Michigan Law Review

Volume 70 | Issue 4

1972

Admiralty--Torts--Recovery Permitted for Mental Suffering of Surviving Spouse in Death Action Under General Maritime Law--*In re Sincere Navigation Corp.*

Michigan Law Review

ADMIRALTY—TORTS—Recovery Permitted for Mental Suffering of Surviving Spouse in Death Action Under General Maritime Law—*In re Sincere Navigation Corp.**

A recent federal district court decision, *In re Sincere Navigation Corp.*,[1] allowed recovery for the emotional distress of the spouse and the children of a seaman killed in a collision on the Mississippi River within the territorial waters of Louisiana. The action for wrongful death was brought under general maritime law through a new federal remedy first announced in *Moragne v. States Marine Lines, Inc.*[2] *Moragne* did not specifically enumerate the elements of damage for which recovery would be allowed; instead it left the question open for consideration in later decisions.[3] Whether any recovery was permitted under general maritime law for mental pain and suffering alleged by the surviving spouse or parent of a seaman was the question presented in *Sincere*. It is submitted that the court acted unwisely in answering this question affirmatively; that awards for mental suffering were not contemplated by *Moragne*; and that such awards will frustrate the development of a uniform federal recovery for death on navigable waters.

For nearly a century and a half American seamen have been entitled to maintenance and cure, a right which includes medical care and sustenance for any illness or injury occurring while in the service of a ship.[4] The award is available without a finding of fault, and is made for sickness or injuries regardless of whether they arise out of or are causally connected with the seaman's job.[5] The award, however, is not a completely compensatory remedy. It provides only for payment of the seaman's lost wages and out-of-pocket expenses while he recovers.[6]

---

* 329 F. Supp. 653 (E.D. La. 1971).

1. 329 F. Supp. 653 (E.D. La. 1971).

2. 398 U.S. 375 (1970), *overruling* The Harrisburg, 119 U.S. 199 (1886) (no wrongful death action in general maritime law).

3. 398 U.S. at 408.

4. H. BAER, ADMIRALTY LAW OF THE SUPREME COURT § 1-1, at 1 (2d ed. 1969); G. GILMORE & C. BLACK, JR., THE LAW OF ADMIRALTY § 6-6, at 253 (1957). The first case to recognize this right was Harden v. Gorden, 11 F. Cas. 480 (No. 6,047) (C.C.D. Me. 1823). *See* G. GILMORE & C. BLACK, *supra*.

5. Warren v. United States, 340 U.S. 523 (1951) (award to seaman injured in dance hall while drunk); Farrell v. United States, 336 U.S. 511 (1949) (award to seaman injured through his own negligence while overstaying his shore leave); Waterman S.S. Corp. v. Jones, 318 U.S. 724 (1943) (award to seaman injured on authorized shore leave not connected with ship's business); Calmar S.S. Corp. v. Taylor, 303 U.S. 525 (1938) (seaman suffering from Buerger's disease entitled to award because he became incapacitated while a member of crew). *See generally* H. BAER, *supra* note 4, at 1-13; G. GILMORE & C. BLACK, *supra* note 4, at 253-61.

6. The amount paid for maintenance is based on the amount he is entitled to while at sea. Calmar S.S. Corp. v. Taylor, 303 U.S. 525 (1938). Cure represents payment for medical expenses. The award for maintenance and cure is separate from the injured

In the *Osceola*,[7] a 1903 case, the Supreme Court opened another avenue of recovery to an injured seaman by announcing the duty of "seaworthiness." As originally stated this doctrine permitted seamen to recover from the shipowner when injuries were caused by the "unseaworthiness of the ship or a failure to supply and keep in order the proper appliances appurtenant to the ship."[8] It has today evolved into a concept of absolute liability[9] both for purely structural infirmities[10] and for shipboard operations that cause harm because of unsound practices[11] or defective equipment.[12]

The Court had held in 1886, in *The Harrisburg*,[13] that general maritime law would not afford an action for wrongful death.[14] The distinction between injury, for which the seaman could recover under unseaworthiness, and death, for which no recovery was permitted, survived in general maritime law until *Moragne*. Chief Justice Waite had, however, left a small loophole in *The Harrisburg*'s otherwise blanket denial of wrongful death recovery when he stated that "no action at law can be maintained for such a wrong in the absence of a statute giving the right . . . ."[15] This language was used by the Court in *The Hamilton*[16] to allow the application of the

---

seaman's wages, to which he is also entitled until the end of that voyage. The Osceola, 189 U.S. 158, 175 (1903).

7. 189 U.S. 158 (1903).

8. 189 U.S. at 175.

9. *See* Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) (rejecting independent contractor defense); Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944) (rejecting fellow servant defense); Rich v. Ellerman & Bucknall S.S. Co., 278 F.2d 704 (2d Cir. 1960) (rejecting defense of lack of notice of defect); Van Carpels v. S.S. American Harvester, 297 F.2d 9 (2d Cir. 1961), *cert. denied*, 369 U.S. 865 (1962) (rejecting defense of act of God); West v. United States, 256 F.2d 671 (3d Cir. 1958), *aff'd.*, 361 U.S. 118 (1959) (rejecting defense of due diligence); Lahde v. Soc. Armodora Del Norte, 220 F.2d 357 (9th Cir.), *cert. denied*, 350 U.S. 825 (1955) (rejecting defense of lack of knowledge).

10. *See, e.g.*, Wiel & Amundsen A/S v. Potter, 228 F.2d 341 (9th Cir. 1955) (defective ship's railing); Gainer v. S.S. Longview Victory, 226 F. Supp. 912 (E.D. Va.), *aff'd. sub nom.* Thornton v. Victory Carriers, Inc., 338 F.2d 959 (4th Cir. 1964) (improper ventilation of hold).

11. Waldron v. Moore-McCormack Lines, Inc., 386 U.S. 724 (1967) (employment of too few crewmen to complete task safely); Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1959) (slime making railing temporarily slippery); Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336 (1955) (employment of seaman with savage and vicious nature); The Rolph, 299 F. 52 (9th Cir. 1924) (employment of brutal mate). *See also* Guiterrez v. Waterman S.S. Corp., 373 U.S. 206 (1963); Keen v. Overseas Tankship Corp., 194 F.2d 515 (2d Cir.), *cert. denied*, 343 U.S. 966 (1952).

12. *See, e.g.*, Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) (broken shackle); Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944) (parting of line).

13. 119 U.S. 199 (1886).

14. Prior to *The Harrisburg*, some lower courts had held that such a recovery did exist. *See, e.g.*, The Manhasset, 18 F. 918 (E.D. Va. 1884); The Sea Gull, 21 F. Cas. 909 (No. 12,578) (C.C.D. Md. 1865).

15. 119 U.S. at 213.

16. 207 U.S. 398 (1907).

Delaware wrongful death statute to grant recovery for a death that had occurred on the high seas.[17] More importantly, wrongful death statutes were later applied to permit recovery in state territorial waters.[18] Similarly, state statutes were applied to allow a remedy for the decedents' beneficiaries.[19] The over-all result was patchwork coverage, with the harsh common-law doctrine prevailing whenever a state had no death statute.[20]

In 1920 Congress passed two statutes of importance to injured seamen. The Jones Act[21] provides a negligence action in favor of a seaman's representatives if an injury results in death.[22] This wrongful death action is possible only if there are in existence the beneficiaries named under the Federal Employers Liability Act (FELA),[23] which is incorporated into the Jones Act. The Death on the High Seas Act (DOHSA)[24] gives a remedy in admiralty for death by any wrongful act, neglect, or default that occurs beyond a marine league from shore.[25] Protection under the Act is extended to survivors of all who perish at sea, not merely seamen but passengers as well.[26] This

17. 207 U.S. at 406. *The Hamilton* involved a state statute that apparently was intended to apply on the high seas. Because it was "generally understood" that state death statutes were not intended to apply on the high seas, the precise ruling in *The Hamilton* has had little lasting effect. *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 393 n.10 (1970).

The *Hamilton* Court also relied on the old maxim "the law follows the flag." 207 U.S. at 405. This doctrine is still relevant to choice of law problems in maritime cases. *See, e.g.*, Richards v. United States, 369 U.S. 1, 15 (1962); Romero v. International Terminal Operating Co., 358 U.S. 354, 383 (1958); Lauritzen v. Larsen, 345 U.S. 571 (1953). *See generally* G. GILMORE & C. BLACK, *supra* note 4, at 386-94; Currie, *The Choice Among State Laws in Maritime Death Cases*, 21 VAND. L. REV. 297 (1968); Note, *Admiralty Recovery Under the Jones Act for Foreign Seamen: The Demise of the Law of the Flag*, 49 N.C. L. REV. 320 (1971).

18. The Tungus v. Skovgaard, 358 U.S. 588 (1959); Western Fuel Co. v. Garcia, 257 U.S. 233 (1921).

19. United States v. The S.S. Washington, 172 F. Supp. 905 (E.D. Va.), *affd. sub nom.* United States v. Texas Co., 272 F.2d 711 (4th Cir. 1959); Petition of Gulf Oil Corp., 172 F. Supp. 911 (S.D.N.Y. 1959).

20. *See generally* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 393 (1970).

21. Act of June 5, 1920, ch. 250, 41 Stat. 988 (codified in scattered sections of 46 U.S.C.).

22. 46 U.S.C. § 688 (1970).

23. 45 U.S.C. § 51 (1970) [hereinafter FELA]. The Act establishes three mutually exclusive classes of beneficiaries: (1) the surviving spouse and children; (2) if none of class (1), the parents; and (3) if none of classes (1) or (2), the next of kin dependent upon the deceased. "And if the employee leaves no survivors in any of the classes of beneficiaries alternatively designated, it necessarily follows that the personal representative can not maintain any action to recover damages for the death, since there is no beneficiary in whose behalf such an action can be brought." Lindgren v. United States, 281 U.S. 38, 41 (1930).

24. Act of March 20, 1920, ch. 111, 41 Stat. 537, 46 U.S.C. §§ 761-68 (1970).

25. 46 U.S.C. § 761 (1970).

26. *See, e.g.*, National Airlines v. Stiles, 268 F.2d 400 (5th Cir.), *cert. denied*, 361 U.S. 885 (1959) (recovery by representatives of deceased airline passengers).

statute differs from the Jones Act in the standard of care,[27] statute of limitations,[28] and beneficiaries.[29] The internal differences in the statutory remedies[30] as well as the sporadic use of state law resulted in inconsistent coverage,[31] which permitted different awards to similar plaintiffs depending upon where they were injured. This situation compelled Supreme Court clarification in *Moragne*.

In *Moragne* a longshoreman was killed while working on board a vessel in navigable waters within the State of Florida.[32] His widow brought an action against the owner of the vessel in state court to recover damages for wrongful death. Her claims sounded both in unseaworthiness and negligence.[33] After removal of the case to federal district court on the basis of diversity of citizenship,[34] the owner moved for dismissal of the wrongful death claim, in so far as it was based on unseaworthiness, on the grounds that (1) general maritime law provided no remedy for wrongful death within territorial waters (*The Harrisburg*) and (2) unseaworthiness was not a basis for liability under the Florida Wrongful Death Act.[35] The district court dismissed that part of the complaint but made the necessary certification[36] to permit an appeal. The court of appeals affirmed the dismissal[37] after the Supreme Court of Florida answered a certified question to the effect that the Florida statute did not permit recovery based on unseaworthiness.[38] The United States Supreme Court reversed, overruling *The Harrisburg* and holding

27. Under FELA, the standard of care is "negligence" (45 U.S.C. § 51 (1970)), while under the DOHSA, liability is imposed for any "wrongful act, neglect, or default" (46 U.S.C. § 761 (1970)). The latter statute has been read to include an action for unseaworthiness; the former, to include only pure negligence actions. *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 395 (1970).

28. The DOHSA specifies a two-year period from the date of the wrongful act (46 U.S.C. § 763 (1970)), while the FELA allows three years from date of death (45 U.S.C. § 56 (1970)).

29. FELA beneficiaries are mutually exclusive (*see* note 23 *supra*); the class of DOHSA beneficiaries is significantly broader and is not composed of mutually exclusive groups. A seaman who dies on the high seas is covered by both the Jones Act and the DOHSA. The Four Sisters, 75 F. Supp. 399 (D. Mass. 1947) (recovery by a father under Jones Act did not bar a recovery by a sister of deceased under DOHSA).

30. For an excellent schematic breakdown of the various acts, see M. NORRIS, MARITIME PERSONAL INJURIES 340-44 (2d ed. 1966).

31. *See* note 43 *infra* and accompanying text. *See generally* Day, *Maritime Wrongful Death and Survival Recovery: The Need for Legislative Reform*, 64 COLUM. L. REV. 648 (1964); Note, *Judicial Expansion of Remedies for Wrongful Death in Admiralty: A Proposal*, 49 B.U. L. REV. 114 (1969).

32. 398 U.S. at 376.

33. *See* 398 U.S. at 376.

34. 398 U.S. at 376.

35. FLA. STAT. ANN. § 768.01 (1964).

36. 398 U.S. at 376. *See* 28 U.S.C. § 1292(b) (1970).

37. Moragne v. States Marine Lines, Inc., 409 F.2d 32 (5th Cir. 1969).

38. Moragne v. States Marine Lines, Inc., 211 S.2d 161 (Fla. 1968).

that a wrongful death action may be brought under general maritime law for violation of a maritime duty.[39]

An unanimous court, per Justice Harlan, attacked the holding of *The Harrisburg* as "somewhat dubious even when rendered."[40] Harlan examined the judicial and statutory developments in the law since the case was decided and concluded that these developments had so weakened the common-law rationale for the decision that it could no longer be considered valid.[41] Looking then to the federal enactments that provided wrongful death actions, the Court determined that they were not intended to be exhaustive or preclusive.[42] Indeed, the existence of these statutes, far from precluding recognition of a general maritime remedy, argued in its favor. Only by recognizing a general right to recover for wrongful death could interstices between the statutes be covered and disparities in treatment be amended.[43]

Justice Harlan articulated the main thrust of the decision when he said:

> 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. . . . Such uniformity not only will further the concerns of both of the 1920 acts but also will give effect to the constitutionally based principle that federal admiralty law should be a "system of law coextensive with and operating uniformly in, the whole country."[44]

The purpose of *Moragne,* therefore, was to make a uniform provision for recovery for any plaintiff who is injured or killed while at sea or employed as a seaman.

Traditionally, personal representatives of a deceased seaman have not been allowed a recovery for other than pecuniary losses[45] under

39. 398 U.S. at 409.

40. 398 U.S. at 378.

41. 398 U.S. at 388.

42. 398 U.S. at 402.

43. The disparities noted by the *Moragne* Court were (1) "that whenever the rule of *The Harrisburg* holds sway: within territorial waters, identical conduct violating federal law . . . [the theory of unseaworthiness] produces liability if the victim is merely injured, but frequently not if he is killed"; (2) "that identical breaches of the duty to provide a seaworthy ship, resulting in death, produce liability outside the three mile limit [under DOHSA] . . . but not within the territorial waters of a state whose local statute excludes unseaworthiness claims"; and (3) "that the true seaman, that is, a member of a ship's company, covered by the Jones Act—is provided no remedy for death caused by unseaworthiness within territorial waters, while a longshoreman . . . does have such a remedy when allowed by a state statute." 398 U.S. at 395-96.

44. 398 U.S. at 401-02, *quoting* The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1875).

45. As a general matter, the damage award in wrongful death actions is measured

the Jones Act[46] and the DOHSA.[47] The district court in *Sincere* recognized this fact,[48] although it conspicuously omitted reference to similar holdings under general maritime law.[49] Reading *Moragne* as "not so much reject[ing] the rationale of *The Harrisburg* as rely-[ing] on significant developments in the one hundred fifty years since,"[50] the court looked at the laws of the various states that permit nonpecuniary damages and found them to be "the most persuasive guides to decision."[51] Concluding that these "persuasive guides" pointed to recovery, the district court awarded damages for the surviving spouse's mental pain and suffering.[52] The decision seemed to turn on the unstated conclusion that *Moragne* was premised on state law developments other than the simple recognition of the propriety of a wrongful death action.[53] *Moragne* did look to state law developments in that they provided recovery for wrongful death, a fact that not only undercut the rationale of *The Harrisburg* but also created a situation in which diverse state laws were occupying a field abandoned by federal law.[54] It was the latter point in particular that concerned the *Moragne* Court. The cause of inconsistent recoveries for various plaintiffs was not so much the particularities of various state laws, but rather the total absence of a federal cause of action that necessitated the application of any state act.[55] The thrust of *Moragne* was to achieve uniformity by creating a general federal cause of action, obviating the *necessity* of recourse to *any* state statute.

---

by and limited to the pecuniary benefits that the beneficiaries might reasonably have expected to receive from the decedent. *See generally* W. PROSSER, THE LAW OF TORTS 905-10 (4th ed. 1971); Page, *"Pecuniary" Damages for Wrongful Death*, 1963 TRIAL LAW. GUIDE 398.

46. Michigan Cent. R.R. v. Vreeland, 227 U.S. 59 (1913) (FELA); Neal v. Saga Shipping Co., 407 F.2d 481 (5th Cir.), *cert. denied*, 395 U.S. 986 (1969); Petition of Marina Merchante Nicaraguense, 248 F. Supp. 15 (S.D.N.Y. 1965), *modified on other grounds*, 364 F.2d 118 (2d Cir. 1966), *cert. denied*, 385 U.S. 1005 (1967); Orona v. Isbrandtsen Co., 204 F. Supp. 777 (S.D.N.Y. 1962), *affd.*, 313 F.2d 241 (2d Cir. 1963).

47. The limitation to pecuniary damages is part of the statutory language of the DOHSA ("recovery in [a suit under the act] . . . shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought . . . ." 46 U.S.C. § 742 (1970)). *See, e.g.*, First Natl. Bank v. National Airlines, Inc., 288 F.2d 621 (2d Cir. 1961); National Airlines v. Stiles, 268 F.2d 400 (5th Cir.), *cert. denied*, 361 U.S. 885 (1959); Petition of Moore-McCormack Lines, Inc., 184 F. Supp. 585 (S.D.N.Y. 1960), *modified on other grounds*, 295 F.2d 583 (2d Cir. 1961), *cert. denied*, 368 U.S. 989 (1962).

48. *See* 329 F. Supp. at 655.

49. *See, e.g.*, Igneri v. Cie de Transports Oceaniques, 323 F.2d 257 (2d Cir. 1963), *cert. denied*, 376 U.S. 949 (1964); Simpson v. Knut Knutsen, O.A.S., 296 F. Supp. 1308 (N.D. Cal. 1969), *modified*, 444 F.2d 523 (9th Cir. 1971); Valitutto v. D/S I/D Garonne, 295 F. Supp. 764 (S.D.N.Y. 1969).

50. 329 F. Supp. at 657.

51. 329 F. Supp. at 656-57.

52. 329 F. Supp. at 661.

53. *See* 398 U.S. at 388-90.

54. *See* text accompanying notes 15-19 *supra*.

55. 398 U.S. at 401.

Other federal courts that have considered whether nonpecuniary damages could be awarded in the newly created general maritime wrongful death suit have read *Moragne* as clearly precluding any consideration of state statutes or case law and compelling the denial of recovery for nonpecuniary harm. In *Petition of United States Steel Corp.*,[56] the court denied recovery to five surviving widows for loss of consortium in actions brought under general maritime law. In so holding, the court of appeals construed *Moragne* to mean that "all facets of that right of recovery, including the measure of damages [are] to be governed by the principles of the general maritime law."[57] It is interesting to note that the court in *United States Steel* focused in part on the necessity for promoting a uniform and supreme federal maritime law.[58] In *Petition of Canal Barge Co.*,[59] recovery by a widow and her children was limited to pecuniary awards of the type previously recognized by federal decisions. The court said that to supplement the general maritime law by borrowing from state law in computing damages would present a "classic example of confusion" that could not be permitted in light of *Moragne*.[60]

On the other hand, the precise measure of damages to be awarded under the new federal remedy was not explicitly set forth in *Moragne*.[61] The Supreme Court in fact indicated that in determining damages "the courts will not be without persuasive analogy for guidance. Both the Death on the High Seas Act and the numerous state wrongful-death acts have been implemented with success for decades."[62] Thus, if one were not predisposed to read *Moragne* as absolutely compelling uniformity in damages, as were the courts in *United States Steel* and *Canal Barge*, there is, at least in dicta, support for the proposition that the *Sincere* court could examine state law. Yet the reference to state statutes is not an absolute mandate to consider or be bound by state law. It merely suggests an authority that could be consulted. Concerning other equally important questions, *Moragne* set out guidelines for the lower courts to use in filling out the new federal remedy. Questions were raised concerning the applicable statute of limitations and the identity of beneficiaries under the new right.[63] In reference to the former, the *Moragne* Court suggested that it might be feasible to adopt the general maritime doctrine of laches, reflected in the two-year pro-

56. 436 F.2d 1256 (6th Cir. 1970), *cert. denied*, 402 U.S. 987 (1971).
57. 436 F.2d at 1279.
58. 436 F.2d at 1279.
59. 323 F. Supp. 805 (N.D. Miss. 1971).
60. 323 F. Supp. at 821.
61. *See* 398 U.S. at 408.
62. 398 U.S. at 408.
63. *See* 398 U.S. at 406-08.

vision found in the DOHSA.[64] With respect to the latter, the Court indicated that the beneficiary provisions of the DOHSA might properly be applied since that Act relates to the death of "any person" rather than to a specific class of persons as does the Jones Act.[65] Thus, as to *these* two open questions, the Supreme Court specifically turned to the existing federal statutes for guidance and did not discuss the possibility of any reference to state law. The opinion as a whole seems to direct the attention of the lower court to *federal* sources.

The *Sincere* court specifically recognized *Moragne*'s goal when it stated: "This conclusion [in favor of a nonpecuniary award] may conflict with *Moragne*'s goal of uniformity of recovery for all who perish on navigable waters."[66] With the goal of ultimate uniformity in mind, the award of this element of damages seems particularly inappropriate. If every federal district court were to follow the law of the state in which it is sitting, the majority would not be in accord with *Sincere*. Damages for survivors' mental pain and suffering are permitted with sufficient specificity to provide a "guideline" favoring the award in only nine states,[67] and the desirability or propriety of such an award has long been debated.[68]

64. 398 U.S. at 406 (referring to 46 U.S.C. § 763 (1970)).

65. 398 U.S. at 407-08.

66. 329 F. Supp. at 657.

67. The states *clearly* allowing an award for beneficiaries' mental pain and suffering, either by statute or case law, are as follows: Arkansas (ARK. STAT. ANN. § 27-909 (1962) (recovery limited to immediate family or one in loco parentis)); Florida (FLA. STAT. ANN. § 768.03 (1964) (recovery limited to parents who lose minor child)); Kansas (KAN. STAT. ANN. § 60-1904 (1964)); Louisiana (Kaough v. Hadley, 165 S. 748 (La. App. 1936) (minor)); Palmer v. American Gen. Ins. Co., 126 S.2d 777 (La. App. 1960) (deceased child)); Maryland (MD. ANN. CODE art. 67, § 4 (1970) (for death of spouse or minor child)); South Carolina (Gomillion v. Forsythe, 218 S.C. 211, 62 S.E.2d 297 (1950)); South Dakota (Simons v. Kidd, 73 S.D. 306, 42 N.W.2d 307 (1950)); Virginia (Matthews v. Hicks, 197 Va. 112, 87 S.E.2d 629 (1955)); West Virginia (Lester v. Rose, 147 W. Va. 575, 130 S.E.2d 80 (1963)).

In addition to these clear authorities, there are peculiarities in other state laws that will permit recovery of some questionable "pecuniary" losses, often at the caprice of a jury. This is especially true of a wrongful death of a child. *See* Comment, *A Modern View of Wrongful Death Recoveries: Herein of the Infant and the Aged*, 54 NW. U. L. REV. 254 (1959). However, the important point is that the law *is* unclear and there *is* much debate. *See* note 68 *infra*. The statutes and cases noted above are the few that are sufficiently clear to be reasonably considered as "guidelines" permitting the recovery of the beneficiaries' mental pain and suffering in a wrongful death action. There is much commentary that attempts to digest the law of this area. *See, e.g.*, Page, *supra* note 45; Comment, *Recovery for Mental Anguish of Survivors in Wrongful Death Actions*, 18 ARK. L. REV. 161 (1964); Comment, *Wrongful Death Damages in North Carolina*, 44 N.C. L. REV. 402 (1966) (extensive review of all state law); Comment, 54 NW. U. L. REV. 254, *supra* (extensive review of all state law).

68. *See, e.g.*, Duffey, *The Maldistribution of Damages in Wrongful Death*, 19 OHIO ST. L.J. 264 (1958); Green, *Relational Interests*, 29 ILL. L. REV. 460 (1934); Meyer, *A New Death Act*, 43 DICK. L. REV. 83 (1939); Miller, *Dead Men in Torts: Lord Campbell's Act Was Not Enough*, 19 CATH. U. L. REV. 283 (1970); Oppenheim, *The Survival of Tort Actions and the Action for Wrongful Death—A Survey and a Proposal*, 16 TUL.

The award of nonpecuniary damages for the survivors' mental pain and suffering would make Justice Harlan's specific guidance logically inconsistent since the DOHSA will clearly not permit the award.[69] There is obviously some congressional design expressed by the wording of the DOHSA, and it should be accorded weight when seeking a uniform recovery under *Moragne*. The more reasonable way to read Harlan's guidance is to use state law to the extent that it is compatible with the federal statute.[70]

The use of state wrongful death law in admiralty cases has resulted in inconsistent recoveries. *Moragne* attempted to "bring more placid waters"[71] by recognizing a remedy for wrongful death under general maritime law. The award by the *Sincere* court did not further this goal of uniformity by taking an element of damages permitted by a small minority of states so early in the life of a new federal remedy. The court chose to disregard opposite authority that had been specifically suggested by the Supreme Court. By permitting such an award, the *Sincere* court has created a situation in which identical plaintiffs will receive different awards depending on where they bring their action or on whether they sue under general maritime law or one of the federal acts. This is precisely the problem the *Moragne* decision attempted to alleviate. Any departures from previous maritime law on damages should be left to the Supreme Court; in the interim, uniformity should prevail.

L. REV. 386 (1942); Schumacher, *Rights of Action Under Death and Survival Statutes*, 23 MICH. L. REV. 114 (1924); Comment, 18 ARK. L. REV. 161, *supra* note 67; Comment, 44 N.C. L. REV. 402, *supra* note 67; Comment, 54 NW. U. L. REV. 254, *supra* note 67; Note, *Death of the Head of the Family—Elements of Damages Under South Carolina's Lord Campbell's Act*, 19 S. CAR. L. REV. 220 (1967).

69. *See* note 47 *supra*.

70. There is an additional constitutional dimension to the question of uniformity in the admiralty area. As Justice Harlan noted in *Moragne* with his quote from *The Lottawanna* (*see* text accompanying note 44 *supra*), admiralty law is unique. Article III, § 2 of the Constitution specifically allocates admiralty jurisdiction to the federal courts ("The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction . . ."). The Supreme Court affirmed the principle of federal supremacy in admiralty in Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917). Justice Harlan's quotation from *The Lottawanna* as the capstone of his plea for uniformity suggests that the Court in *Moragne* was aware of the extra measure of force given their decision by the Constitution. When conflicts arise between general federal maritime law and local law, the local law must yield. *See, e.g.*, Kossick v. United Fruit Co., 365 U.S. 731 (1961); Romero v. International Terminal Operating Co., 358 U.S. 354 (1958); Pope & Talbot, Inc. v. Hawn, 346 U.S. 375 (1953); Panama R.R. v. Johnson, 264 U.S. 375 (1924); Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918); Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917).

71. 398 U.S. at 408.