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SHIPS SUITORS AND STATE STATUTES

John J. Monigan, Jr.*
and Arthur C. Dwyer**

At the 1958 and 1959 terms of the United States Supreme Court, four decisions concerning maritime matters contributed substantially to the confusion in what has been described as the "tangled seine" of the maritime injury remedy. The decisions, The Tungus v. Skovgaard, United Pilots Association v. Halecki, Hess v. United States, and Goett v. Union Carbide, were concerned with the existence of a cause of action in admiralty based upon the alleged unseaworthiness of a vessel, for damages consequent upon wrongful death in territorial waters of a state where the Death on the High Seas Act did not apply.

While the Court in all of the decisions followed the concept often repeated since the decision in The Harrisburg, that admiralty affords no remedy for wrongful death but that under the principles established in The Hamilton, and La Bourgogne, admiralty would adopt a remedy created by foreign or state law, there was a great disparity among the members of the Court as to the effect of such determination.

In The Tungus, an action in rem was brought against a ship and its owners to recover damages for the death of a maintenance foreman who was assisting in the repair of a pump used in the discharge of a cargo of cocaonut oil from a vessel which was docked at Bayonne, New Jersey. The libel alleged the unseaworthiness of the craft and a negligent failure to provide the decedent

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1 Note, 57 Yale L.J. 243 (1947).
7 119 U.S. 199 (1886).
8 207 U.S. 398 (1907).
9 210 U.S. 95 (1908).
with a reasonably safe place to work. The District Court dismissed the libel
holding that a wrongful death action for unseaworthiness would not lie and
that the owners owed no duty of exercising ordinary care to provide the dece-
dent a safe place to work. The Court of Appeals set aside that decree and
remanded the case, concluding that the New Jersey Wrongful Death Act\textsuperscript{10} included a cause of action for unseaworthiness and that the trial court had erred concerning the scope of the owners' duty to exercise reasonable care
for the decedent's safety. The court did not decide what defenses, if any, would
be available to the claim, leaving that to the trial court to determine after
remand.

Mr. Justice Stewart, for the majority of the Court, concluded that the
Court of Appeals rightly determined the primary issue in the case to be whether
the New Jersey statute giving a right of action where death was caused by
a wrongful act, neglect or default, was broad enough to include an action for
dead caused by the unseaworthiness of a vessel.\textsuperscript{11} The Court recognized the
fact that the courts of New Jersey had not resolved that question but never-
theless regarded as binding upon it a determination by a state court con-
cerning the existence of a cause of action for wrongful death and the defenses
which were available thereunder.

Mr. Justice Frankfurter concurred in the result but expressed the opinion
that the construction of a state statute should not, as a matter of wise ad-
ministration, be determined independently by the lower federal courts, but
rather should await a determination by the state court while the matter is held in
the federal court.\textsuperscript{12}

Mr. Justice Brennan, with whom the Chief Justice and Justices Black
and Douglas joined, concurred in part and dissented in part. The minority
concurred with the conclusion of the Court that there was no cause of action
for wrongful death in admiralty in the circumstances of the case, and that a
state wrongful death statute could be utilized by an admiralty court in supple-
menting the substantive right to recover. Once the substantive right of recovery
was created, however, his view was that the remedy should be determined by
general principles of admiralty law; the defenses applicable to the cause of
action afforded by state law could not be recognized if they were different
from concepts usually applied in maritime matters. The basis for the con-
clusion that the remedy thus created would not be circumscribed other than
by maritime concepts was said to be the necessity for uniformity in admiralty
matters and the anomaly that otherwise completely different standards of re-
covery would apply to death actions from those applicable to injuries short
of death. In the latter cases, whether a cause of action is asserted in the state

\textsuperscript{10} N.J. Rev. Stat. § 2A:31-1 (1951), provides:
When the death of a person is caused by a wrongful act, neglect or
default, such as would, if death had not ensued, have entitled the person
injured to maintain an action for damages resulting from the injury, the
person who would have been liable in damages for the injury if death
had not ensued shall be liable in an action for damages, notwithstanding
the death of the person injured and although the death was caused
under circumstances amounting in law to a crime.


\textsuperscript{12} Id. at 597.
court under the Saving to Suitors Clause, or in an admiralty court, federal concepts of liability, and of the applicable defenses, control.

In the *Halecki* case, an action to recover damages under the New Jersey Wrongful Death Act was brought in the Southern District of New York predicated on diversity of citizenship. The plaintiff's decedent was an employee of a subcontractor hired to overhaul a ship's generators during the course of the ship's annual overhaul at a shipyard in Jersey City. To perform the work it was necessary to spray the generators with tetrachloride, which was a toxic compound known to the decedent and to his foreman as requiring special precautions in handling. Special ventilating equipment and the ship's own equipment were utilized to exhaust the fumes created by the chemical, but the decedent, who did most of the spraying, collapsed the following day and died two weeks later of carbon tetrachloride poisoning. The action was based both upon the alleged unseaworthiness of the vessel and upon negligence. It was tried to a jury under instructions that either theory of liability would render the defendant liable and contributory negligence on the part of the decedent would serve only to mitigate damages. A verdict was returned in favor of the plaintiff and the Court of Appeals affirmed, expressing the view that the New Jersey Wrongful Death Act included a cause of action for unseaworthiness and that the concept of comparative negligence was applicable to the contributory negligence of the decedent.

Mr. Justice Stewart, for the majority of the Court, recognized that a cause of action for wrongful death was essentially one of interpretation of the applicable New Jersey law, but held that the decedent was not such a person as fell within the class of those benefited by the principle of indemnity for unseaworthiness; and since both that theory of recovery and the cause of action based upon negligence were integrated in the charge to the jury, a new trial was required.

The dissenting opinion, which was written by Mr. Justice Brennan, with whom the Chief Justice and Justices Black and Douglas joined, was directed to the question of whether or not the plaintiff's decedent was a person for whose benefit indemnity for unseaworthiness applied.

In the *Hess* case, an action was brought against the United States under the Federal Tort Claims Act to recover for the death of the petitioner's decedent, who was drowned in the Columbia River during the course of his employment as a carpenter foreman for a construction company hired to perform repair work on Bonneville Dam, a structure owned and operated by the United States and located on navigable waters within the territorial limits of the State of Oregon. The decedent's employer, in order to perform the work which it had contracted to perform, told the government inspector...
of its plan to send a working party, of which the decedent was a member, to take soundings from a boat near the foot of a spillway dam. To accomplish the soundings, the operating personnel of the dam were requested to close certain spillway gates near the point where the work was to be done. This request was complied with, but a tug and barge unit carrying the working party, of which the plaintiff's decedent was a member, veered and struck a pier as it approached the dam, stoving a hole in the barge and carrying the unit toward that part of the dam where the spillway gates were open. The unit capsized, resulting in the deaths of all but one of the working party.

The theory of liability asserted in the complaint was that the decedent's death was proximately caused by the failure of the operating personnel to close a sufficient number of spillway gates near where the soundings were to be taken. Liability was asserted under the wrongful death statute of Oregon,\(^\text{18}\) and under the employers' liability law of that state.\(^\text{19}\) The wrongful death statute permitted recovery for death caused by the wrongful act or omission of another, limited liability therefor to $20,000 and provided that the contributory negligence of the decedent would be an absolute bar to recovery. The employers' liability law of Oregon provided for the imposition of liability for failure "to use every device, care and precaution which it is practicable to use for the protection and safety of life and limb".\(^\text{20}\) No monetary limit on recovery was provided; the contributory negligence of the decedent served only to mitigate damages.\(^\text{21}\)

The trial, held without a jury, resulted in the entry of a judgment in favor of the United States. It was determined that the decedent's death, occurring as it did on navigable waters, required the application of the maritime law which would apply the Wrongful Death Act of the state of Oregon. It absolved the defendant of liability under that statute because the decedent's death was not caused by the negligence of the United States or of its employees. The trial court concluded that the employers' liability law was inapplicable, that the United States was not responsible for the work being performed, and that the standard of care prescribed in that Act, if applied to death in the circumstances there presented, would be unconstitutional. This judgment was affirmed by the Court of Appeals. The review in the Supreme Court was then confined to the contention that error resulted in the determination of the court that the employers' liability law was not applicable.

Mr. Justice Stewart, speaking for the majority of the Court, held that, in the circumstances there presented, the right of recovery was to be measured under the substantive standards of the state law, rather than of the admiralty law. He did not reach the question of whether a state wrongful death act might contain provisions so offensive to traditional principles of maritime law that admiralty would decline to enforce them.\(^\text{22}\) He concluded that the provisions of the employers' liability law might constitutionally be invoked to afford

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20 Ibid.
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the remedy for wrongful death in the circumstances there presented and left for determination by the Court of Appeals the correctness of the District Court's alternative finding that the statute was inapplicable as a matter of state law.

The Chief Justice and Justices Black, Douglas and Brennan joined in the opinion of the Court under the compulsion of the Court's ruling in *The Tungus*, stating it to be their view that so long as the ruling of that case prevails it should be applied "evenhandedly" even though some members of the Court believed that "state law is the measure of recovery when it helps the defendant, as in *Tungus*, but is not when it militates against the defendant as it does here."\(^{23}\)

Mr. Justice Harlan wrote a dissenting opinion in which Mr. Justice Frankfurter joined, approaching the question in the light of the historical development of the cause of action for wrongful death based upon the creation of a remedy for wrongful death by state statutes; he concluded that the source of law in each instance was federal although the remedy which was provided by a state could constitutionally be accepted by admiralty since only a remedy and not a substantive right was provided.

Since the Oregon statute imposed a liability upon the defendant greater than that which admiralty afforded and prescribed a standard of care different from that which was in accordance with the principles applicable to maritime torts, the application of such a state statute to a maritime cause of action offended the requisite uniformity prescribed by the Constitution and accordingly was beyond the competence of a state.\(^{24}\)

Mr. Justice Whittaker concurred in the decision except insofar as it might be regarded as conflicting with the views expressed in his decision in *Goett*.\(^{25}\)

In the *Goett* case, a libel in admiralty was brought by the administratrix of an employee of a barge company engaged in repairing a river barge then on the waters of the Kanawha River in the territorial waters of West Virginia. The theory of liability was alternative: either the barge owner was negligent in turning over the barge for repairs without its being equipped with rescue equipment, or the vessel was unseaworthy because of the lack of such equipment, which lack caused the death of the decedent. The West Virginia Wrongful Death Act provided a maximum recovery of $20,000.\(^{26}\) The trial court found that the vessel was in fact unseaworthy and that its owner was negligent as charged in the libel and held in addition that the decedent was not guilty of contributory negligence nor did he assume the risk of injury.

The owner appealed, and the decision was reversed, the Court of Appeals concluding that the barge owner owed no duty to the employees of the company charged with making the repairs to the vessel once the vessel had been turned over to the repair company. It accordingly disagreed with the trial court's finding of negligence and held further that the vessel was not unseaworthy at the time of the accident and that the decedent was not in the class of persons to whom the warranty of unseaworthiness extended. The court did not determine whether the law of West Virginia afforded a cause of action for wrong-

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\(^{23}\) *Id.* at 322.

\(^{24}\) *Id.* at 338-39.

\(^{25}\) *Id.* at 339.

ful death predicated upon the unseaworthiness of the vessel nor did it determine whether the West Virginia statute incorporated the standard of negligence prescribed by the maritime law.

The *per curiam* Supreme Court opinion directed a reversal and a remand of the case to determine whether the West Virginia Wrongful Death Act employed the standard of law of that state or of the general maritime law upon the question of negligence. The case thus depended on the applicable substantive law standard and whether the trial court's determination as to negligence was correct.27

A dissenting opinion was filed by Mr. Justice Harlan, with whom Mr. Justice Frankfurter joined. The ground for the dissent was that there was no basis for determining that the Court of Appeals did not correctly resolve the question of state substantive law controlling the action, unless such state law imposed duties greater than those created by maritime substantive law; he concluded further that the Court should not disturb the decision of the Court of Appeals that it was unnecessary to reach the difficult question of whether the West Virginia wrongful death statute embraced a cause of action for unseaworthiness based upon federal concepts, because under federal law the vessel was not in fact seaworthy.28

Mr. Justice Whittaker was of the opinion that the Court of Appeals correctly determined that the action was governed by the general maritime law as remedially supplemented by the West Virginia wrongful death statute.29 He carefully articulated the view that the source of law applicable in such actions was federal, even though a state remedial statute was adopted to afford a framework within which relief could be granted. He observed that his conclusion was essential to preserve the requisite nationwide harmony and uniformity required in maritime matters.30 He also expressed the view that the Court of Appeals correctly concluded that the doctrine of unseaworthiness was inapplicable, citing in support *West v. United States.*31

Mr. Justice Stewart filed a separate dissenting opinion. The basis for his dissent was that there was no reason to believe that the Court of Appeals did not apply the substantive law of West Virginia, which would be enforced in admiralty as enunciated in *The Tungus* with the *obligatio* created by the state wrongful death statute. An additional ground for his dissent was that even if it could be considered that the Court of Appeals erroneously applied principles of the West Virginia law to the case, it was not shown that the substantive law of West Virginia was more favorable to the plaintiff than the general maritime law.32

As a consequence of the great disparity of approach manifested by the members of the Court to the problem presented by the death of an individual in circumstances where none of the federal statutes creating a cause of action

28 Id. at 344-45.
29 Id. at 345.
30 Id. at 347.
31 361 U.S. 118 (1960). (The owner of a vessel withdrawn from navigation owed no duty to respond in damages for unseaworthiness.)
applies, some reference to the source of law in maritime matters appears necessary. The conflicting concepts engendered by the Saving to Suitors clause, and the constitutional delegation of jurisdiction to the federal courts in admiralty and maritime matters, suggest the wisdom of judicial restraint in the enunciation of applicable principles, and the advantages of definitive congressional legislation in an area which has been traditionally fraught with confusion, with poorly articulated theories of responsibility and an ingenuous lack of regard for the practical consequences of piecemeal revisions of principles of substantive law.

The United States Supreme Court considered for the first time whether a cause of action existed in admiralty for wrongful death in *The Harrisburg*. Chief Justice Waite, writing for a unanimous Court, reversed the award to a widow and dependent daughter of the first officer of *The Tilton* who was killed by the negligence of *The Harrisburg* in a collision off Nantucket Island within the territorial waters of Massachusetts. *The Harrisburg* was a ship from the Port of Philadelphia. Both Massachusetts and Pennsylvania had adopted wrongful death statutes.

The District Court for the Eastern District of Pennsylvania, evidently following the then prevailing trend of the district courts, had allowed recovery. The Court of Appeals for the Third Circuit affirmed and among its conclusions of law stated: (1) The general maritime law did afford a cause of action for injury which resulted in death; and (2) that even if the statute law of the respective states were applicable, the built-in periods of limitation were not applicable, but the doctrine of laches of the general maritime law should apply.

The Court reviewed the decisions of the district courts, including *The Sea Gull*, which had allowed recovery for injuries resulting in death. It also cited *The Vera Cruz*, in which the House of Lords had held that, under the statute regulating the jurisdiction of admiralty, the court had not been granted jurisdiction to hear cases arising under Lord Campbell’s Act. The Court concluded that at common law there had been no recovery for injuries resulting in death. It further concluded that under the European admiralty codes no cause of action for injuries resulting in death had existed. It stated that the courts which had allowed recovery had done so on the ground that “the common law is not founded on good reason, and is contrary to ‘natural equity and the general principles of law.’” The Court then stated: “[A]s it is the duty of the courts to declare the law, not to make it, we cannot change this rule.”

The Court did not consider whether the law of Massachusetts or Pennsylvania could apply because the period of limitation of both had run.

35 In Sherlock v. Alling, 93 U.S. 99 (1896), the Supreme Court affirmed a decision allowing recovery under a state wrongful death statute.
38 21 Fed. Cas. 909 (No. 12578) (C.C. Md. 1865).
39 10 App. Cas. 59 (H.L. 1884).
40 9 & 10 Vict. L.R. ch. 93.
41 119 U.S. 199, 213-14 (1886).
The Supreme Court again considered the question of whether a cause of action exists in admiralty for injuries resulting in death in *The Hamilton* and in *La Bourgogne*. These cases were not presented to the Court, however, until it had decided what is now regarded as the landmark case of *The Osceola*.

A seaman on board *The Osceola* had recovered an award in an *in rem* proceeding for injuries sustained when the master of the vessel had ordered the loading derrick lowered in advance of landing at a port in Wisconsin. The heavy winds from the Great Lakes blew the derrick back across the deck, injuring the seaman. The Court of Appeals entered no decision but certified three questions to the Supreme Court: (1) Is a vessel liable for negligence of the master? (2) Is the master a fellow servant? (3) On the facts of the case, is the vessel liable for negligence? Mr. Justice Brown, writing for a unanimous Court, answered “no” to questions 1 and 3 and “yes” to question 2.

In the course of his opinion, Mr. Justice Brown noted that the English courts since the passage of the Merchants' Shipping Act in 1876, and the American courts, without benefit of statute but as a matter of general admiralty law, had been holding an owner of a vessel liable for a failure to see that all reasonable means had been used to make a vessel seaworthy before and during a voyage. The Court said that this did not mean that there could be a recovery for negligence but that there was a cause of action for unseaworthiness. No member of the Court indicated that the American courts were exceeding their proper function by allowing a recovery where none had been allowed by admiralty and for which no statute had been enacted by the Congress. This decision was not to receive serious consideration by the Supreme Court until 1946 in *Seas Shipping v. Sieracki*.

The basic Supreme Court decisions on the role that state and admiralty laws were to have in allowing recovery in actions for wrongful death were established in *The Hamilton* and *La Bourgogne*.

Mr. Justice Holmes in *The Hamilton* held that where two ships involved in a collision resulting in loss of life were each owned by Delaware corporations, and that state had adopted a wrongful death statute, a court sitting in admiralty could apply the law of Delaware to afford relief. The state had power to legislate because, under the Saving to Suitors clause, the courts of each state could hear cases arising under the general maritime law and apply new remedies; hence there was no reason why the legislatures could not act. He suggested that the problem was similar to that in the conflicts of law where the law of one jurisdiction created rights and the courts of another jurisdiction

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42 207 U.S. 398 (1907).
43 210 U.S. 95 (1908).
44 189 U.S. 158 (1903).
45 39 & 40 Vict. L.R. ch. 80, § 5.
46 328 U.S. 85 (1946).
47 207 U.S. 398 (1907).
48 210 U.S. 95 (1908).
enforced them in its own courts. After citing *Slater v. Mexican National R.R.*, and saying that the state law imposed an obligation on *The Hamilton*, he said: "Courts constantly enforce rights arising from and depending upon other laws than those governing the local transactions of the jurisdiction in which they sit..." The Court also pointed out that the Congress had not acted in this field.

The following year Mr. Justice Waite, writing for a unanimous Court, again said that there could be no recovery for injuries resulting in death under the admiralty law. Since the vessel allegedly at fault was owned by a French corporation and the accident occurred 60 miles from shore, there was no basis for applying the law of any state. Nevertheless, the Court allowed recovery by looking to the law of France, which provided a recovery for wrongful death although such law was not to be considered in determining the standard for assessing fault.

The result in each case is consistent; each looks to a body of law other than admiralty law upon which to base relief for wrongful death. They are also consistent in adhering to the view that the Supreme Court cannot legislate by judicial fiat in creating new causes of action or principles in admiralty. But both decisions are inconsistent with the implicit assumption in *The Osceola* that the American courts could fashion the rule in respect to unseaworthiness by their own action.

Starting in 1917, Mr. Justice McReynolds wrote the prevailing opinion for the Court in a series of cases, which established that the Congress and the Supreme Court were supreme in the area of admiralty law, and that the states had almost no power to legislate or create new remedies so far as the law of admiralty was concerned.

The dependents of stevedore Jensen, by recovering an award under the New York Workmen's Compensation Act for his death — the result of an accident which occurred while he was unloading a vessel in the Port of New York — brought about the first decision. The Southern Pacific Company, a Kentucky corporation, appealed the award to the United States Supreme Court on the grounds that the state of New York had no power to impose its legislation on foreign vessels coming into New York. Mr. Justice McReynolds, speaking for the Court, reversed the award.

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51 194 U.S. 120 (1904). The analogy to the realm of the conflicts of law is not appropriate. The Supreme Court is the final arbiter in all cases arising under the general maritime law. If a state court reaches a result not consistent with the Supreme Court's view there is an appeal to the Supreme Court, and the decision may be reversed. See Garrett v. Moore-McCormack, 317 U.S. 239 (1942).

52 207 U.S. 398, 406 (1907).

53 *La Bourgogne*, 210 U.S. 95 (1908). In this decision it is obvious that the Saving to Suitors clause of § 9 of the Judiciary Act of 1789 could and did have no part. Despite Mr. Justice Holmes' dissenting remarks about the common law in *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917), it is submitted that the Court in this case was applying its own concepts of the general maritime law.


55 244 U.S. 205 (1917).
The majority held that under Art. III, §2 of the Constitution the United States was given jurisdiction over maritime and admiralty matters, and that under Art. I, §8 of the Constitution the Congress had authority to pass all legislation necessary and proper to provide a uniform body of maritime and admiralty law. The Court stated that if New York were allowed to apply its law, "the necessary consequence would be the destruction of the very uniformity in respect of maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded. . . ." 56

Justices Holmes and Pitney entered vigorous, separate dissenting opinions. Mr. Justice Holmes referred to state statutes regulating pilotage fees, establishing materialmen's liens, and establishing causes of action for injuries resulting in wrongful death. He further stated that the states had and could develop the admiralty law by developing the common law, both judicially and legislatively, under the Saving to Suitors clause. He said:

> The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified. . . . It always is the law of some state, and if the district courts adopt the common law of torts, as they have shown a tendency to do, they thereby assume that a law not of maritime origin and deriving its authority in that territory only from some particular state of this Union also governs maritime torts in that territory—and if the common law, the statute law has at least equal force, as the discussion in *The Osceola* assumes. . . ." 57

Mr. Justice Pitney in his dissent reviewed at length the history of the admiralty law. He found that the framers of the Constitution had not intended that there was to be an absolute uniform body of admiralty law. On the contrary, the states were to have a concurrent jurisdiction to act at least until the Congress had passed legislation. In *Chelentis*, 58 Mr. Justice McReynolds again wrote the prevailing opinion. He affirmed the dismissal of an action for full indemnity on the grounds of negligence by a seaman who had suffered a broken leg as the result of an improvident order of the master of the vessel. It was said that in an action against the owner of the vessel, admiralty did not recognize an action for negligence but only for maintenance and cure and unseaworthiness. Recognizing that the Congress might have changed the law so far as masters were concerned, the majority adhered to its view that

> . . . no state has power to abolish the well recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law. Such a substitution would distinctly and definitely change or add to the settled maritime law; and it would be destructive of the uniformity and consistency at which the Constitution aimed. 59

> . . . we think, under the saving clause, a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but . . . the defendant's liability shall

56 Id. at 236.
57 Id. at 222.
59 Id. at 382.
be measured by common law standards rather than those of the maritime law.  

Again in *Stewart*, Mr. Justice McReynolds was to write the prevailing opinion. He again reversed an award to the dependents of a deceased harbor worker under the New York Workmen's Compensation Law, even though Congress had passed a statute permitting the states to apply workmen's compensation acts in such situations. The majority opinion said:

> The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters, within the admiralty and maritime jurisdiction. Moreover, it took from the states all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. . . .

During this period the Congress was not idle. It responded to the work of the Supreme Court. It adopted legislation affording a remedy for seamen injured as the result of negligence and recognizing a cause of action in admiralty for wrongful death on the high seas. Thus, it would seem that when the Supreme Court has asserted the power of the federal government to act, and the need was demonstrated, Congress has acted in a way which encouraged uniform admiralty development in all ports and areas.

Mr. Justice McReynolds subsequently demonstrated that a millennium had not been reached. In *Western Fuel Co. v. Garcia*, he again wrote the opinion for the Court and denied recovery to the dependents of a decedent stevedore who had instituted suit under the California wrongful death statute on the grounds that negligence had caused the decedent's death. This time his decision was not on the ground that state law was inapplicable but that it was applicable. The majority willingly accepted the provision that the Congress had inserted in the Death on the High Seas Act - i.e., its application was not to extend to those waters within the territorial limits of a state or of the Great Lakes.

This holding seems inconsistent with the Supreme Court's decisions in *Jensen* and *Stewart*. But the Court said that the subject is maritime and local in character . . . [and] will not work material prejudice to the characteristic features of the general maritime law nor interfere with the proper harmony and uniformity of that law. . . .

60 Id. at 384.
62 Id. at 160.
64 The Congress acted quickly to reverse the decision in *International Stevedore Co. v. Haverty*, 272 U.S. 50 (1926), that stevedores were seamen under the Jones Act. Then Congress passed the Longshoremen's and Harbor Workers' Act, 44 Stat. 1424 (1927), 33 U.S.C. § 903 (1959). Congress thereby expressed its desire to have a uniform compensation act apply.
65 257 U.S. 233 (1921).
66 Id. at 242.
To review the Supreme Court's subsequent retreat from the position developed by Mr. Justice McReynolds is beyond the scope of this article. It is sufficient for our purposes to note that the retreat occurred. If the Supreme Court and Mr. Justice McReynolds had adhered to the views expressed in Jensen, Chelentis and Stewart, the result in Garcia would have been different and we might today have an act of Congress which would apply uniformly in all wrongful death actions, both as to questions of substantive right and questions of available defenses. Whether the Supreme Court would have applied such legislation in such a manner as to produce the results dictated is problematic.

The Supreme Court has demonstrated in recent years that, except in the case of actions for wrongful death, it has power to create new causes of action and is willing to use that power in developing the general maritime law. In Seas Shipping Co. v. Sieracki, an independent stevedoring company employed one Sieracki to help load the S.S. Robin Hood. Sieracki was injured when a boom shackle broke and a freight car was dropped on him. After receiving longshoremen's benefits from his employer, he sued the vessel and two corporations which had constructed the craft, basing his action on the grounds, (1) that the vessel was unseaworthy and, (2) on negligence, in that the iron in the shackle was improperly forged. A judgment was recovered by Sieracki against the shipbuilders but not against the vessel. The Supreme Court affirmed the reversal of the judgment for the shipowner by the Court of Appeals.

Mr. Justice Rutledge, writing for five members of the Court, held that the owner of the vessel was liable to Sieracki because it had a non-delegable duty to provide him with a seaworthy vessel. Neither the majority nor the dissenting opinion seems to have considered the Court's power to create a new cause of action in general maritime law.

The majority assumed that Sieracki was doing the traditional work of the ship's crew when he was helping to load the vessel. Mr. Justice Rutledge and the rest of the majority could see no reason why a person doing the work of a crewman should not have the same benefits under the warranty of seaworthiness. The fact that the warranty historically had been founded on contract with the shipowner was not material. The majority said that the real basis of imposing the liability was the owner's consent to have the work done. If the owner of a vessel incurred any additional expense, he should pass it on to the shipping industry generally. The majority further stated that the existence of the Longshoremen's and Harbor Workers' Act was no reason to deny this additional cause of action to stevedores.

Others have demonstrated that the majority's historical assumptions as to the work of the ship's crew, and as to the inability of vessels to pass on the added costs of such liability, were incorrect.

68 Ibid.
70 Tetreault, op. cit. supra note 69, at 416-18.
Chief Justice Stone dissented. He said there was no need, as a matter of policy, to extend the benefits of the warranty of seaworthiness to stevedores. The dissent expressed the view that the Longshoremens's and Harbor Workers' Act provided sufficient protection.

As the Chief Justice noted:

The Court has thus created a new right in maritime workers, not members of the crew of a vessel, which has not hitherto been recognized by the maritime law or by any statute. . . .

The decision in Sieracki, then, is significant, not merely because it extended the warranty of seaworthiness to stevedores, but because the Court made such extension unaided by legislation.

But Mr. Justice Black writing for the majority in Pope & Talbot v. Hawn, held that Sieracki did not preclude a recovery based upon negligence. The injury having occurred in Pennsylvania, the law of that state was sufficient to provide a basis for liability but was not sufficient to provide any defenses which were repugnant to admiralty concepts; i.e., contributory negligence could not be a bar to recovery. Mr. Justice Jackson dissented on the ground that the Longshoremens's and Harbor Workers' Act covered the situation. He further commented that even if Sieracki were right, it should not be applied, for Hawn was not doing the work of the ship's crew.

Once again the Court in essence concluded it had no power to legislate, but was willing to engage in the fiction of saying that the law of a state could be applied to provide not only a remedy but a right as well.

The Congress had to pass the Jones Act to permit members of a ship's crew to recover for negligence, the Death on the High Seas Act to permit recovery for wrongful death, and the Longshoremens's and Harbor Workers' Act ostensibly to insure recovery for ordinary accidents occurring to harbor workers. If in the instances of negligence and wrongful death, the Court did not have the power to grant relief, it is difficult to understand where the Court obtained the power to declare and develop the warranty of seaworthiness.

The rigid adherence of the Court to the concept that admiralty, without congressional action or without resort to state statutes, can afford no remedy for wrongful death, seems remarkable. Particularly anomalous is the application of state wrongful death acts almost all of which, including the statute of New Jersey which was before the Court in the Tungus and Halecki cases, have been determined to be within the jurisdiction of admiralty. Moreover, the view that no cause of action for wrongful death exists in admiralty, except as remedially supplemented by state or foreign law, is not only unrealistic, but in marked contrast to the attitude of the Court as to any other cause of action within the area of the jurisdiction conferred by Article III of the Constitution.

71 Seas Shipping Co. v. Sieracki, 328 U.S. 85, 103 (1945).
73 The singular result thus achieved, contrary as it is to the normal concepts of statutory construction, is perhaps no more bizarre than the action of the court in The Osceola, 189 U.S. 158 (1908), which regarded a cause of action for indemnity for unseaworthiness, afforded by the Merchant Shipping Act of 1876, 38 & 40 Vict. c. 80 § 5, as being an accepted principle of admiralty, despite the absence of legislation creating such a right. The result has been regarded by text writers as of dubious ancestry, GILMORE & BLACK, THE LAW OF ADMIRALTY 316 (1957), and was so recognized by the Court in United Pilots Assn. v. Halecki, 358 U.S. 613 (1959).
The problem of the source of law which the courts of the United States were to administer under the constitutional provision pertaining to admiralty and maritime jurisdiction, combined with the effect of the Saving to Suitors Clause, has been a fruitful source of scholarly research. The Court has never been reluctant to assert the supremacy of the admiralty jurisdiction in areas other than that of wrongful death, except in the turbulent waters created by its decision in the Jensen case.\textsuperscript{74}

In \textit{Workman v. New York City},\textsuperscript{75} admiralty principles governed the collision in territorial waters of the state of New York between a British vessel and a fire boat owned by the city of New York. In \textit{Garrett v. Moore-McCormack Co.},\textsuperscript{76} an action in a state court under the Jones Act, the admiralty concept of the evidence necessary to sustain a seaman's release was held to be controlling and beyond the reach of state substantive law. And at the same term of court at which the \textit{Tungus} and \textit{Halecki} cases were decided, a unanimous court determined, in \textit{Kemarec v. Compagnie Generale Transatlantique},\textsuperscript{77} a diversity of citizenship case, that in an action against a shipowner based upon unseaworthiness of the vessel and the negligence of its crew, it was error to regard the substantive law of the state of New York as controlling the status of the plaintiff to maintain the negligence action.

There is no conceptual basis for a distinction in the source of law applicable to a maritime cause of action dependent upon whether injuries do or do not result in death.\textsuperscript{78}

It was determined long ago that the Saving to Suitors clause could not constitutionally afford a remedy in a state court in an \textit{in rem} proceeding,\textsuperscript{79} the theory being that such a proceeding was unknown to the common law and hence not within the competence of the state courts to provide. It is surprising that a cause of action for wrongful death, which was unknown to the common law, must be regarded not only as one which can be afforded by a state court but indeed one whose existence and scope is determined by the substantive law of the state and beyond the power of the court of admiralty to reach, except as the admiralty law is remedially supplemented by the divergent principles adopted by the courts of the 50 sovereign states.\textsuperscript{80}

In other aspects of maritime causes of action, the Court has not been slow to adopt new approaches and to extend to new areas principles of relatively

\textsuperscript{74} Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917). The navigational hazards of attempting to follow the course there charted were demonstrated in Hawn v. Ross Island Sand and Gravel Co., 358 U.S. 272 (1959): an employer who had not insured himself under the Oregon Workmen's Compensation Act there was held liable in an action for damages in a state court—even though he had obtained insurance under the Longshoremen's and Harbor Workers' Compensation Act, and even though the employee involved had been injured, aboard ship, while dredging sand and gravel in a lagoon which opened upon a navigable river.

\textsuperscript{75} 179 U.S. 552 (1900).

\textsuperscript{76} 317 U.S. 239 (1942).

\textsuperscript{77} 358 U.S. 625 (1959).

\textsuperscript{78} See Note, 108 U. Pa. L. Rev. 899, 905-06 (1960).

\textsuperscript{79} The Moses Taylor, 71 U.S. (4 Wall.) 411 (1866); The Hine v. Trevor, 71 U.S. (4 Wall.) 555 (1866).

\textsuperscript{80} The state wrongful death statutes are collected in 6A \textsc{Knauth, Benedict on Admiralty} 849-1278 (7th ed. 1958).
narrow original application. Thus, the maritime doctrine of unseaworthiness, first enunciated in *dicta* in *The Osceola,* was extended by repeated decisions to create an entirely new concept of remedies available to longshoremen and other shoreside workers with the consequent alteration of the basic responsibility of shipowners and stevedore employers. After the articulation of the doctrine of responsibility of a shipowner for unseaworthiness in *Seas Shipping v. Sieracki* and later cases, the relative duties and responsibilities imposed upon a shipowner and a stevedore employer were reconstituted so as to render the immunity of a stevedore employer to its employees—other than within the framework of the Longshoremen’s and Harbor Workers’ Act—completely unrecognizable.

It was held in *Ryan Co. v. Pan Atlantic Corp.* that a vessel which was cast in damages for being unseaworthy could recover against a stevedore employer in indemnity on a breach of an implied undertaking in the contract to stevedore. The doctrine was even further extended, to reach a similar result, when the contract to stevedore was not made with the owner of the vessel but with a time charterer; the theory was that the vessel was the third party beneficiary of the contract.

It seems evident then that the Court, for reasons not always articulated, has not been reluctant to formulate new concepts of liability in maritime matters. The uncertainty consequent upon the disparate views of the members of the Court in the four principal cases here discussed suggests the applicability of the observation originally made concerning the *Jensen* line of cases: The primary uniformity thus achieved was that of resultant unpredictability.

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81 189 U.S. 158 (1903).
82 328 U.S. 85 (1946).
84 In Sen. R. 973, 69th Cong., 1st Sess. 16 (1926), the following comment appears: Sections (4), (5) and (6) of the bill contain the appropriate provisions for making certain that the compensation will be paid, abolishing liability on the part of the employer except for the payment of the prescribed compensation, and fixing the time at which compensation begins. (Emphasis added.)
86 358 U.S. 423 (1959). The circumstances under which a stevedore company is liable in indemnity to a vessel when no contract exists apparently have not been identified. See King v. Waterman Steamship Corp., 272 F.2d 823 (3d Cir. 1959), *cert. granted sub nom.* Waterman Steamship Corp. v. Dugan & McNamara, Inc., 362 U.S. 926 (1960). Nor has the confusion in the area of responsibility for a vessel in unseaworthiness been confined to the resolution of responsibility as between the vessel and the stevedore employer. The so-called control test and the admiralty doctrine of contribution have been resorted to by a vessel to escape the harsh liability imposed upon it by reason of unseaworthiness, but these devices are no longer available to escape the responsibility of a beneficiary of the concepts. A vessel is no longer able to escape liability to a person injured if its unseaworthiness results from the fault of persons other than the vessel or its crew. Petterson v. Alaska S. S. Co., 205 F.2d 478 (9th Cir. 1953), *aff’d per curiam,* 347 U.S. 396 (1956); Feinman v. A. H. Bull S. S. Co., 216 F.2d 393 (3d Cir. 1954). To accomplish a similar result, the admiralty doctrine of contribution in collision cases was used to limit the pecuniary responsibility of the vessel, but that device was held inapplicable to non-collision cases and contribution denied when both the vessel and others were guilty of negligence. *Halcyon Lines v. Haenn Ship Corp.*, 342 U.S. 282 (1952). Some limitations on the doctrine of unseaworthiness have become evident in the most recent decisions of the Court. See *West v. United States*, 361 U.S. 118 (1960), and *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 339 (1960).
87 Tetreault, *op. cit. supra* note 69, at 406.
The uniformity which has always been regarded as necessary to admiralty and maritime jurisdiction, which had its origin in the judicial article of the Constitution, manifestly cannot be altered by the Saving to Suitors clause, or the Death on the High Seas Act. That the motivation for the passage of the Death on the High Seas Act was to promote uniformity in maritime matters and to eliminate the divergent application of state laws to causes of action in matters maritime is abundantly manifest.

The present dilemma could be remedied by congressional action. It could, as well, be eliminated by judicial action, since the problem presented is one largely of the Court's own making. The varied remedies now afforded maritime workers create such a complex of diverse substantive rights, procedural problems and available defenses, that the area is one which would suggest definitive legislation to establish some degree of predictability in a vastly confusing and confused field.

The view which makes admiralty courts depend upon the interpretation of divergent substantive law, so that there is a difference between legal result when an injured seaman falls in Boston and when he falls in Jersey City, and when his fall kills, rather than injures him, seems hardly in accordance with the uniformity essential in admiralty and maritime matters.

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88 This is not the only possible solution. For a different approach, see Kolius and Cecil, Maritime Torts Resulting In Death In State Territorial Waters: The Skovgaard and Halecki Cases, 26 INS. COUNSEL J. 567 (1959). See also Note, 46 VA. L. Rev. 775 (1960); and Note, 34 Tul. L. Rev. 179 (1959).

89 The conflicting concepts regarding jury trial in actions on the law side of the court as opposed to the admiralty side, election of remedies between the Jones Act and actions of indemnity for unseaworthiness, are illustrative of additional areas of uncertainty. Romero v. International Terminal Co., 358 U.S. 354 (1959); Doucette v. Vincent, 194 F.2d 834 (1st Cir. 1952); Jordine v. Walling, 185 F.2d 662 (3d Cir. 1950). See also Note, 73 Harv. L. Rev. 126, 138-57 (1959); and Comment, 34 Notre Dame Lawyer 576 (1959).