

SURVIVAL OF TORT ACTIONS UNDER FEDERAL MARITIME LAW

Recovery for tortious maritime injury resulting in death historically has consisted of a confusing and often irreconcilable body of law arising variously from federal statutes,¹ state statutes² or decisional law³ depending upon how far from shore the injury occurred,⁴ the type of damages sought,⁵ and the status of the victim:⁶ recovery for harm just over three miles from shore might be allowed whereas damages for harm suffered a hundred yards closer to shore might not be allowed;⁷ a wrongful death action might be maintainable if the tort occurred within the coastal waters of one state but not of another;⁸ an action for identical injuries might be maintainable by a non-seaman, but not by a seaman.⁹

Many of the anomalies in this area of maritime law have been remedied in a piecemeal fashion over the past 55 years through statutes and court decisions. In 1886, the Supreme Court unsettled maritime law when it decided in *The Harrisburg*¹⁰ that a wrongful death action did not survive in admiralty, absent a statute.¹¹ A partial remedy for that void was provided in 1920 by the enactment of the Death on the High Seas Act¹² [hereinafter DOHSA] which allowed an action for wrongful death in international waters. However, in state coastal waters, recovery for wrongful death remained dependent upon the existence of state wrongful death statutes.¹³ Thus, for those dying in the territorial waters of one state recovery might be had, but not for those dying in the waters of another state. Further, DOHSA limited recovery to "pecuniary loss"¹⁴—generally held not to include damages for "pain and suffering"¹⁵—so the scope

¹ Jones Act, 46 U.S.C. § 688 (1970); Death on the High Seas Act, 46 U.S.C. §§ 761-68 (1970).

² See *The Tungus v. Skovgaard*, 358 U.S. 588 (1959).

³ See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970); *The Harrisburg*, 119 U.S. 199 (1886).

⁴ See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 395 (1970).

⁵ See *Dennis v. Central Gulf S.S. Corp.*, 453 F.2d 137, 140 (5th Cir.), cert. denied, 409 U.S. 948 (1972).

⁶ See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 395-96 (1970).

⁷ Compare *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964), with *Doyle v. Albatross Tanker Corp.*, 367 F.2d 465 (2d Cir. 1966).

⁸ See *The Tungus v. Skovgaard*, 358 U.S. 588 (1959).

⁹ See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 395-96 (1970).

¹⁰ 119 U.S. 199 (1886).

¹¹ *Id.* at 213.

¹² 46 U.S.C. §§ 761-68 (1970).

¹³ See *The Tungus v. Skovgaard*, 358 U.S. 588, 591 (1959).

¹⁴ 46 U.S.C. § 762 (1970). The measure of damages for death on the high seas is generally the amount of pecuniary benefit which the beneficiary might reasonably expect to receive had the deceased lived. *The S.S. Black Gull*, 90 F.2d 619, 620-21 (2d Cir. 1937); *The City of Rome*, 48 F.2d 333, 337 (S.D.N.Y. 1930).

¹⁵ *Dennis v. Central Gulf S.S. Corp.*, 453 F.2d 137, 140 (5th Cir.), cert. denied, 409 U.S. 948 (1972); *Canillas v. Joseph M. Carter, Inc.*, 280 F. Supp. 48, 51 (S.D.N.Y. 1968); *Decker v. Moore-McCormack Lines, Inc.*, 91 F. Supp. 560, 561 (D. Mass. 1950).

of damages in a wrongful death action within and without the three mile limit could be different depending upon the peculiarities of the applicable state statutes.

On the same day Congress enacted DOHSA, it passed the Jones Act¹⁶ which permitted seamen to bring a wrongful death action for injuries occurring both on the high seas¹⁷ and in state waters.¹⁸ The act also allowed seamen's tort actions to survive their death.¹⁹ The Jones Act, however, only allowed actions based on negligence²⁰ and not on the theory of unseaworthiness which is a strict liability theory.²¹ The result was that a seaman could not bring an action for wrongful death based on unseaworthiness in state waters, but he could recover damages for injuries occurring on the high seas by supplementing his Jones Act action with an action under DOHSA.²² The allowance of survival actions by the Jones Act but not by DOHSA also raised the question whether Congress specifically intended that tort actions arising from injuries to non-seamen on the high seas, not survive.

In 1971, the Supreme Court, in *Moragne v. States Marine Lines, Inc.*,²³ took a major step in clarifying maritime law. In that case an action was brought for wrongful death when a longshoreman was killed aboard a vessel within the navigable waters of Florida.²⁴ After the district court dismissed the suit,²⁵ the court of appeals certified to the Florida Supreme Court the question whether the state's wrongful death statute allowed recovery for unseaworthiness.²⁶ When the Florida court answered that its state statute did not allow an action based on unseaworthiness, the court of appeals affirmed the district court's decision, following the rule that absent a statute there is no action for wrongful death.²⁷ The Supreme Court granted certiorari, overruled *The Harrisburg*, and allowed a federal maritime wrongful death action.²⁸ The holding in *Moragne* freed recovery for wrongful death in state waters from the peculiarities of

¹⁶ 46 U.S.C. § 688 (1970).

¹⁷ See, e.g., *Gerardo v. United States*, 101 F. Supp. 383 (N.D. Cal. 1951).

¹⁸ See, e.g., *Sanderson v. Sause Bros. Ocean Towing Co.*, 114 F. Supp. 849 (D. Ore. 1953).

¹⁹ See *Cities Serv. Oil Co. v. Launey*, 403 F.2d 537, 540 (5th Cir. 1968).

²⁰ *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 154 (1964); *Lindgren v. United States*, 281 U.S. 38, 48 (1930).

²¹ If an individual is injured because a vessel was unable to withstand the perils of an ordinary voyage at sea, he may seek compensation based on a theory of unseaworthiness. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 549 (1960); *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 100 (1944).

²² *Kernan v. American Dredging Co.*, 355 U.S. 426, 430 n.4 (1958) (dictum); *Doyle v. Albatross Tanker Corp.*, 367 F.2d 465, 466-67 (2d Cir. 1966).

²³ 398 U.S. 375 (1970).

²⁴ *Id.* at 376.

²⁵ *Id.*

²⁶ 409 F.2d 32 (5th Cir. 1969).

²⁷ *Id.*

²⁸ 398 U.S. at 409.

state wrongful death statutes by providing a uniformly applicable federal maritime wrongful death action. It also allowed a wrongful death action based on a claim of unseaworthiness brought on behalf of seamen killed in state territorial waters because a Jones Act suit could be supplemented with a *Moragne*-type action.²⁹

While *Moragne* served to bring order to maritime law relating to wrongful death, it left unresolved the question as to whether the remedy it fashioned is limited to state territorial waters or applies to the high seas as well. Consequently, courts have divided on this point.³⁰ The significance of the issue as to the scope of the holding in *Moragne* derives from the fact that damages for pain and suffering are recoverable under *Moragne*³¹ but not under DOHSA which limits recovery to "pecuniary loss."³² *Moragne* also left untouched and unsettled the law governing survival of actions:³³ damages for pain and suffering were recoverable for maritime tort injuries,³⁴ but if the victim died, the chances for recovery of damages often died with him because lower courts have followed Supreme Court dictum that, absent a statute, actions do not survive.³⁵

Against this background, the First Circuit recently squarely confronted the problem of maritime survival actions, in *Barbe v. Drummond*,³⁶ and filled a post-*Moragne* gap in maritime law by holding that there exists a federal maritime survival action.³⁷ The First Circuit opinion, if accepted, will dispel the uncertainty in maritime law which was left unresolved by the *Moragne* decision. *Barbe* arose out of the following facts: On May 17, 1969, Drummond and Janet Barbe, his guest, left Massachusetts in a 26 foot powerboat planning to cross Massachusetts Bay.³⁸ Drummond was too inexperienced with the operation of his craft to attempt such a

²⁹ Id. at 396 n.12.

³⁰ Compare *Sennett v. Shell Oil Co.*, 325 F. Supp. 1 (E.D. La. 1971) ("Though *Moragne* dealt with the problem of death in coastal waters, . . . nothing in the opinion suggests that the maritime right is to be denied those whose death is brought about wrongfully on the High Seas." Id. at 7.), with *Fitzgerald v. A.L. Burbank & Co.*, 451 F.2d 670, 683 (2d Cir. 1971).

³¹ *Green v. Vantage S.S. Corp.*, 466 F.2d 159, 167 (4th Cir. 1972); *Dennis v. Central Gulf S.S. Corp.*, 453 F.2d 137, 141 (5th Cir.), cert. denied, 409 U.S. 948 (1972); *In re Farrell Lines, Inc.*, 339 F. Supp. 91, 93-94 (E.D. La. 1971).

³² See cases cited at note 15 supra.

³³ Wrongful death statutes permit a designated class of individuals to recover for the injury to them occasioned by the loss of the deceased. Survival statutes permit the right of action the deceased would have had, had he lived, to be brought by his estate. For a discussion of the difference between wrongful death and survival statutes, see text accompanying notes 75-77.

³⁴ See *Heredia v. Davis*, 12 F.2d 500, 501 (4th Cir. 1926); *Vastano v. Partownership Brovigtank*, 158 F. Supp. 477, 480 (E.D.N.Y. 1957).

³⁵ *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 371 (1932) (dictum).

³⁶ 507 F.2d 794 (1st Cir. 1974).

³⁷ Id. at 799. While the First Circuit does not specifically address itself to the matter, it seems probable that the federal maritime survival action is applicable to all admiralty cases whether arising from incidents within or without the three mile limit. Cf. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

³⁸ 507 F.2d at 796.

voyage, particularly on a stormy night.³⁹ This inexperience resulted in the craft striking a pillar of a bridge which crosses the North River.⁴⁰ Driving the ship into the chopping surf caused the frame which was broken by the impact to gradually open.⁴¹ It was not until much later, while on the bay, that Drummond noticed that the craft was taking on water. After inept attempts to obtain help and save the craft, he and Janet Barbe abandoned it.⁴² Janet Barbe died of exposure after several hours in the icy waters.⁴³

The administrator of Janet Barbe's estate brought suit against Drummond to recover, inter alia, for Janet's conscious pain and suffering.⁴⁴ The district court found the defendant negligent and granted the plaintiff \$15,000 for pain and suffering, and \$1,500 for funeral expenses.⁴⁵ On appeal the plaintiff advanced three theories upon which the court of appeals might sustain the award of damages for pain and suffering. Recognizing that DOHSA has been held not to allow recovery for pain and suffering,⁴⁶ the plaintiff first contended that the court could look to state law for a survival statute to supplement federal maritime law.⁴⁷ Second, the plaintiff suggested that the court could allow recovery for pain and suffering under the federal maritime wrongful death act action created by *Moragne*.⁴⁸ The third theory advanced by the plaintiff was that the Supreme Court's ruling in *Moragne* provided sufficient support to allow a federal maritime survival action.⁴⁹

The United States Court of Appeals for the First Circuit, reversing in part the order of the District Court HELD: a federal maritime survival action, which permits the deceased's estate to recover for pain and suffering, is allowable to supplement the statutory recovery scheme of DOHSA.⁵⁰ The decision of the First Circuit, if followed, would complete the slowly evolving body of federal maritime law dealing with recovery when a victim of a maritime tort dies. The *Barbe* decision introduces the same certainty and uniformity to the law of maritime survival actions as did the *Moragne* decision to the law of maritime wrongful death actions.

If the reasoning of the First Circuit in *Barbe* prevails, the scheme of recovery when the victim of a tort arising in admiralty

³⁹ Id. at 797.

⁴⁰ Id. at 796.

⁴¹ Id.

⁴² Id.

⁴³ Id.

⁴⁴ Id. at 795.

⁴⁵ Id. at 796.

⁴⁶ See cases cited at note 15 supra.

⁴⁷ 507 F.2d at 797.

⁴⁸ Id. at 798.

⁴⁹ Id. at 799.

⁵⁰ Id. The court also held that the weight of the evidence supported the finding of negligence, id. at 797, and that funeral expenses are not recoverable in an action for wrongful death based on the Death on the High Seas Act. Id. at 802. The scope of this comment, however, is limited to analysis of the award for pain and suffering.

dies will be as follows: as to the wrongful death of a seaman, an action can be brought under the Jones Act and supplemented with an action based on unseaworthiness by use of DOHSA on the high seas and *Moragne* in state waters; as to the wrongful death of a non-seaman, an action can be maintained by employing DOHSA on the high seas and *Moragne* in state territorial waters; a seaman's Jones Act action will survive his death pursuant to that Act and his general maritime actions will survive under the *Barbe* rule; a non-seaman's general maritime actions will survive under *Barbe*.

The decision in *Barbe* will be analyzed in this comment in light of the existing framework of maritime law on which it is superimposed. Initially, an inquiry will be pursued as to whether the *Moragne* decision—on its facts dealing with an incident occurring in coastal waters—should be limited in its application to occurrences in state territorial waters, or whether *Moragne* could govern incidents on the high seas alongside DOHSA so as to obviate the dilemma presented in the *Barbe* case. It will be shown that *Moragne* cannot properly be construed as controlling tort claims arising on the high seas. The analysis will continue with consideration of several issues: whether *Barbe* conflicts with the existing statutory regulation of claims arising in international waters; whether the use of state survival statutes would have provided a sounder legal basis on which to decide *Barbe*; and finally, whether the policies underlying *Moragne* apply equally to survival of actions, so as to justify the First Circuit's creation of a federal survival action.

Attention should first be focused on whether the court in *Barbe* correctly concluded that the *Moragne* decision—on its facts applying to torts committed in coastal waters⁵¹—should be limited in its application to occurrences in state territorial waters, or whether *Moragne* could operate on the high seas alongside DOHSA. This is essential because pain and suffering are recoverable under *Moragne*⁵² but not under DOHSA.⁵³ Thus if the court in *Barbe* had found that *Moragne* applied to injuries on the high seas, the court could have granted the plaintiff damages based on existing law and foregone any discussion of survival of tort claims. It is the conclusion that *Moragne* only applies to occurrences in state waters, coupled with the fact that DOHSA does not permit recovery for pain and suffering, that caused the court in *Barbe* to reach the survival issue.

Language in *Moragne* suggests that the Supreme Court specifically meant to limit *Moragne* to its facts and did not at the time intend to decide whether the newly created federal wrongful death action applied to the high seas or whether Congress had precluded judicial action in that area.⁵⁴ However, the specific language of

⁵¹ 398 U.S. at 376.

⁵² See cases cited at note 31 supra.

⁵³ See cases cited at note 15 supra.

⁵⁴ "We find that Congress has given no affirmative indication of an intent to preclude the

Moragne is not necessarily dispositive of the point at issue. An understanding of the anomalies in maritime law which the Court sought to rectify is instructive in attempting to ascertain the intended scope of the remedy the Court provided.

The first anomaly was that failure to provide a seaworthy vessel would result in liability if the victim were merely injured⁵⁵ but frequently would not if he were killed because, under the rule of *The Harrisburg*,⁵⁶ recovery was made to depend upon state statutes.⁵⁷ Moreover, if failure to provide a seaworthy ship resulted in death on the high seas, liability attached because a claim of unseaworthiness could be brought under DOHSA.⁵⁸ Yet in state waters, where recovery was dependent upon state statutes which may exclude unseaworthiness claims, the plaintiff was often without a cause of action for wrongful death.⁵⁹ Finally, a seaman could not recover for death caused by unseaworthiness within state waters, while longshoremen who had assumed some of the duties of seamen could recover, if the state statute provided a remedy.⁶⁰

Thus it becomes apparent that the court in *Moragne* never addressed a need for judicial alteration of the scheme of recovery for accidents on the high seas. Rather, its attention focused on the inequitable application of the law in state territorial waters—the gap left by federal legislation and decisional law.⁶¹ The Court's creation of a federal maritime wrongful death right applicable to accidents in state territorial waters was meant to abolish dependence upon varied state statutes for recovery⁶² and to allow the representative of a seaman, dying in state territorial waters, to bring an action for wrongful death based on unseaworthiness.⁶³ *Moragne* thus introduced uniformity: on the high seas a seaman could supplement his

judicial allowance of a remedy for wrongful death to persons in the situation of the petitioner." 398 U.S. at 393. "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." *Id.* at 402.

⁵⁵ See, e.g., *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 544-49 (1960); *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 99, 103 (1944).

⁵⁶ 119 U.S. 199 (1886). No action will lie under general maritime law for the wrongful death of a person absent an applicable statute. *Id.* at 213.

⁵⁷ 398 U.S. at 395. See, e.g., *The Tungus v. Skovgaard*, 358 U.S. 588, 590-91 (1959).

⁵⁸ See *Kernan v. American Dredging Co.*, 355 U.S. 426, 430 n.4 (1958).

⁵⁹ 398 U.S. at 395.

⁶⁰ *Id.* at 395-96. This is the result of two interpretations of the Jones Act. First, the Jones Act, which Congress passed in 1920 along with DOHSA, was held to allow recovery only for negligence, not for unseaworthiness, which was a strict liability theory. See cases cited at note 22 *supra*. Second, in *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964), the Supreme Court held that the Jones Act was the exclusive method of recovery for seamen and could not be supplemented by state wrongful death statutes. *Id.* at 154-55.

⁶¹ "Indeed, *Moragne*, which was essentially a response to a gap in maritime remedies for deaths occurring in state territorial waters, explicitly counsels against the sort of *tabula rasa* restructuring of the law of admiralty undertaken by the majority." *Sea-Land Serv., Inc. v. Gaudet*, 414 U.S. 573, 596 (1974) (Powell, J., dissenting).

⁶² 398 U.S. at 401.

⁶³ *Id.* at 396 n.12.

Jones Act action for wrongful death based on negligence with a DOHSA action based on unseaworthiness⁶⁴ and in state territorial waters, he could supplement his Jones Act action with a *Moragne*-type action.⁶⁵

There are additional arguments which support the contention that the scope of the *Moragne* opinion was intended to be limited to actions arising out of accidents occurring in state waters. Although Congress has largely left to the courts the responsibility for fashioning maritime law,⁶⁶ Congress does have paramount power in this area.⁶⁷ It can either create or take away a cause of action within the admiralty jurisdiction of the federal courts.⁶⁸ "If it has this power, it may certainly specify the details of the remedy which it provides."⁶⁹ Since Congress created a wrongful death action on the high seas—DOHSA—which limited damages to "pecuniary loss,"⁷⁰ it could be argued that Congress meant to preclude judicial expansion of the scope of damages for wrongful death occurring on the high seas. Moreover, given the fact that wrongful death actions arising from events on the high seas have been regulated by Congress, it seems unlikely that the Supreme Court would have intended *Moragne* to apply alongside DOHSA without some discussion concluding that Congress did not intend DOHSA to be the exclusive remedy for wrongful death on the high seas.

Additionally, assuming arguendo that *Moragne* applies to wrongful death actions stemming from incidents on the high seas, damages for pain and suffering still need not be considered recoverable. Although such damages have been awarded under *Moragne*, the cases in which such awards were made have all involved claims arising in state waters.⁷¹ This line of cases does not seem inconsistent with Congressional regulation of maritime claims since the legislature, by not extending DOHSA to state territorial waters, clearly demonstrated that it was not concerned with uniformity of damages within and without the three mile limit.⁷² In contrast, in

⁶⁴ *Doyle v. Albatross Tanker Corp.*, 367 F.2d 465, 467 (2d Cir. 1966).

⁶⁵ 398 U.S. at 396 n.12. This view of *Moragne* as filling the gap in the federal statutory scheme—its failure to provide a wrongful death action in state waters—was apparently embraced by the Eighth Circuit in *Spiller v. Thomas M. Lowe & Assoc., Inc.*, 466 F.2d 903 (8th Cir. 1972), where the court held that the class of beneficiaries under *Moragne* should be the same as under DOHSA so as to promote uniformity within and without the three mile limit. *Id.* at 908 n.7.

⁶⁶ *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20 (1963).

⁶⁷ See *Detroit Trust Co. v. The Barlum*, 293 U.S. 21 (1934): "The Congress thus has paramount power to determine the maritime law which shall prevail throughout the country." *Id.* at 43.

⁶⁸ See *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20 (1963); *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 40-41 (1943).

⁶⁹ *Fitzgerald v. A.L. Burbank & Co.*, 451 F.2d 670, 683 (2d Cir. 1971).

⁷⁰ See note 14 *supra*.

⁷¹ See cases cited at note 31 *supra*.

⁷² *Sea-Land Serv., Inc. v. Gaudet*, 414 U.S. 573, 588 n.22 (1974); *Greene v. Vantage S.S. Corp.*, 466 F.2d 159, 165 (4th Cir. 1972); *Dennis v. Central Gulf S.S. Corp.*, 453 F.2d 137, 140 (5th Cir.), cert. denied, 409 U.S. 948 (1972).

wrongful death actions based on occurrences on the high seas, Congress has clearly delineated the scope of damages. In light of this Congressional mandate, arguably courts should construe the judicially created wrongful death action as mirroring DOHSA. This "mirror construction" would result in damages being limited to "pecuniary loss" whether the cause of action arose under *Moragne* or DOHSA. Consequently, it would seem that the First Circuit, in *Barbe*, correctly declined to justify its decision to permit recovery for pain and suffering by construing *Moragne* as permitting such recovery in a tort claim arising out of an incident on the high seas.

While the First Circuit did reject the plaintiff's second theory for sustaining the award of damages for pain and suffering, his third theory which proposed the survival of maritime tort actions, was accepted. The First Circuit created a federal maritime survival action by analogizing the policies operative in *Barbe*, to those accepted in *Moragne*.⁷³ In examining the correctness of the *Barbe* decision, two issues must be addressed: first, whether Congress has preempted the field of survival of maritime tort actions; and second, if it has not, upon what theory survival of actions should be allowed.

In deciding whether Congress has preempted the field of survival of maritime tort actions, thereby barring judicial action, it must be understood that wrongful death statutes have long been considered distinct from survival statutes.⁷⁴ Survival statutes were designed to modify the common law rule that personal tort actions would die with the plaintiff.⁷⁵ These statutes permit the executor or administrator of the decedent's estate to bring the tort claim the deceased would have had but for his death. Generally, they do not permit recovery for harm suffered by the family of the deceased as a result of the decedent's demise.⁷⁶ Wrongful death statutes, on the other hand, provide for a representative to bring an action on behalf of a designated group of individuals who have suffered an injury, either financial or emotional, as a result of the death of the victim.⁷⁷

Congress, in enacting DOHSA, provided an action for wrongful death.⁷⁸ However, DOHSA contains no provision for the survival of actions.⁷⁹ Therefore, given the distinct nature of wrongful

⁷³ 507 F.2d at 799.

⁷⁴ *Sea-Land Serv., Inc. v. Gaudet*, 414 U.S. 573, 575 n.2 (1974); *Pezzulli v. D'Ambrosia*, 344 Pa. 643, 647-48, 26 A.2d 659, 661 (1942).

⁷⁵ 2 F. Harper & F. James, *The Law of Torts* § 24.1, at 1284 & n.2 (1956); W. Prosser, *Handbook of the Law of Torts* § 126, at 898 (4th ed. 1971).

⁷⁶ See *Livingston*, *Survival of Torts Actions*, 37 Calif. L. Rev. 63, 66-68 (1949); *Schumacher*, *Rights of Action Under Death and Survival Statutes*, 23 Mich. L. Rev. 114, 128-30 (1924).

⁷⁷ W. Prosser, *supra* note 75, § 127, at 906.

⁷⁸ 46 U.S.C. § 761 (1970). See *Decker v. Moore-McCormack Lines, Inc.*, 91 F. Supp. 560, 561 (D. Mass. 1950); *Pickles v. F. Leyland & Co.*, 10 F.2d 371, 372 (D. Mass. 1925); Comment, 60 Colum. L. Rev. 534, 536 n.16 (1960).

⁷⁹ See Comment, 60 Colum. L. Rev. 534, 536 n.16 (1960).

death and survival actions, it would seem that the creation by Congress of a wrongful death action on the high seas has not ipso facto precluded judicial creation of a separate survival action. Indeed, many states have statutes providing for both actions⁸⁰ without any apparent difficulties such as double recovery.⁸¹

A further possible indicator of whether Congress intended to disallow survival of actions growing out of events on the high seas is the Jones Act, which was passed at the same time as DOHSA. The Jones Act extended coverage of the Federal Employers Liability Act⁸² [hereinafter FELA] to seamen.⁸³ FELA expressly allows both for wrongful death and for survival of tort claims⁸⁴ and therefore so does the Jones Act for it mandates that the rights enjoyed by those originally covered by FELA (railroad employees) be enjoyed by seamen.⁸⁵ The argument has been advanced that since the Jones Act, passed at the same time as DOHSA, provides for a survival action while DOHSA does not, it should be assumed that Congress intended to limit recovery on the high seas for non-seamen to wrongful death.⁸⁶ However, an examination of the legislative history of DOHSA shows that Congress never considered the question of survival of actions.⁸⁷ Nor does there seem to be any policy reason for allowing an action of a seaman to survive under the Jones Act and denying that right to a non-seaman under DOHSA.⁸⁸ The allowance of survival of actions under the Jones Act was probably not a conscious decision by the Congress; it was probably fortuitous, occasioned by incorporation of FELA into the Jones Act.⁸⁹ This would appear to be the case because the Jones Act, while expressly allowing only a wrongful death action, incorporates the remedial procedures of FELA which include survival of actions. This suggests that Congress was not concerned with survival of actions

⁸⁰ See, e.g., Wis. Stat. Ann. § 895.01 (Supp. 1973) (survival of actions); Wis. Stat. Ann. § 895.03 (Supp. 1973) (wrongful death). For a partial listing of states having both survival and wrongful death statutes see Note, 44 Harv. L. Rev. 980, 981 n.23 (1931).

⁸¹ If recovery is allowed under both DOHSA and a survival action, collateral estoppel could apply to prevent double recovery. See *Sea-Land Serv., Inc. v. Gaudet*, 414 U.S. 573, 592-95 (1974).

⁸² 45 U.S.C. §§ 51-60 (1970).

⁸³ See *Cities Serv. Oil Co. v. Launey*, 403 F.2d 537, 540 (5th Cir. 1968).

⁸⁴ Recovery for wrongful death is permitted by 45 U.S.C. § 51 (1970) and survival of claims is made possible by 45 U.S.C. § 59 (1970).

⁸⁵ See *Lindgren v. United States*, 281 U.S. 38, 40-41 (1930); *Hutchison v. Pacific-Atlantic S.S. Co.*, 217 F.2d 384, 386 (9th Cir. 1954); *Nordquist v. United States Trust Co.*, 188 F.2d 776, 777 (2d Cir. 1951).

⁸⁶ This argument was made by the defendant in *Dugas v. National Aircraft Corp.*, 438 F.2d 1386, 1390 (3d Cir. 1971).

⁸⁷ See S. Rep. No. 216, 66th Cong., 1st Sess. 3 (1919); H.R. Rep. No. 674, 66th Cong., 2d Sess. 3 (1920); 59 Cong. Rec. 4482-86 (1920).

⁸⁸ G. Gilmore & C. Black, *The Law of Admiralty* 308 (1957).

⁸⁹ See O'Day, *Maritime Wrongful Death and Survival Recovery: The Need for Legislative Reform*, 64 Colum. L. Rev. 648, 654 (1964); Comment, *The Application of State Survival Statutes in Maritime Causes*, 60 Colum. L. Rev. 534, 537 (1960).

when enacting either DOHSA or the Jones Act.⁹⁰ If this analysis is accurate, it would appear that the failure of Congress to include a provision for the survival of actions in DOHSA should not be read as an affirmative Congressional direction to disallow survival actions.

There have been several decisions supporting the view that the remedies offered in DOHSA are exclusive; barring recovery under any other theory of liability when a tort results in an individual's death on the high seas.⁹¹ However, a majority of opinions supports the contention that DOHSA does not provide the sole method of recovery when death occurs on the high seas.⁹² The Supreme Court in *Kernan v. American Dredging Co.*,⁹³ has subscribed to this majority view, stating in dictum that an action stemming from a tort committed on the high seas can be maintained under a state survival statute to compensate the estate of the decedent for damages he suffered before his death.⁹⁴ This authority, combined with an understanding of the history and scope of DOHSA and the Jones Act, suggest that the legislature did not intend to limit recovery on the high seas to the provisions of DOHSA. Consequently, the *Barbe* court's creation of a federal maritime survival action, covering actions arising in international waters, does not intrude upon Congressional prerogatives.

Once it is determined that Congress has not prohibited the survival of maritime actions, the question arises as to the proper theory under which to allow survival actions. One course is that advocated by the plaintiff in *Barbe* in his first theory and adopted by the Third Circuit in *Dugas v. National Aircraft Corp.*⁹⁵ In *Dugas* the plaintiff brought an action to recover for the pain and suffering experienced by his daughter who died in a plane crash in international waters.⁹⁶ The Third Circuit noted that DOHSA, which precludes recovery for pain and suffering, is solely a wrongful death statute and need not be read as preempting the distinct remedy embodied in state survival statutes.⁹⁷ Thus the court allowed recov-

⁹⁰ See O'Day, *supra* note 89, at 654 n.35.

⁹¹ See *Dugas v. National Aircraft Corp.*, 438 F.2d 1386, 1390 (3d Cir. 1971); *Igneri v. CIE de Transports Oceaniques*, 323 F.2d 257, 266 n.21 (2d Cir. 1963), cert. denied, 376 U.S. 949 (1964); *Echavarria v. Atlantic & Caribbean Steam Nav. Co.*, 10 F. Supp. 677, 678 (E.D.N.Y. 1935).

⁹² See *Canillas v. Joseph H. Carter, Inc.*, 280 F. Supp. 48, 51 (S.D.N.Y. 1968) (dictum); *Abbott v. United States*, 207 F. Supp. 468, 473 (S.D.N.Y. 1962); *United States v. The S.S. Washington*, 172 F. Supp. 905, 908-09 (E.D. Va.), *aff'd sub. nom. United States v. Texas Co.*, 272 F.2d 711 (4th Cir. 1959); *Petition of Gulf Oil Corp.*, 172 F. Supp. 911, 916 (S.D.N.Y. 1959).

⁹³ 355 U.S. 426 (1958).

⁹⁴ *Id.* at 430 n.4.

⁹⁵ 438 F.2d 1386 (3d Cir. 1971), cited in *Barbe v. Drummond*, 507 F.2d 794, 798 (1st Cir. 1974).

⁹⁶ 438 F.2d at 1387.

⁹⁷ *Id.* at 1388.

ery under a Pennsylvania survival statute.⁹⁸ This rationale, which has been employed by several other courts,⁹⁹ does not conflict with earlier Supreme Court dictum that, absent a statute, maritime actions do not survive.¹⁰⁰

The court in *Barbe* cited *Dugas* with approval, noting that its approach avoided conflict with DOHSA,¹⁰¹ and that there appeared to be no constitutional bar to applying state statutes to actions arising from occurrences on the high seas.¹⁰² However, the First Circuit in *Barbe* noted two deficiencies in the *Dugas* approach.¹⁰³ First, a federal court would be required to divine not only whether a state survival statute was to apply to admiralty claims, but also whether it applied to claims arising from torts which occur on the high seas. From the date of *The Harrisburg* until Congress created a wrongful death action by enacting DOHSA in 1920, federal courts performed the same divination for wrongful death statutes and it proved unsatisfactory because few state wrongful death statutes were meant to apply to the high seas.¹⁰⁴ A similar result could be expected if attempts are made to apply state survival statutes to actions based on a tort committed on the high seas. It is submitted that few, if any, state legislatures, when enacting a survival statute, considered the possibility of their statute applying to the high seas since *Dugas* and similar decisions are relatively few and of recent vintage. Consequently, many plaintiffs will face uncertainty as to whether a particular state survival statute will afford them a remedy for claims arising on the high seas.

The second objection to the *Dugas* approach was that it makes recovery dependent upon the existence of a state statute. Before *Moragne*, recovery for a wrongful death was dependent upon the existence of a state statute. It was this dependency that the *Moragne* court sought to cure in creating a federal wrongful death action to govern wrongful death in state waters.¹⁰⁵ Similarly, *Barbe* is desir-

⁹⁸ Id. at 1392.

⁹⁹ See cases cited at note 92 supra.

¹⁰⁰ *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 371 (1932) (dictum). The approach taken by the court in *Dugas* comports with earlier Supreme Court dictum that a cause of action arising from an event on the high seas can survive the tort victim's death if a pertinent state statute is deemed to apply to incidents on the high seas. *Kernan v. American Dredging Co.*, 355 U.S. 426, 430 n.4 (1958). However, it should be noted that *Kernan* is a pre-*Moragne* case. In light of the Court's holding in *Moragne* and the policies it found persuasive, it seems that the Court would now prefer an approach similar to that taken by the First Circuit in *Barbe*.

¹⁰¹ 507 F.2d at 798.

¹⁰² Id. at 798 n.2.

¹⁰³ Id. at 798.

¹⁰⁴ *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 401 n.15 (1970).

¹⁰⁵ "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." Id. at 401.

able in that it eliminates the confusion and inequity resulting from dependence upon the existence of a state survival statute. A contrary result in *Barbe* would have been regressive, resulting in a scheme of recovery governing the survival of tort actions which would mirror that for wrongful death actions before *Moragne*.

Moreover, it was emphasized in *Moragne* that "[f]ederal law, rather than state, is the more appropriate remedy for violation of the federally imposed duties of maritime law."¹⁰⁶ A fortiori, in *Barbe*, where the claim arose in international waters, it would seem more important to allow a federal remedy to provide access to a federal right. A federal right should be enjoyed uniformly by all the citizenry.¹⁰⁷ Yet under the *Dugas* approach, individuals in an otherwise federal domain would be refused a federal right because a state failed to enact a survival statute or because a court interprets such a statute as not applicable to actions arising from events on the high seas. This is the very situation the Supreme Court sought to rectify in *Moragne* as to wrongful death actions and which the *Barbe* approach avoids with respect to the survival of actions. Given the policies of uniformity and fairness found persuasive in *Moragne*, the course taken in *Barbe*—creating a uniform federal remedy—appears preferable to that taken in *Dugas*.

In *Spiller v. Thomas M. Lowe, Jr. & Associates, Inc.*,¹⁰⁸ a case differing from *Barbe* only in that it involved a wrong committed in coastal waters, the Eighth Circuit previously reached a conclusion similar to that of the First Circuit. In that case, personal representatives of the decedents' estates brought an action after a vessel which was carrying the decedents capsized and sank in the Red River, within the state boundaries of Arkansas.¹⁰⁹ The court noted that although Arkansas law could be used to allow the decedents' actions to survive,¹¹⁰ the methodology of the Supreme Court in *Moragne* supplied a sufficient basis to allow a federal maritime survival action.¹¹¹ Thus, the Eighth Circuit concluded that creation of a federal remedy—one independent of state law—was the preferable course.¹¹²

It has been submitted that the federal maritime wrongful death

¹⁰⁶ Id. at 401 n.15.

¹⁰⁷ For a discussion of the need for uniformity in federal law see Note, The Federal Common Law, 82 Harv. L. Rev. 1512, 1529 (1969).

¹⁰⁸ 466 F.2d 903, 909 (8th Cir. 1972).

¹⁰⁹ Id. at 904.

¹¹⁰ Id. at 910.

¹¹¹ Id. at 909. The court, in discussing the case of *Marsh v. Buckeye S.S. Co.*, 330 F. Supp. 972 (N.D. Ohio 1971), noted:

Although choosing to utilize state law, the Ohio district court did go on to remark, "However, it should be noted that it is only a small leap from the decision in *Moragne* to an acceptance of the survival of personal injury actions as an integral part of the general maritime law." . . . We are willing to make that leap.

466 F.2d at 910 n.9, quoting *Marsh*, 330 F. Supp. at 974.

¹¹² 466 F.2d at 909-10.

action created in *Moragne* is limited in application to actions stemming from incidents in state waters. Further, it was suggested that Congress has taken no action which would prevent a court from using a survival theory to maintain recovery for pain and suffering when the actions grow out of occurrences on the high seas. However, analysis revealed that the approach taken by the Third Circuit in *Dugas* was deficient because it made access to a federal right hinge on the existence of a state survival statute. While it has been suggested that the First Circuit's approach in *Barbe* is preferable, before a final determination of the propriety of the First Circuit's decision can be made, the question of whether a federal remedy can be fashioned must be addressed. When the Supreme Court overruled *The Harrisburg* in *Moragne*, it grounded its decision, at least in part, on the fact that the reason for disallowing wrongful death actions at common law—the felony-merger rule¹¹³—had long since disappeared.¹¹⁴ If it is concluded that the reasons underlying the common law rule that actions do not survive the victim's death have vanished, it follows from the method of analysis used by the Supreme Court in *Moragne* that an additional justification exists for finding a federal maritime survival action.

The common law did not recognize survival of actions. The general rule was that no executor or administrator could sue or be sued for any tort committed by or against the deceased.¹¹⁵ The rule, expressed by the maxim *actio personalis mortui cum persona*,¹¹⁶ seems to have been grounded in the principle found in both Roman and English law that a right of action was not transferable.¹¹⁷ Because of the bilateral nature of contractual and delictual rights—the fact that one is entitled to performance while the other owes a duty—the act of one party was not allowed to change the relationship.¹¹⁸ Nor would the law make a change when a party died.¹¹⁹ Property rights however, lacked this bilateral character: "Ownership is good as against the world."¹²⁰ Therefore, the rule developed that property rights were transferable and thus survived, while contractual and delictual rights did not. Subsequently the rule

¹¹³ 398 U.S. at 382-84. "[T]he common law did not allow 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 preempted by, the felony." *Id.* at 382.

¹¹⁴ 398 U.S. at 381.

¹¹⁵ J. Salmon, *The Law of Torts* § 23, at 69 (3d ed. 1912).

¹¹⁶ "Personal actions die with the person." *Id.* The origin of the rule is obscure, which has led to some fallacious conjecture. "So much at sea has scholarship been to account for the rule with which we are dealing, that some have indulged the fancy that *personalis* in the maxim must have originated in a misprint of *poenalis*." 3 T. Street, *The Foundations of Legal Liability* 61 (1906).

¹¹⁷ 3 T. Street, *The Foundations of Legal Liability* 61-62 (1906).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 62.

¹²⁰ *Id.* at 63.

evolved to allow survival of a cause of action for assumpsit.¹²¹ Yet the rule persisted that tort actions die with the person.¹²²

The different treatment afforded actions based on property and contractual rights as opposed to those based on personal rights turned on the fact that trespass, the form for all tort actions, was penal in nature;¹²³ consequently, when the wrongdoer died, it seemed logical to allow the tort claim against him to lapse since he could no longer be prosecuted for the criminal offense and because the tort action derived from the Crown's action for criminal trespass.¹²⁴ When the victim died, the reason for disallowing survival of actions was somewhat different. Here the felony-merger rule came into play.¹²⁵ At common law, the tort was considered less important than the felony and merged into it.¹²⁶ Thus the civil action was suspended until the criminal one was concluded.¹²⁷ Since the punishment for a felony was death and forfeiture of all property to the Crown, at the conclusion of the criminal action there was no property upon which to base the recovery sought in the civil suit.¹²⁸

The rule in this country has never been that a felon's property is forfeited.¹²⁹ Although the felony-merger doctrine was applied to delay civil suits until after the criminal trial, nothing prevented a subsequent civil action.¹³⁰ Nevertheless, American courts adopted the rule that actions do not survive,¹³¹ even though the rationale for the felony-merger rule which provided that a felon's property was forfeited to the state, never existed in America. Thus the parallel between wrongful death actions and survival of actions is complete. Both the common law rule against survival of tort claims and that forbidding wrongful death actions were grounded in the felony-merger rule. It is precisely because the rationale for the rule had disappeared that the Supreme Court in *Moragne* overruled *The Harrisburg*, creating a maritime wrongful death action.¹³² Following the example of the Supreme Court in *Moragne*, it seems reasonable that the First Circuit, when confronted with a product of the archaic felony-merger rule in *Barbe*, created a federal maritime survival action.

¹²¹ Id. at 68.

¹²² 3 W. Holdsworth, A History of English Law 577-78 (1927).

¹²³ Id.

¹²⁴ W. Prosser, Handbook of the Law of Torts § 126, at 898 (4th ed. 1971).

¹²⁵ Id.

¹²⁶ *Smith v. Sykes*, 89 Eng. Rep. 160 (K.B. 1677); *Higgins v. Butcher*, 80 Eng. Rep. 61 (K.B. 1606).

¹²⁷ *Smith v. Selwyn* [1914] 3 K.B. 98, 103. The reason for the rule may have been to compel the injured person to prefer criminal charges. W. Prosser, *supra* note 124, § 2, at 8.

¹²⁸ *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 382 (1970).

¹²⁹ Id. at 384.

¹³⁰ See *Hyatt v. Adams*, 16 Mich. 180, 185-88 (1867); *Grosso v. Delaware, L. & W.R.R.*, 50 N.J.L. 317, 319-20, 13 A. 233, 234 (Sup. Ct. 1888).

¹³¹ W. Prosser, *supra* note 124, § 126, at 899.

¹³² 398 U.S. at 384-88.

Barbe also comports with the other rationale stated by the Court in *Moragne*. Of major significance to the Court in *Moragne* was what it perceived as a striking legislative recognition of a public policy in favor of wrongful death actions:¹³³ every state had enacted a wrongful death statute and several federal statutes allowed a wrongful death action.¹³⁴ As a matter of judicial integrity, courts should be cognizant of legislative policy determinations and reflect such determinations in decisional law.¹³⁵

Courts have historically turned to statutes for guidance and have meshed the policies enunciated by the statutes with existing common law principles.¹³⁶ The clear legislative policy in favor of wrongful death actions provided yet another justification for the *Moragne* decision. Similar reasoning supports the *Barbe* result. There has been a considerable amount of legislation changing the common law rule that actions do not survive. All states have to some extent altered the rule and about half have allowed personal injury actions to survive.¹³⁷ Also, among federal statutes, FELA and the Jones Act provide for survival actions.¹³⁸ These statutes provide an unmistakable indication of public policy in favor of survival actions. Following the lead of *Moragne*, the First Circuit chose to incorporate this legislatively recognized policy into the maritime law and allowed a survival action in the void left by the legislature.

Moragne resulted in the emancipation of wrongful death actions in admiralty from their previous dependence on state statutes and thus established a uniform remedy in the federal courts. It was this same desire for uniformity which served as the driving force behind the First Circuit's decision in *Barbe*. The court in *Barbe* recognized that while *Moragne* permits recovery for pain and suffering, its application is limited to actions stemming from occurrences in state territorial waters and that DOHSA does not permit recovery for pain and suffering because of its "pecuniary loss" limitation. Therefore, applying an analysis similar to that of the Supreme Court in *Moragne*, the First Circuit created a federal maritime survival action, sustaining an award of damages for the conscious pain and suffering of a deceased tort victim in an action arising from events on the high seas.

Viewed in the light of the evolution of maritime law, it is

¹³³ Id. at 390.

¹³⁴ Id.

¹³⁵ "This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law." Id. at 390-91.

¹³⁶ J. Landis, *Statutes and the Sources of Law*, in *Harvard Legal Essays* 213 (1934).

¹³⁷ W. Prosser, *supra* note 124, § 126, at 900.

¹³⁸ See text accompanying notes 84 & 85 *supra*.

submitted that the *Barbe* decision is correct. If followed by other circuits, it will aid in providing a comprehensive and equitable system of recovery within the admiralty jurisdiction of the federal courts.

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