actions, this forecloses more expansive remedies in a general maritime action founded on strict liability. We will not create, under our admiralty powers, a remedy that is disfavored by a clear majority of the States and that goes well beyond the limits of Congress' ordered system of recovery for seamen's injury and death. Because Torregano's estate cannot recover for his lost future income under the Jones Act, it cannot do so under general maritime law.

[498 US 37]

VI

[1f, 2e, 8b] Cognizant of the constitutional relationship between the courts and Congress, we today act in accordance with the uniform plan of maritime tort law Congress created in DOHSA and the Jones Act. We hold that there is a general maritime cause of action for the wrongful death of a seaman, but that damages recoverable in such an action do not include loss of society. We also hold that a general maritime survival action cannot include recovery for decedent's lost future earnings. Accordingly, the judgment of the Court of Appeals is affirmed.

Justice Souter took no part in the consideration or decision of this case.

TEXACO REFINING AND MARKETING, INC. and Texaco Marine Services, Inc., Petitioners,

v.

ESTATE OF DAU VAN TRAN, et al., Respondents.

No. D-0473.

Supreme Court of Texas.

April 24, 1991.

Rehearing Overruled May 30, 1991.

OPINION

GAMMAGE, Justice.

Dau Van Tran was crushed to death when a large wave, purportedly caused by the tanker TEXACO CALIFORNIA's excessive speed, washed ashore just as he exited the water between a dock barge and a shrimp boat. Suit was filed against the tanker's owners and operators, Texaco Refining and Marketing, Inc. and Texaco Marine Services, Inc. ("Texaco"), under the Texas Wrongful Death and Survivorship Statutes[1]. The suit also alleged Texaco violated article 29 of the Inland Rules, by failing to practice good seamanship. Texaco named the owner/operator of the shrimp boat and dock involved, Farmer Boy's Catfish Kitchens International, Inc., as a third party defendant. Plaintiffs alleged negligence and violations of general maritime law against the third party.

The trial court rendered judgment against Texaco, exonerating the other defendant. The Beaumont Court of Appeals affirmed. 777 S.W.2d 783, writ denied. Subsequently, the U.S. Supreme Court granted writ of certiorari, vacated the judgment and remanded the cause to the court of appeals for further reconsideration in light of *Sisson v. Ruby*, 497 U.S. ——, 110 S.Ct. 2892, 111 L.Ed.2d 292 (1990). On remand, the court of appeals reaffirmed its original decision. 795 S.W.2d 870. Mindful of the U.S. Supreme Court's remand order, and after a review of applicable law, we conclude the court of appeals erred in its conclusions. Accordingly, we will reverse.

[1-4] Dau Van Tran was neither a seaman nor a longshoreman. He was a "good samaritan" who stopped to help the elderly captain of a shrimp boat free his propeller. He was against the dock barge between two tires when the wave washed ashore, throwing the shrimp boat against the dock crushing him. The facts and circumstances of this case remove it from statutes protecting classes of individuals under traditional maritime law: the Jones Act, 46 U.S.C.App. § 688, which protects seamen; the Death on the High Seas Act, DOHSA, 46 U.S.C.App. § 761 et seq., applicable to deaths of persons occurring on the high seas beyond a maritime league from shore; and the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq., giving longshoremen worker's compensation benefits. General maritime jurisdiction would be appropriate, however, under the Admiralty Extension Act of 1948, 46 U.S.C.App. § 740: "[t]he admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." The Admiralty Extension Act's purpose "was to prevent individuals from falling through the cracks of state law and admiralty jurisdiction". *Kahn v. Gates Constr. Corp.*, 103 A.D.2d 438, 480 N.Y.S.2d 351, 355 (1984). Texaco argues the trial court incorrectly awarded damages to the plaintiffs for mental anguish, loss of society, and prejudgment interest, none of which are permitted under general maritime law. Damages for the mental anguish suffered by the beneficiaries "are not compensable

1. Texas Wrongful Death Statute, Tex.Civ.Prac. & Rem.Code Ann. §§ 71.001-.002 (Vernon 1986); Texas Survival Statute, Tex.Civ.Prac. & Rem Code Ann. § 71.021 (Vernon 1986).

under the maritime wrongful-death remedy," *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 585 n. 17, 94 S.Ct. 806, 815 n. 17, 39 L.Ed.2d 9 (1974). Loss of society is not recoverable under general maritime law, *Miles v. Apex Marine*, — U.S. —, —, 111 S.Ct. 317, 326, 112 L.Ed.2d 275 (1990). Contrary to Texaco's assertions, however, an award of prejudgment interest in an admiralty case is within the sound discretion of the court. *Pickle v. International Oilfield Divers, Inc.*, 791 F.2d 1237, 1240 (5th Cir.1986), cert. denied, 479 U.S. 1059, 107 S.Ct. 939, 93 L.Ed.2d 989 (1987). "In fact, generally in maritime law, prejudgment interest should be awarded." *Curry v. Fluor Drilling*, 715 F.2d 893, 896 (5th Cir.1983).

[5, 6] The U.S. Supreme Court remanded this cause following its decision in *Sisson v. Ruby, supra*. *Sisson* sets out a two-part test to determine maritime jurisdiction's appropriateness: first, a court must determine the event's potentially disruptive impact on maritime commerce; second, the general conduct surrounding the incident must be substantially related to traditional maritime activity. Examining the first requirement of the *Sisson* test, we consider the potentially disruptive impact of the incident on maritime commerce—whether it poses a significant hazard to commercial vessels. Here a ship allegedly navigating at too great a speed caused a large wave which injured someone along the shoreline. This activity poses a threat to any person or thing in close proximity to the shoreline. This would not appear to constitute a potential disruption to maritime activity or commercial vessels. It could be argued, however, that such an event would potentially endanger passing vessels and docked commercial ships with their attendant dockside activities. Texaco also presented evidence at trial that the TEXACO CALIFORNIA's speed was necessary to protect the ship, apparently to compensate for a strong cross-current which could have grounded the ship. The second part of the *Sisson* test concerns whether the conduct involved was substantially related to traditional maritime activity. The general conduct giving rise to the incident was the passage of the vessel through the ship channel, and is clearly substantially related to traditional maritime activity. Moreover, during oral arguments both sides conceded a maritime tort had occurred.

[7] Where applicable *and* properly invoked, general maritime law preempts state causes of action and remedies, consistent with the longstanding desire of Congress and the judiciary to achieve uniformity in the exercise of admiralty jurisdiction pursuant to the U.S. Constitution, art. 3, § 2, cl. 1. *See Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 676–677, 102 S.Ct. 2654, 2659, 73 L.Ed.2d 300 (1982). The "savings to suitors" clause of 28 U.S.C. 1333(1) permits state courts to adjudicate maritime actions "constrained by the 'reverse-*Erie*' doctrine which requires that substantive remedies afforded by States conform to governing federal maritime standards." *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 223, 106 S.Ct. 2485, 2494, 91 L.Ed.2d 174 (1986).

[8, 9] Where general maritime law is properly invoked by pleadings and litigated at trial, a trial court's failure to award damages consistent with maritime law is clearly reversible error. Plaintiff's live pleadings refer to the Inland Water Rules and failure to practice good seamanship. Texaco did not plead maritime law nor object to evidence of damages inconsistent with maritime law, but did raise it in its fourteenth proposed finding of fact and conclusion of law: "The case at bar is governed by the principles of general maritime law." Maritime remedy constraints were again raised in Texaco's motion for new trial. Moreover, one of the plaintiffs' proposed findings of fact states: "The TEXACO CALIFORNIA failed to observe the rules of the road and the rules of good seamanship on the day in question." In response to Texaco's motion for new trial, the plaintiffs filed amended findings of fact. Acknowledging Texaco's plea that the court not award mental anguish damages inconsistent with maritime law remedies, plaintiffs asked the court to "reconsid-

er its award for loss of companionship, affection and society, both past and future, for both the mother and father."

We conclude this was sufficient notice to the trial court to invoke general maritime law and its limited remedies. Accordingly, we reverse the judgment of the court of appeals and remand this cause to the trial court for rendition of judgment consistent with this opinion.

YAMAHA MOTOR CORPORATION, U. S. A., et al., Petitioners

v

LUCIEN B. CALHOUN, et al., Individually and as Administrators of the ESTATE OF NATALIE CALHOUN, Deceased

516 US 199, 133 L Ed 2d 578, 116 S Ct 619

[No. 94-1387]

Argued October 31, 1995. Decided January 9, 1996.

Justice Ginsburg delivered the opinion of the Court.

[1a] Twelve-year-old Natalie Calhoun was killed in a jet ski accident on July 6, 1989. At the time of her death, she was vacationing with family friends at a beach-front resort in Puerto Rico. Alleging that the jet ski was defectively designed or made, Natalie's parents sought to recover from the manufacturer pursuant to state survival and wrongful death statutes. The manufacturer contended that state remedies could not be applied because Natalie died on navigable waters; federal, judge-declared maritime law, the manufacturer urged, controlled to the exclusion of state law.

Traditionally, state remedies have been applied in accident cases of this order—maritime wrongful death cases in which no federal statute specifies the appropriate relief and the decedent was not a seaman, longshore worker, or person otherwise engaged in a maritime trade. We hold, in accord with the United States Court of Appeals for the Third Circuit, that state remedies remain applicable in such cases and have not been displaced by the federal maritime wrongful death action recognized in *Moragne* v *States Marine Lines, Inc.*, 398 US 375, 26 L Ed 2d 339, 90 S Ct 1772 (1970).

I

Natalie Calhoun, the twelve-year-old daughter of respondents Lucien and Robin Calhoun, died in a tragic accident on July 6, 1989. On vacation with family friends at a resort hotel in Puerto Rico, Natalie had rented a "WaveJammer" jet ski manufactured by Yamaha Motor Company, Ltd., and distributed by Yamaha Motor Corporation, U. S. A. (collectively, "Yamaha"), the petitioners in this case. While riding the WaveJammer, Natalie slammed into a vessel anchored in the waters off the hotel frontage, and was killed.

The Calhouns, individually and in their capacities as administrators of their daughter's estate, sued Yamaha in the United States District Court for the Eastern District of Pennsylvania. Invoking Pennsylvania's wrongful death and survival statutes, 42 Pa. Cons. Stat. §§ 8301-8302 (1982 and Supp. 1995), the Calhouns asserted several bases for recovery (including negligence, strict liability, and breach of implied warranties), and sought damages for lost future earnings, loss of society, loss of support and services, and funeral expenses, as well as punitive damages. They grounded federal jurisdiction on both diversity of citizenship, 28 USC § 1332 [28 USCS § 1332],[1] and

1. The Calhouns are citizens of Pennsylvania. Yamaha Motor Corporation, U. S. A. is incorporated and has its principal place of business in California; Yamaha Motor Company, Ltd. is incorporated and has its principal place of business in Japan

admiralty, 28 USC § 1333 [28 USCS § 1333].

Yamaha moved for partial summary judgment, arguing that the federal maritime wrongful death action this Court recognized in *Moragne* v *States Marine Lines, Inc.*, 398 US 375, 26 L Ed 2d 339, 90 S Ct 1772 (1970), provided the exclusive basis for recovery, displacing all remedies afforded by state law. Under *Moragne*, Yamaha contended, the Calhouns could recover as damages only Natalie's funeral expenses. The District Court agreed with Yamaha that *Moragne*'s maritime death action displaced state remedies; the court held, however, that loss of society and loss of support and services were compensable under *Moragne*.

Both sides asked the District Court to present questions for immediate interlocutory appeal pursuant to 28 USC § 1292(b) [28 USCS § 1292(b)]. The District Court granted the parties' requests, and in its § 1292(b) certifying order stated:

"Natalie Calhoun, the minor child of plaintiffs Lucien B. Calhoun and Robin L. Calhoun, who are Pennsylvania residents, was killed in an accident not far off shore in Puerto Rico, in the territorial waters of the United States. Plaintiffs have brought a diversity suit against, *inter alia*, defendants Yamaha Motor Corporation, U. S. A. and Yamaha Motor Co., Ltd. The counts of the complaint directed against the Yamaha defendants allege that the accident was caused by a defect or defects in a Yamaha jet ski which Natalie Calhoun had rented and was using at the time of the fatal accident. Those counts sound in negligence, in strict liability, and in implied warranties of merchantability and fitness. The district court has concluded that admiralty jurisdiction attaches to these several counts and that they constitute a federal maritime cause of action. The questions of law certified to the Court of Appeals are whether, pursuant to such a maritime cause of action, plaintiffs may seek to recover (1) damages for the loss of the society of their deceased minor child, (2) damages for the loss of their child's future earnings, and (3) punitive damages." App. to Pet. for Cert. A-78.

Although the Court of Appeals granted the interlocutory review petition, the panel to which the appeal was assigned did not reach the questions presented in the certified order, for it determined that an anterior issue was pivotal. The District Court, as just recounted, had concluded that any damages the Calhouns might recover from Yamaha would be governed exclusively by federal maritime law. But the Third Circuit panel questioned that conclusion and inquired whether state wrongful death and survival statutes supplied the remedial prescriptions for the Calhouns' complaint. The appellate panel asked whether the state remedies endured or were "displaced by a federal maritime rule of decision." 40 F. 3d 622, 624 (1994). Ultimately, the Court of Appeals ruled that state law remedies apply in this case. *Id.*, at 644.

II

[2] In our order granting certiorari, we asked the parties to brief a preliminary question: "Under 28 USC § 1292(b) [28 USCS § 1292(b)], can the courts of appeals exercise ju-

risdiction over any question that is included within the order that contains the controlling question of law identified by the district court?" 514 US —, 131 L Ed 2d 999, 115 S Ct 1998 (1995). The answer to that question, we are satisfied, is yes.

Section 1292(b) provides, in pertinent part:

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that *such order* involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal *from the order* may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals . . . may thereupon, in its discretion, permit an appeal to be taken *from such order*, if application is made to it within ten days after the entry of the order." (Emphasis added.)

As the text of § 1292(b) indicates, appellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court. The court of appeals may not reach beyond the certified order to address other orders made in the case. *United States* v *Stanley*, 483 US 669, 677, 97 L Ed 2d 550, 107 S Ct 3054 (1987). But the appellate court may address any issue fairly included within the certified order because "it is the *order* that is appealable, and not the controlling question identified by the district court." 9 J. Moore & B. Ward, Moore's Federal Practice ¶ 110.25[1], p. 300 (2d ed. 1995). See also 16 C. Wright, A. Miller, E. Cooper, & E. Gressman, Federal Practice and Procedure § 3929, pp. 144-145 (1977) ("[T]he court of appeals may review the entire order, either to consider a question different than the one certified as controlling or to decide the case despite the lack of any identified controlling question."); Note, Interlocutory Appeals in the Federal Courts Under 28 USC § 1292(b) [28 USCS § 1292(b)], 88 Harv. L. Rev. 607, 628-629 (1975) ("scope of review [includes] all issues material to the order in question").

We therefore proceed to the issue on which certiorari was granted: Does the federal maritime claim for wrongful death recognized in *Moragne* supply the exclusive remedy in cases involving the deaths of nonseafarers[2] in territorial waters?

III

[1b, 3] Because this case involves a watercraft collision on navigable waters, it falls within admiralty's domain. See *Sisson* v *Ruby*, 497 US 358, 361-367, 111 L Ed 2d 292, 110 S Ct 2892 (1990); *Foremost Ins. Co.* v *Richardson*, 457 US 668, 677, 73 L Ed 2d 300, 102 S Ct 2654 (1982). "With admiralty jurisdiction," we have often said, "comes the application of substantive admiralty law." *East River S. S. Corp.* v *Transamerica Delaval Inc.*, 476 US 858, 864, 90 L Ed 2d 865, 106 S Ct 2295 (1986). The exercise of admiralty jurisdiction, however, "does not result in automatic displacement of state law." *Jerome B. Grubart, Inc.* v *Great*

2. By "nonseafarers," we mean persons who are neither seamen covered by the Jones Act, 46 USC App. § 688 (1988 ed.) [46 USCS Appx § 688], nor longshore workers covered by the Longshore and Harbor Workers' Compensation Act, 33 USC § 901 *et seq.* [33 USCS §§ 901 *et seq.*].

Lakes Dredge & Dock Co., 513 US ——, ——, 130 L Ed 2d 1024, 115 S Ct 1043 (1995). Indeed, prior to *Moragne*, federal admiralty courts routinely applied state wrongful death and survival statutes in maritime accident cases.[3] The question before us is whether *Moragne* should be read to stop that practice.

Our review of maritime wrongful death law begins with *The Harrisburg*, 119 US 199, 30 L Ed 358, 7 S Ct 140 (1886), where we held that the general maritime law (a species of judge-made federal common law) did not afford a cause of action for wrongful death. The *Harrisburg* Court said that wrongful death actions are statutory and may not be created by judicial decree. The Court did not question the soundness of this view, or examine the historical justifications that account for it. Instead, the Court merely noted that common law in the United States, like the common law of England, did not allow recovery "for an injury which results in death," *id.*, at 204, 30 L Ed 358, 7 S Ct 140 (internal quotation marks omitted), and that no country had "adopted a different rule on this subject for the sea from that which it maintains on the land," *id.*, at 213, 30 L Ed 358, 7 S Ct 140. The Court did not consider itself free to chart a different course by crafting a judge-made wrongful death action under our maritime law.

Federal admiralty courts tempered the harshness of *The Harrisburg*'s rule by allowing recovery under state wrongful death statutes. See, *e.g.*, *The Hamilton*, 207 US 398, 52 L Ed 264, 28 S Ct 133 (1907); *The City of Norwalk*, 55 F. 98 (SDNY 1893).[4] We reaffirmed this practice in *Western Fuel Co.* v *Garcia*, 257 US 233, 66 L Ed 210, 42 S Ct 89 (1921), by holding that California's wrongful death statute governed a suit brought by the widow of a maritime worker killed in that State's territorial waters. Though we had generally refused to give effect to state laws regarded as inconsonant with the substance of federal maritime law, we concluded that extending state wrongful death statutes to fatal accidents in territorial waters was compatible with substantive maritime policies: "The subject is maritime and local in character and the specified modification of or supplement to the rule applied in admiralty courts . . . will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations." *Id.*, at 242, 66 L Ed 210, 42 S Ct 89.[5] On similar reasoning, we also held that state sur-

3. Throughout this opinion, for economy, we use the term wrongful death remedies or statutes to include survival statutes.

4. Congress also mitigated the impact of *The Harrisburg* by enacting two statutes affording recovery for wrongful death. In 1920, Congress passed the Death on the High Seas Act (DOHSA), 46 USC App. § 761 *et seq.* (1988 ed.) [46 USCS Appx §§ 761 *et seq.*], which provides a federal claim for wrongful death occurring more than three nautical miles from the shore of any State or Territory. In that same year, Congress also passed the Jones Act, 46 USC App. § 688 (1988 ed.) [46 USCS Appx § 688], which provides a wrongful death claim to the survivors of seamen killed in the course of their employment, whether on the high seas or in territorial waters.

5. Indeed, years before *The Harrisburg*, this Court rendered a pathmarking decision, *Steamboat Co.* v *Chase*, 16 Wall 522, 21 L Ed 369 (1873). In *Steamboat*, the Court upheld, under the "saving-to-suitors" proviso of the Judiciary Act of 1789 (surviving currently in 28 USC

vival statutes may be applied in cases arising out of accidents in territorial waters. See *Just* v *Chambers*, 312 US 383, 391-392, 85 L Ed 903, 61 S Ct 687 (1941).

State wrongful death statutes proved an adequate supplement to federal maritime law, until a series of this Court's decisions transformed the maritime doctrine of unseaworthiness into a strict liability rule. Prior to 1944, unseaworthiness "was an obscure and relatively little used" liability standard, largely because "a shipowner's duty at that time was only to use due diligence to provide a seaworthy ship." *Miles* v *Apex Marine Corp.*, 498 US 19, 25, 112 L Ed 2d 275, 111 S Ct 317 (1990) (internal quotation marks omitted). See also *Moragne*, 398 US, at 398-399, 26 L Ed 2d 339, 90 S Ct 1772. *Mahnich* v *Southern S. S. Co.*, 321 US 96, 88 L Ed 561, 64 S Ct 455 (1944), however, notably expanded a shipowner's liability to injured seamen by imposing a nondelegable duty "to furnish a vessel and appurtenances reasonably fit for their intended use." *Mitchell* v *Trawler Racer, Inc.*, 362 US 539, 550, 4 L Ed 2d 941, 80 S Ct 926 (1960). The duty imposed was absolute; failure to supply a safe ship resulted in liability "irrespective of fault and irrespective of the intervening negligence of crew members." *Miles*, 498 US, at 25, 112 L Ed 2d 275, 111 S Ct 317. The unseaworthiness doctrine thus became a "species of liability without fault," *Seas Shipping Co.* v *Sieracki*, 328 US 85, 94, 90 L Ed 1099, 66 S Ct 872 (1946), and soon eclipsed ordinary negligence as the primary basis of recovery when a seafarer was injured or killed. *Miles*, 498 US, at 25-26, 112 L Ed 2d 275, 111 S Ct 317.[6]

The disparity between the unseaworthiness doctrine's strict liability standard and negligence-based state wrongful death statutes figured prominently in our landmark *Moragne* decision. Petsonella Moragne, the widow of a longshore worker killed in Florida's territorial waters, brought suit under Florida's wrongful death and survival statutes, alleging both negligence and unseaworthiness. The district court dismissed the claim for wrongful death based on unseaworthiness, citing this Court's decision in *The Tungus* v *Skovgaard*, 358 US 588, 3 L Ed 2d 524, 79 S Ct 503, 71 ALR2d 1280 (1959). There, a sharply-divided Court held that "when admiralty adopts a State's right of action for wrongful death, it must enforce the right as an integrated whole, with whatever conditions and limitations the creating State has attached." *Id.*, at 592, 3 L Ed 2d 524, 79 S Ct 503, 71 ALR2d 1280. Thus, in wrongful death actions involving fatalities in territorial waters, state statutes provided the standard of liability as well as the remedial regime. Because the Florida Supreme Court had pre-

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§ 1333(1) [28 USCS § 1333(1)]), a state court's application of the State's wrongful death statute to a fatality caused by a collision in territorial waters between defendants' steamboat and a sailboat in which plaintiff's decedent was passing.

6. The Court extended the duty to provide a seaworthy ship, once owed only to seamen, to longshore workers in *Seas Shipping Co.* v *Sieracki*, 328 US 85, 90 L Ed 1099, 66 S Ct 872 (1946). Congress effectively overruled this extension in its 1972 amendments to the Longshore and Harbor Workers' Compensation Act, 33 USC § 901 *et seq.* [33 USCS §§ 901 *et seq.*]. See 33 USC § 905(b) [33 USCS § 905(b)]. We have thus far declined to extend the duty further. See *Kermarec* v *Compagnie Generale Transatlantique*, 358 US 625, 629, 3 L Ed 2d 550, 79 S Ct 406 (1959) (unseaworthiness doctrine inapplicable to invitee aboard vessel).

viously held that Florida's wrongful death statute did not encompass unseaworthiness as a basis of liability, the Court of Appeals affirmed the dismissal of Moragne's unseaworthiness claim. See *Moragne*, 398 US, at 377, 26 L Ed 2d 339, 90 S Ct 1772.

[1c] The Court acknowledged in *Moragne* that *The Tungus* had led to considerable uncertainty over the role state law should play in remedying deaths in territorial waters, but concluded that "the primary source of the confusion is not to be found in *The Tungus*, but in *The Harrisburg*." 398 US, at 378, 26 L Ed 2d 339, 90 S Ct 1772. Upon reexamining the soundness of *The Harrisburg*, we decided that its holding, "somewhat dubious even when rendered, is such an unjustifiable anomaly in the present maritime law that it should no longer be followed." 398 US, at 378, 26 L Ed 2d 339, 90 S Ct 1772. Accordingly, the Court overruled *The Harrisburg* and held that an action "lie[s] under general maritime law for death caused by violation of maritime duties." 398 US, at 409, 26 L Ed 2d 339, 90 S Ct 1772.

IV

[1d] Yamaha argues that *Moragne*—despite its focus on "maritime duties" owed to maritime workers—covers the waters, creating a uniform federal maritime remedy for all deaths occurring in state territorial waters, and ousting all previously available state remedies. In Yamaha's view, state remedies can no longer supplement general maritime law (as they routinely did before *Moragne*), because *Moragne* launched a solitary federal scheme.[7] Yamaha's reading of *Moragne* is not without force; in several contexts, we have recognized that vindication of maritime policies demanded uniform adherence to a federal rule of decision, with no leeway for variation or supplementation by state law. See, *e.g.*, *Kossick* v *United Fruit Co.*, 365 US 731, 742, 6 L Ed 2d 56, 81 S Ct 886 (1961) (federal maritime rule validating oral contracts precluded application of state Statute of Frauds); *Pope & Talbot, Inc.* v *Hawn*, 346 US 406, 409, 98 L Ed 143, 74 S Ct 202 (1953) (admiralty's comparative negligence rule barred application of state contributory negligence rule); *Garrett* v *Moore-McCormack Co.*, 317 US 239, 248-249, 87 L Ed 239, 63 S Ct 246 (1942) (federal maritime rule allocating burden of proof displaced conflicting state rule).[8] In addition, Yamaha correctly points out that

7. If *Moragne*'s wrongful death action did not extend to nonseafarers like Natalie, one could hardly argue that *Moragne* displaced the state law remedies the Calhouns seek. Lower courts have held that *Moragne*'s wrongful death action extends to nonseafarers. See, *e.g.*, *Sutton* v *Earles*, 26 F. 3d 903 (CA9 1994) (recreational boater); *Wahlstrom* v *Kawasaki Heavy Industries, Ltd.*, 4 F. 3d 1084 (CA2 1993) (jet skier), cert. denied, 510 US ——, 127 L Ed 2d 380, 114 S Ct 1060 (1994). We assume, for purposes of this decision, the correctness of that position. Similarly, as in prior encounters, we assume without deciding that *Moragne* also provides a survival action. See *Miles* v *Apex Marine Corp.*, 498 US 19, 34, 112 L Ed 2d 275, 111 S Ct 317 (1990). The question we confront is not what *Moragne* added to the remedial arsenal in maritime cases, but what, if anything, it removed from admiralty's stock.

8. The federal cast of admiralty law, we have observed, means that "state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system[,] [b]ut this limitation still leaves the States a wide scope." *Romero* v *International Terminal Operating Co.*, 358 US 354, 373, 3 L Ed 2d 368, 79 S Ct 468 (1959). Our precedent does not precisely delineate that scope. As we recently acknowledged, "[i]t would be idle to pretend that the line separating permissible from impermissible state regulation is readily

uniformity concerns informed our decision in *Moragne*.

The uniformity concerns that prompted us to overrule *The Harrisburg*, however, were of a different order than those invoked by Yamaha. *Moragne* did not reexamine the soundness of *The Harrisburg* out of concern that state damage awards in maritime wrongful death cases were excessive, or that variations in the remedies afforded by the States threatened to interfere with the harmonious operation of maritime law. Variations of this sort had long been deemed compatible with federal maritime interests. See *Western Fuel*, 257 US, at 242, 66 L Ed 210, 42 S Ct 89. The uniformity concern that drove our decision in *Moragne* related, instead, to the availability of unseaworthiness as a basis of liability.

By 1970, when *Moragne* was decided, claims premised on unseaworthiness had become "the principal vehicle for recovery" by seamen and other maritime workers injured or killed in the course of their employment. *Moragne*, 398 US, at 399, 26 L Ed 2d 339, 90 S Ct 1772. But with *The Harrisburg* in place, troubling anomalies had developed that many times precluded the survivors of maritime workers from recovering for deaths caused by an unseaworthy vessel. The *Moragne* Court identified three anomalies and concluded they could no longer be tolerated.

First, the Court noted that "within territorial waters, identical conduct violating federal law (here the furnishing of an unseaworthy vessel) produces liability if the victim is merely injured, but frequently not if he is killed." *Id.*, at 395, 26 L Ed 2d 339, 90 S Ct 1772. This occurred because in nonfatal injury cases, state substantive liability standards were superseded by federal maritime law, see *Kermarec* v *Compagnie Generale Transatlantique*, 358 US 625, 628, 3 L Ed 2d 550, 79 S Ct 406 (1959); *Pope & Talbot*, 346 US, at 409, 98 L Ed 143, 74 S Ct 202, which provided for maritime worker recovery based on unseaworthiness. But if the same worker met death in the territorial waters of a State whose wrongful death statute did not encompass unseaworthiness (as was the case in *Moragne* itself), the survivors could not proceed under that generous standard of liability. See *The Tungus*, 358 US, at 592-593, 3 L Ed 2d 524, 79 S Ct 503, 71 ALR2d 1280.

Second, we explained in *Moragne* that "identical breaches of the duty to provide a seaworthy ship, resulting in death, produce liability outside the three-mile limit . . . but not within the territorial waters of a State whose local statute excludes unseaworthiness claims." *Moragne*, 398 US, at 395, 26 L Ed 2d 339, 90 S Ct 1772. This occurred because survivors of a maritime worker killed on the high seas could sue for wrongful death under the Death on the High Seas Act (DOHSA), 46 USC App. § 761 *et seq.* (1988 ed.) [46 USCS Appx §§ 761 *et seq.*], which encompasses unseaworthiness as a basis of liability. *Moragne*, 398 US, at 395, 26 L Ed 2d 339, 90 S Ct 1772 (citing *Kernan* v *American Dredging Co.*,

discernible in our admiralty jurisprudence." *American Dredging Co.* v *Miller*, 510 US —, —, 127 L Ed 2d 285, 114 S Ct 981 (1994). We attempt no grand synthesis or reconciliation of our precedent today, but confine our inquiry to the modest question whether it was *Moragne*'s design to terminate recourse to state remedies when nonseafarers meet death in territorial waters.

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355 US 426, 430, n. 4, 2 L Ed 2d 382, 78 S Ct 394 (1958)).

Finally, we pointed out that "a true seaman [a member of a ship's company] . . . is provided no remedy for death caused by unseaworthiness within territorial waters, while a longshoreman, to whom the duty of seaworthiness was extended only because he performs work traditionally done by seamen, does have such a remedy when allowed by a state statute." 398 US, at 395-396, 26 L Ed 2d 339, 90 S Ct 1772. This anomaly stemmed from the Court's rulings in *Lindgren* v *United States*, 281 US 38, 74 L Ed 686, 50 S Ct 207 (1930), and *Gillespie* v *United States Steel Corp.*, 379 US 148, 13 L Ed 2d 199, 85 S Ct 308 (1964), that the Jones Act, 46 USC App. § 688 (1988 ed.) [46 USCS Appx § 688], which provides only a negligence-based claim for the wrongful death of seamen, precludes any state remedy, even one accommodating unseaworthiness. As a result, at the time *Moragne* was decided, the survivors of a longshore worker killed in the territorial waters of a State whose wrongful death statute incorporated unseaworthiness could sue under that theory, but the survivors of a similarly-situated seaman could not.[9]

The anomalies described in *Moragne* relate to ships and the workers who serve them, and to a distinctly maritime substantive concept—the unseaworthiness doctrine. The Court surely meant to "assure uniform vindication of federal policies," 398 US, at 401, 26 L Ed 2d 339, 90 S Ct 1772, with respect to the matters it examined. The law as it developed under *The Harrisburg* had forced on the States more than they could bear—the task of "provid[ing] the sole remedy" in cases that did not involve "traditional common-law concepts," but "concepts peculiar to maritime law." 398 US, at 401, n. 15, 26 L Ed 2d 339, 90 S Ct 1772 (internal quotation marks omitted). Discarding *The Harrisburg* and declaring a wrongful death right of action under general maritime law, the Court concluded, would "remov[e] the tensions and discrepancies" occasioned by the need "to accommodate state remedial statutes to exclusively maritime substantive concepts." 398 US, at 401, 26 L Ed 2d 339, 90 S Ct 1772.[10]

Moragne, in sum, centered on the extension of relief, not on the contraction of remedies. The decision recalled that " 'it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by estab-

9. As noted earlier, unseaworthiness recovery by longshore workers was terminated by Congress in its 1972 amendments to the Longshore and Harbor Workers' Compensation Act, 33 USC § 901 *et seq.* [33 USCS §§ 901 *et seq.*]. See 33 USC § 905(b) [33 USCS § 905(b)].

10. The Court might have simply overruled *The Tungus*, see *supra* pp. — — —, 133 L Ed 2d, at 587-588, thus permitting plaintiffs to rely on federal liability standards to obtain state wrongful death remedies. The petitioner in *Moragne*, widow of a longshore worker, had urged that course when she sought certiorari. See *Moragne* v *States Marine Lines, Inc.*, 398 US 375, 378, n. 1, 26 L Ed 2d 339, 90 S Ct 1772 (1970). But training *Moragne* solely on *The Tungus* would have left untouched the survivors of seamen, who remain blocked by the Jones Act from pursuing state wrongful death claims—whether under a theory of negligence or unseaworthiness. See *Gillespie* v *United States Steel Corp.*, 379 US 148, 154-155, 13 L Ed 2d 199, 85 S Ct 308 (1964). Thus, nothing short of a federal maritime right of action for wrongful death could have achieved uniform access by seafarers to the unseaworthiness doctrine, the Court's driving concern in *Moragne*. See 398 US, at 396, n. 12, 26 L Ed 2d 339, 90 S Ct 1772.

lished and inflexible rules.' " *Id.*, at 387, 26 L Ed 2d 339, 90 S Ct 1772 (quoting *The Sea Gull*, 21 F. Cas. 909, 910 (No. 12,578) (CC Md. 1865) (Chase, C. J.)). The Court tied Petsonella Moragne's plea based on the unseaworthiness of the vessel to a federal right-of-action anchor,[11] but notably left in place the negligence claim she had stated under Florida's law. See 398 US, at 376-377, 26 L Ed 2d 339, 90 S Ct 1772.[12]

Our understanding of *Moragne* accords with that of the Third Circuit, which Judge Becker set out as follows:

"*Moragne* . . . showed no hostility to concurrent application of state wrongful death statutes. Indeed, to read into *Moragne* the idea that it was placing a ceiling on recovery for wrongful death, rather than a floor, is somewhat ahistorical. The *Moragne* cause of action was in many respects a gap-filling measure to ensure that seamen (and their survivors) would all be treated alike. The 'humane and liberal' purpose underlying the general maritime remedy of *Moragne* was driven by the idea that survivors of seamen killed in state territorial waters should not have been barred from recovery simply because the tort system of the particular state in which a seaman died did not incorporate special maritime doctrines. It is difficult to see how this purpose can be taken as an intent to preclude the operation of state laws that do supply a remedy." 40 F. 3d, at 641-642 (citation omitted).

We have reasoned similarly in *Sun Ship, Inc.* v *Pennsylvania*, 447 US 715, 65 L Ed 2d 458, 100 S Ct 2432 (1980), where we held that a State may apply its workers' compensation scheme to land-based injuries that fall within the compass of the Longshore and Harbor Workers' Compensation Act, 33 USC § 901 *et seq.* [33 USCS §§ 901 *et seq.*]. See *Sun Ship*, 447 US, at 724, 65 L Ed 2d 458, 100 S Ct 2432 (a State's remedial scheme might be "more generous than federal law" but nevertheless could apply because Congress indicated no concern "about a disparity between adequate federal benefits and *superior* state benefits") (emphasis in original).[13]

[1e, 4] When Congress has pre-

11. While unseaworthiness was the doctrine immediately at stake in *Moragne*, the right of action, as stated in the Court's opinion, is "for death caused by violation of maritime duties." *Moragne*, 398 US, at 409, 26 L Ed 2d 339, 90 S Ct 1772. See *East River S. S. Corp.* v *Transamerica Delaval Inc.*, 476 US 858, 865, 90 L Ed 2d 865, 106 S Ct 2295 (1986) (maritime law incorporates strict product liability); *Kermarec*, 358 US, at 630, 3 L Ed 2d 550, 79 S Ct 406 (negligence). See also G. Gilmore & C. Black, The Law of Admiralty 368 (2d ed. 1975).

12. *Moragne* was entertained by the Court of Appeals pursuant to a 28 USC § 1292(b) [28 USCS § 1292(b)] certification directed to the District Court's order dismissing the unseaworthiness claim. See 398 US, at 376, 26 L Ed 2d 339, 90 S Ct 1772.

13. Federal maritime law has long accommodated the States' interest in regulating maritime affairs within their territorial waters. See, *e.g.*, *Just* v *Chambers*, 312 US 383, 390, 85 L Ed 903, 61 S Ct 687 (1941) ("maritime law [is] not a complete and perfect system"; "a considerable body of municipal law . . . underlies . . . its administration"). States have thus traditionally contributed to the provision of environmental and safety standards for maritime activities. See, *e.g.*, *Askew* v *American Waterways Operators, Inc.*, 411 US 325, 36 L Ed 2d 280, 93 S Ct 1590 (1973) (oil pollution); *Huron Portland Cement Co.* v *Detroit*, 362 US 440, 4 L Ed 2d 852, 80 S Ct 813, 78 ALR2d 1294 (1960) (air pollution); *Kelly* v *Washington ex rel. Foss Co.*, 302 US 1, 82 L Ed 3, 58 S Ct 87 (1937) (safety inspection); *Cooley* v *Board of Wardens of Port of Philadelphia ex*

scribed a comprehensive tort recovery regime to be uniformly applied, there is, we have generally recognized, no cause for enlargement of the damages statutorily provided. See *Miles*, 498 US, at 30-36, 112 L Ed 2d 275, 111 S Ct 317 (Jones Act, rather than general maritime law, determines damages recoverable in action for wrongful death of seamen); *Offshore Logistics, Inc.* v *Tallentire*, 477 US 207, 232, 91 L Ed 2d 174, 106 S Ct 2485 (1986) (DOHSA, which limits damages to pecuniary losses, may not be supplemented by nonpecuniary damages under a state wrongful death statute); *Mobil Oil Corp.* v *Higginbotham*, 436 US 618, 624-625, 56 L Ed 2d 581, 98 S Ct 2010 (1978) (DOHSA precludes damages for loss of society under general maritime law). But Congress has not prescribed remedies for the wrongful deaths of nonseafarers in territorial waters. See *Miles*, 498 US, at 31, 112 L Ed 2d 275, 111 S Ct 317. There is, however, a relevant congressional disposition. Section 7 of DOHSA states: "The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter." 46 USC App. § 767 [46 USCS Appx § 767]. This statement, by its terms, simply stops DOHSA from displacing state law in territorial waters. See *Miles*, 498 US, at 25, 112 L Ed 2d 275, 111 S Ct 317; *Tallentire*, 477 US, at 224-225, 91 L Ed 2d 174, 106 S Ct 2485; *Moragne*, 398 US, at 397-398, 26 L Ed 2d 339, 90 S Ct 1772. Taking into account what Congress sought to achieve, we preserve the application of state statutes to deaths within territorial waters.

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[1f, 5a] For the reasons stated, we hold that the damages available for the jet ski death of Natalie Calhoun are properly governed by state law.[14] The judgment of the Court of Appeals for the Third Circuit is accordingly *affirmed*.

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rel. Soc. for Relief of Distressed Pilots, 12 How 299, 13 L Ed 996 (1852) (pilotage regulation). Permissible state regulation, we have recognized, must be consistent with federal maritime principles and policies. See *Romero*, 358 US, at 373-374, 3 L Ed 2d 368, 79 S Ct 468.

14. [5b] The Third Circuit left for initial consideration by the District Court the question whether Pennsylvania's wrongful death remedies or Puerto Rico's apply. 40 F. 3d 622, 644 (1994). The Court of Appeals also left open, as do we, the source—federal or state—of the standards governing liability, as distinguished from the rules on remedies. We thus reserve for another day reconciliation of the maritime personal injury decisions that rejected state substantive liability standards, and the maritime wrongful death cases in which state law has held sway. Compare *Kermarec*, 358 US, at 628, 3 L Ed 2d 550, 79 S Ct 406 (personal injury); *Pope & Talbot, Inc.* v *Hawn*, 346 US 406, 409, 98 L Ed 143, 74 S Ct 202 (1953) (same), with *Hess* v *United States*, 361 US 314, 319, 4 L Ed 2d 305, 80 S Ct 341 (1960) (wrongful death); *The Tungus* v *Skovgaard*, 358 US 588, 592-594, 3 L Ed 2d 524, 79 S Ct 503, 71 ALR2d 1280 (1959) (same).