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## Admiralty - Wrongful Death Statutes - Use of State Law

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## RECENT DECISIONS

ADMIRALTY—WRONGFUL DEATH STATUTES—USE OF STATE LAW—Petitioner's decedent, a carpenter, was employed by a contractor hired to repair the Bonneville Dam, which is owned and operated by the United States. During the course of his employment, decedent was drowned when the boat he was in capsized in the water below the dam. Petitioner sued the United States in federal district court under the Federal Tort Claims Act,<sup>1</sup> alleging that the accident was caused by the negligence of employees of the United States who were operating the dam. The claim was based on the Oregon Wrongful Death Statute<sup>2</sup> and on the Oregon Employer's Liability Law, which, in certain circumstances, permits recovery for death if defendant employer did not "use every device, care and precaution which it is practicable to use for the protection and safety of life and limb."<sup>3</sup> The district court held there was no negligence, and therefore no liability under the Wrongful Death Statute, and that the Employer's Liability Law did not apply because the use of the high standard of care established by the law would be unconstitutional. The court of appeals affirmed on the ground that there had not been any negligence and that the Employer's Liability Law "could not be constitutionally applied to this case."<sup>4</sup> On certiorari to the Supreme Court of the United States, *held*, reversed and remanded, two justices dissenting.<sup>5</sup> When courts applying maritime law adopt state wrongful death statutes, state substantive law is followed, even when the state standard of care is higher than the duty imposed by maritime law. *Hess v. United States*, 361 U.S. 314 (1960).

The Supreme Court in *The Harrisburg*,<sup>6</sup> which overruled a number of lower court decisions,<sup>7</sup> held that general maritime law gave no action for wrongful death, but indicated such actions would be allowed in admiralty if based upon statute.<sup>8</sup> Subsequent cases approved the use of state wrongful death statutes, where applicable, to escape the harsh general maritime law doctrine.<sup>9</sup> Federal legislation providing remedies for wrongful death has diminished the need for applying state statutes,<sup>10</sup> but they are still used

<sup>1</sup> 28 U.S.C. (1958) §§1346 (b), 2674.

<sup>2</sup> Ore. Rev. Stat. (1953) §30.020.

<sup>3</sup> Ore. Rev. Stat. (1953) §§654.305-654.335.

<sup>4</sup> *Hess v. United States*, (9th Cir. 1958) 259 F. (2d) 285 at 292, cert. granted 359 U.S. 923 (1959).

<sup>5</sup> Justices Harlan and Frankfurter. See note 20 *infra*.

<sup>6</sup> 119 U.S. 199 (1886).

<sup>7</sup> *The Sea Gull*, (C.C. Md. 1865) 21 Fed. Cas. 909 at 910, No. 12,578. See *Cutting v. Seabury*, (D.C. Mass. 1860) 6 Fed. Cas. 1083 at 1084, No. 3521 (dictum).

<sup>8</sup> *The Harrisburg*, note 6 *supra*, at 213.

<sup>9</sup> E.g., *Western Fuel Co. v. Garcia*, 257 U.S. 233 at 242 (1921); *The Hamilton*, 207 U.S. 398 at 406 (1907).

<sup>10</sup> The Death on the High Seas Act, 41 Stat. 537 (1920), 46 U.S.C. (1958) §761 provides a remedy for wrongful death but only if it occurs more than one marine league from shore; The Merchant Marine Act of 1920 (Jones Act), 41 Stat. 1007 (1920), 46 U.S.C. (1958) §688 allows a recovery for the wrongful death only if the decedent was a "seaman" in the course of his employment.

in areas where federal law does not apply. Courts applying state wrongful death statutes have generally assumed that they create a new right of action for the maritime tort, a right rooted in state rather than maritime law,<sup>11</sup> and that in these instances state substantive law controls. This assumption was recently confirmed in *The Tungus v. Skovgaard*,<sup>12</sup> where the Court held that a state wrongful death statute<sup>13</sup> could give a remedy based on unseaworthiness only if the state statute was interpreted, as a matter of state law, to embrace such a claim. The statute there involved was so construed, although it imposed a duty of care in terms of ordinary common law negligence.<sup>14</sup> The principal case follows *The Tungus* doctrine by requiring the application of state substantive law. However, unlike the situation in *The Tungus*, the duty of care imposed by the state law in the principal case was higher than that found in maritime law and, to this extent, the principal case represents an extension of that doctrine. In decisions prior to *The Tungus*, a minority of courts interpreted state wrongful death statutes to provide only a remedy,<sup>15</sup> and applied maritime substantive law under these statutes. This interpretation rested largely on the ground that the duty of care imposed by maritime law was a traditional maritime right, of which a person could not be deprived. This view was rejected in *The Tungus* in favor of the application of state substantive law. However, upon comparison with *The Tungus* doctrine and its inherent difficulties, it would seem that the rejected view is supported by the more persuasive reasoning. Courts following the reasoning in both *The Tungus* and the principal case would appear to be required to apply the state standard of care regardless of whether it imposes a greater or lesser duty than that imposed by maritime law.<sup>16</sup> The application of a lower state standard of care was avoided in *The Tungus* by interpreting the state wrongful death statute to incorporate the higher maritime standard of care.<sup>17</sup> Other courts, however, have refused to use this fiction of incorpora-

<sup>11</sup> *The H.S., Inc.*, No. 72, (3d Cir. 1942) 130 F. (2d) 341 at 343; *Klingseisen v. Costanzo Transportation Co.*, (3d Cir. 1939) 101 F. (2d) 902 at 903. See *Pym v. The Great Northern Ry. Co.*, 4 B. & S. 396, 122 Eng. Rep. 509 (1863).

<sup>12</sup> 358 U.S. 588 (1959).

<sup>13</sup> N.J. Stat. Ann. (1952) §2A:31-1.

<sup>14</sup> The New Jersey act was patterned after the original Lord Campbell's Act, 9 & 10 Vict., c. 93 (1846).

<sup>15</sup> *O'Leary v. United States Lines Co.*, (1st Cir. 1954) 215 F. (2d) 708 at 711 (dictum); *Pope & Talbot v. Hawn*, 346 U.S. 406 at 409 (1953) (dictum); *Riley v. Agwilines, Inc.*, 296 N.Y. 402 at 405, 73 N.E. (2d) 718 (1947). See also Wardner, "Enforcement of a Right of Action Acquired Under Foreign Law for Death Upon the High Seas," 21 HARV. L. REV. 75 at 79 (1907). For discussion of the meaning of the dictum in *Pope & Talbot v. Hawn*, see Kolius and Cecil, "Maritime Torts Resulting in Death in State Territorial Waters: The Skovgaard and Halecki Cases," 26 INS. COUNSEL J. 567 at 579 (1959); note, 34 TULANE L. REV. 181 at 182 (1959).

<sup>16</sup> See *Babin v. Lykes Bros. Steamship Co.*, (La. App. 1957) 94 S. (2d) 715 at 716 (1957); *Graham v. Lusi*, (5th Cir. 1953) 206 F. (2d) 223 at 225. But see note 20 infra.

<sup>17</sup> In *The Tungus v. Skovgaard*, note 12 supra, the Supreme Court accepted the court of appeals' interpretation of the New Jersey wrongful death statute. See note, 45 VA. L. REV. 1222 at 1223 (1959); Kolius and Cecil, "Maritime Torts Resulting in Death in State Territorial Waters: The Skovgaard and Halecki Cases," 26 INS. COUNSEL J. 567 (1959).

tion because it cannot be justified by the language in the wrongful death statute.<sup>18</sup> The problem of avoiding the application of a lower state standard of care would never arise if the view rejected in *The Tungus* were used by the courts. Under such a view, maritime law would be applied in every case and the normally higher duty of care<sup>19</sup> imposed by this law would result in greater protection for the individual. Only in rare instances, as the principal case where the state statute requires an abnormally high standard of care, would there be an exception.<sup>20</sup>

Moreover, the use of state wrongful death statutes substantively has created an indefensible anomaly in the law.<sup>21</sup> In an area where state wrongful death statutes are used, recovery may turn on whether or not the injury is fatal. If fatal, state law applies, for the action will arise under the wrongful death statute; while if non-fatal, maritime law controls, since it affords a tort remedy.<sup>22</sup> The ludicrousness of this situation is magnified when a wrongful death action and survival action are brought based on the same accident. For example, assume the decedent has been contributorily negligent. Since a state survival statute supplies only the remedy,<sup>23</sup> maritime law with its comparative negligence rule applies, and there might still be a recovery. However, since a wrongful death statute creates a new right under state substantive law, contributory negligence would be an absolute bar to any recovery.<sup>24</sup> This anomaly can also be avoided by following the view rejected in *The Tungus*, as in all situations the substantive maritime law would control. Finally, it should be noted that the use of the different substantive law of each state under the view in the principal case may, in certain situations, violate the constitutional requirement of uniformity in maritime law.<sup>25</sup> The Court in the principal case recognized this danger by leaving "... open the question whether a state wrongful death action might contain provisions so offensive to traditional principles of maritime law

<sup>18</sup> E.g., *Graham v. Lusi*, note 16 supra, at 225.

<sup>19</sup> *The Max Morris*, 137 U.S. 1 at 8 (1890) (comparative negligence in maritime law); *The Arizona v. Anelich*, 298 U.S. 110 at 122 (1936) (admiralty does not recognize assumption of risk as a bar to recovery); *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 at 105 (1944) (unseaworthiness doctrine puts an absolute duty on owner to supply a seaworthy ship). One reason for the greater protection of maritime law is its traditional ability to do what is "fair and just": *The Sea Gull*, note 7 supra, at 910; *Pope & Talbot v. Hawn*, note 15 supra, at 409. See Hough, "Admiralty Jurisdiction—Of Late Years," 37 HARV. L. REV. 529 at 529 (1924).

<sup>20</sup> In the principal case Justice Harlan, joined by Justice Frankfurter, dissented on the ground that the federal supremacy principle is violated when the states create a higher standard of duty than maritime law would require. Under this view it would be correct to apply state law as long as it affords no greater protection than maritime law. This result appears contrary to the traditional policies of admiralty discussed in note 19 supra.

<sup>21</sup> But see *O'Leary v. United States Lines*, note 15 supra, at 714 (dissent).

<sup>22</sup> *Graham v. Lusi*, note 16 supra, at 225.

<sup>23</sup> *Just v. Chambers*, 312 U.S. 383 at 392 (1940).

<sup>24</sup> *Byrd v. Napoleon Ave. Ferry Co.*, (E.D. La. 1954) 125 F. Supp. 573 at 578, affd. per curiam (5th Cir. 1955) 227 F. (2d) 958, cert. den. 351 U.S. 925 (1956).

<sup>25</sup> *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917) established the uniformity doctrine but said state wrongful death statutes were an exception. The *Jensen* doctrine is discussed in GILMORE AND BLACK, ADMIRALTY 333 et seq. (1957).

that the admiralty would decline to enforce them.”<sup>26</sup> Under the view that state wrongful death statutes furnish only a remedy to enforce maritime substantive law, there would be no interference with the uniformity doctrine. One solution to the foregoing difficulties is simply to adopt the “remedy” view of state wrongful death statutes, overruling *The Tungus* and all cases based on it, including the principal case.<sup>27</sup> However, the obvious, and perhaps ultimately necessary, alternative solution is congressional legislation extending a wrongful death action to all situations where maritime law is applied, thus avoiding the problems created by the adoption of state statutes. Although Congress has been reluctant to act in this area in the past, the decision in the principal case may well provide sufficient impetus for the needed legislation.

*Louis Frey*

<sup>26</sup> Principal case at 320.

<sup>27</sup> It should be noted that three justices in the majority of *The Tungus* decision are in the dissent in the principal case, and four justices join in the opinion of the Court in the principal case solely because of *The Tungus*, but reserve the right to overrule it; thus only two justices are in favor of this line of reasoning. Moreover, it has been suggested that *The Harrisburg* be overruled as the Court based its decision on English law which has since allowed a wrongful death action in maritime cases. 23 HALSBURY'S LAWS OF ENGLAND, 2d ed., §979 (1936). Some writers have suggested the wrongful death action is today part of our general law and not merely statutory. See note, 13 N.A.C.C.A. L.J. 186 at 189 (1954); Wardner, "Enforcement of a Right of Action Acquired Under Foreign Law