I

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 [**1464] deck damages and crane damages. On the eve 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.

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."

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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 entities 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 those 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~~ non 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

"§ 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

"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

[398 US 376]

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

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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),

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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

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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

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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

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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

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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