Negligence-Based Claims Under General Maritime Law for Wrongful Death—Yea or Nay?

I. INTRODUCTION

In their second edition of *The Law of Admiralty*,[1] Grant Gilmore and Charles L. Black, Jr., began chapter six by saying:

> Since 1940 the Supreme Court has been rewriting the law under which crew members and harbor workers may recover for death and injury. . . . If the Court adheres to its present position, the main outlines of the new law are reasonably clear, although the lower courts will be occupied for a generation in filling in the details.[2]

In 1970, the Supreme Court took a hand in filling in some of those details by finding in *Moragne v. States Marine Lines*[3] "that an action does lie under general maritime law for death caused by violation of maritime duties."[4] The Court left open the possibility of "still other subsidiary issues [that] should require resolution."[5] One of the issues not expressly addressed by the Court in *Moragne* was whether general maritime law recognizes a negligence-based cause of action in wrongful death cases. The courts of appeals for the Ninth and Eleventh Circuits have considered that question and appear to have reached conflicting answers. This Comment will present a brief historical overview of the development of the wrongful death cause of action in maritime law as a means of understand-

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1. G. GILMORE & C. BLACK, JR., THE LAW OF ADMIRALTY (2d ed. 1975).

2. *Id.* at 272. The statement was originally written for the first edition in 1957 and was left intact for the second edition.

3. 398 U.S. 375 (1970). *Moragne* concerned the death of a *Sieracki* seaman, *see infra* note 29, within the territorial waters of Florida. His widow brought suit under Florida's wrongful death statute based on counts of unseaworthiness and negligence. The case was removed to a federal court, which dismissed the unseaworthiness count because the state statute did not recognize unseaworthiness as a cause of action. Plaintiff argued unsuccessfully on appeal to the Fifth Circuit Court of Appeals that she was entitled to relief under federal maritime law without regard to the state statute. The Supreme Court subsequently granted certiorari on that issue. 398 U.S. at 376-77.

4. *Id.* at 409.

5. *Id.* at 408.

ing how the conflict between the Ninth and Eleventh Circuits arose. The logic of the benchmark case within each circuit will be examined, and an attempt will be made to show which circuit's logic is more in line with the guidance given by the Supreme Court in *Moragne*.

II. HISTORICAL PERSPECTIVE

In order to understand fully the context within which the issue arises whether general maritime law recognizes a negligence-based cause of action in wrongful death cases, it is imperative to understand the evolution of the wrongful death action in maritime law.[6] The prevailing view until late in the nineteenth century was that a seaman had no cause of action based either on negligence or unseaworthiness for personal injury or on wrongful death.[7] In 1886, the Supreme Court held in *The Harrisburg*[8] that general maritime law did not afford a cause of action for wrongful death.[9] In 1907, the Court mitigated the harshness of that rule in *The Hamilton*[10] by holding that recovery was possible under a Delaware wrongful death statute when the death occurred as the result of a high seas collision between two ships, both of which were owned by Delaware corporations.[11] The result of *The Hamilton* was the extension of state wrongful death statutes to the high seas when the plaintiff and the defendant are from the same state. The next major breakthrough in the creation of a cause of action for wrongful deaths that occur beyond territorial waters[12] as a result of either negligence or unseaworthiness came in 1920

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6. This historical overview presents only a thumbnail sketch. For a complete explanation of the evolution of maritime law in this area, *see* G. GILMORE & C. BLACK, JR., *supra* note 1, at 359-69; *see also* Edelman, *Recovery for Wrongful Death Under General Maritime Law*, 55 TUL. L. REV. 1123, 1123-48 (1981); Maraist, *Maritime Wrongful Death*—Higginbotham *Reverses Trend and Creates New Questions*, 39 LA. L. REV. 81, 81-87 (1978); Schill, Moragne—Gaudet: *Three if by Sea?* 13 HOUS. L. REV. 917, 918-20 (1976).

7. *See* G. GILMORE & C. BLACK, JR, *supra* note 1, at 389; Maraist, *supra* note 6, at 81-82; Schill, *supra* note 6, at 918. At this point, it might be advantageous to clarify the meanings of seaworthiness and negligence, since the concepts are of major importance in admiralty law. Unseaworthiness has been called a type of no-fault liability. Seas Shipping Co. v. Sieracki, 328 U.S. 85, 94 (1946); *see also* G. GILMORE & C. BLACK, JR., *supra* note 1, at 393. The basic concept is that a seaman is entitled to a safe ship and any factor that makes a ship unsafe also makes it unseaworthy. Negligence, on the other hand, is defined in terms of operational factors. It is applied primarily either in terms of negligent use of seaworthy equipment or of orders improvidently given. *See* G. GILMORE & C. BLACK, JR., *supra* note 1, at 374-92.

8. 119 U.S. 199 (1886), *overruled*, Moragne v. States Marine Lines, 398 U.S. 375 (1970).

9. 119 U.S. at 213. Recovery under state statutes was allowed, however, when the death occurred within territorial waters. *See infra* note 12.

10. 207 U.S. 398 (1907).

11. *Id.* at 407.

12. "Territorial waters" refers to "all inland waters, all waters between line of mean high

with the passage of the Death on the High Seas Act (DOHSA).[13] DOHSA applies to all plaintiffs, not just seamen, but it is not applicable to territorial waters. Shortly after enacting DOHSA, Congress created a federal statutory cause of action for wrongful death resulting from negligence through the enactment of Section 33 of the Merchant Marine Act of 1920[14] (commonly referred to as the Jones Act). The Jones Act is limited in that it applies only to seamen and only to negligence-based actions. It is also quite broad, however, in that it is not geographically limited, but applies whenever the seaman is injured or killed in the course of his employment.[15]

In 1959, the Supreme Court limited the scope of the recovery allowed under a state statute through application of the rule articulated in *The Hamilton*[16] and held in *The Tungus v. Skovgaard*[17] that "when admiralty adopts a State's right of action for wrongful death, it must enforce the right as an integrated whole, with whatever conditions and limitations the creating State has attached."[18] In 1964, the Court further limited the scope of possible recovery and held in *Gillespie v. United States Steel Corp.*[19] that Congress, by passing the Jones Act,[20] preempted the use of a state wrongful death statute by a seaman against his employer.[21] After *Gillespie*, a seaman could recover for wrongful death on the high seas under DOHSA for negligence or unseaworthiness[22] or, if the death occurred in territorial waters, under the Jones Act for negligence.[23] Because the Jones Act foreclosed state wrongful death statutes[24] and covered only

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tide and line of ordinary low water, and all waters seaward to a line three geographical miles distant from the coast line." BLACK'S LAW DICTIONARY 1320 (rev. 5th ed. 1979).

13. 46 U.S.C. §§ 761-68 (1976). The pertinent portion of § 761 states: "Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas . . . the personal representative of the decedent may maintain a suit for damages . . . in admiralty . . . ."

14. Pub. L. No. 66-261, § 33, 41 Stat. 988, 1007 (1921) (codified at 46 U.S.C. § 688 (1976)). The pertinent portion of this code section states: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, . . . and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law . . . ."

15. For a general discussion on the scope and effect of the Jones Act, *see* G. GILMORE & C. BLACK, JR., *supra* note 1, at 328-51.

16. *See supra* notes 10-11 and accompanying text.

17. 358 U.S. 588 (1959).

18. *Id.* at 592.

19. 379 U.S. 148 (1964).

20. *See supra* notes 14-15 and accompanying text.

21. 379 U.S. at 154-55.

22. *See supra* note 13 and accompanying text.

23. *See supra* note 14.

24. *See supra* note 19.

negligence and not unseaworthiness,[25] a seaman killed within territorial waters as a result of an unseaworthy ship had no basis for a wrongful death suit. A nonseaman, on the other hand, was allowed to recover for either unseaworthiness or negligently caused deaths on the high seas under DOHSA and, if the state wrongful death statute authorized such an action, could recover for negligently caused death and for death resulting from unseaworthy conditions within territorial waters. A nonseaman, however, could not sue under the Jones Act and had no claim for relief in the event of a wrongful death caused by an unseaworthy condition within the territorial waters of a state that did not recognize unseaworthiness as a cause of action.[26]

This was the state of the law that led Mr. Justice Harlan, writing for the unanimous Court in *Moragne,* to identify three anomalies of the then existing maritime law. The first anomaly was that violation of a federal law within territorial waters frequently produced liability if the victim was injured, but not if he was killed.[27] A second irregularity was that the breach of the duty to provide a seaworthy ship would result, if death occurred, in liability under DOHSA if outside of territorial waters, but might or might not result in liability within territorial waters, depending on whether the applicable state's statute recognized a claim based on unseaworthiness.[28] The third anomaly was that a true seaman had no remedy for wrongful death caused by unseaworthiness within territorial waters, but a *Sieracki* seaman[29] had such a remedy if the applicable state's wrongful death statute was found to encompass unseaworthiness.[30] The Court's ruling in *Moragne* was "expected to bring more placid waters"[31] to the realm of maritime law through "the recognition of a remedy for wrongful death under general maritime law."[32]

With that background in mind, the central issue for this Comment can now be placed in its proper context. That issue is: Did the remedy for wrongful death under general maritime law recognized by the Court in *Moragne* include both claims based on negligence and claims based on

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25. *See supra* note 14; *see also supra* note 7.

26. This was the factual situation of *Moragne. See supra* note 3.

27. 398 U.S. at 395. This was due simply to the rule of *The Harrisburg,* which held that there was no cause of action for wrongful death under general maritime law. *See supra* note 8 and accompanying text.

28. 398 U.S. at 395.

29. In addition to those persons normally thought of as seamen, the Court held in the case of Seas Shipping Co. v. Sieracki, 328 U.S. 85, 99 (1946), that a nonseaman who was aboard a vessel doing the work of a crewmember had the same warranty of seaworthiness as a crew member. Such a person commonly has been referred to as a *Sieracki* seaman.

30. 398 U.S. at 395-96.

31. *Id.* at 408.

32. *Id.*

unseaworthiness, or should *Moragne* be interpreted strictly as an attempt to ameliorate the anomalies identified by Justice Harlan and applicable only to claims based on unseaworthiness?

III. THE NINTH CIRCUIT RECOGNIZES NEGLIGENCE UNDER *Moragne*

The Ninth Circuit Court of Appeals gave its answer to that question in *Nelson v. United States*.[33] Plaintiff was the widow of a government contractor's employee who was killed on the job when he was washed over the side of a wave suppressor barrier that he was repairing.[34] The court specifically held "that the need for uniformity in maritime wrongful death actions requires extension of *Moragne* to cover claims based on negligence, to the exclusion of state wrongful death actions."[35] The court expressly stated that they could find no case deciding that issue in accord with its decision,[36] but cited Gilmore and Black's *The Law of Admiralty*[37] in support of its position. They also cited a series of cases as lending support to their conclusion.[38]

The portion of Gilmore and Black's treatise to which the court referred in *Nelson* is, in fact, directly on point and supportive of the court's position. It states that the remedy set out by the Supreme Court in *Moragne* "provides recovery for deaths caused by negligence as well as for death caused by unseaworthiness."[39] That statement constitutes a specific resolution of the very issue the court was addressing in *Nelson*. Unfortunately, Gilmore and Black cited no authority for the statement but reached their finding by examining the three anomalies identified by Justice Harlan in *Moragne*[40] and then formulating "several conclusions [that] clearly follow."[41] It is noteworthy that Gilmore and Black's analysis of Justice Harlan's three anomalies refers to unseaworthiness five times, but it never mentions negligence.[42]

The court in *Nelson* also cited[43] the Supreme Court's decision in *Mobil*

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33. 639 F.2d 469 (9th Cir. 1980).

34. *Id.* at 470-71.

35. *Id.* at 473.

36. *Id.*

37. G. GILMORE & C. BLACK, JR., *supra* note 1.

38. Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978); *In re* S/S Helena, 529 F.2d 744 (5th Cir. 1976); Law v. Sea Drilling Corp., 523 F.2d 793 (5th Cir. 1975); *see infra* notes 43-63 and accompanying text.

39. G. GILMORE & C. BLACK, JR., *supra* note 1, at 368.

40. *See supra* notes 27-30 and accompanying text.

41. G. GILMORE & C. BLACK, JR., *supra* note 1, at 368.

42. *Id.*

43. 639 F.2d at 473.

Oil Corp. v. Higginbotham[44] in support of its position. The Ninth Circuit did not identify any specific portion of *Higginbotham,* but simply indicated that it directly supported their logic. In *Higginbotham,* a helicopter crash in the Gulf of Mexico outside of Louisiana's territorial waters killed the pilot and three passengers.[45] The passengers' widows filed suit for wrongful death and included loss of society in the requested damages.[46] The district court found that the deaths were caused by defendant's negligence,[47] but held that maritime law provided no basis for awarding damages for loss of society.[48] The district court's decision was reversed by the court of appeals, but it was reinstated by the Supreme Court.[49] Because loss of society is not a compensable injury under the DOHSA,[50] plaintiffs, on the basis of the holding in *Moragne* that the general maritime law does provide a cause of action for death caused by violation of maritime duties, joined their DOHSA claims with claims under general maritime law. The Supreme Court's reversal of the court of appeals and its consequential disallowance of damages for loss of society were based on the congressional mandate as shown by DOHSA[51] that the measure of damages for death on the high seas should be based on pecuniary losses.[52] The Court never addressed the validity of a negligence-based cause of action under *Moragne.* The Ninth Circuit in *Nelson* apparently concluded that the failure of the Supreme Court to hold in *Higginbotham* that *Moragne* did not recognize a negligence-based cause of action for wrongful death in general maritime law amounted to affirmance of a negligence cause of action.

Higginbotham, however, contains no discussion of the negligence-based cause of action. The Supreme Court in *Higginbotham* expressly limited its grant of certiorari to the issue of whether "the plaintiffs were entitled

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44. 436 U.S. 618 (1978).

45. *Id.* at 619.

46. For an analysis of what properly is included in the term "loss of society", *see* Sea-Land Services v. Gaudet, 414 U.S. 573, 585-86 & n.17 (1974) (defining the term as the loss of positive benefits because of a wrongful death rather than the negative emotional response to that wrongful death); *see also* G. GILMORE & C. BLACK, JR., *supra* note 1, at 372-73 (referring, *id.* at 372, to footnote 17 in *Gaudet* as "what may well be the least convincing footnote (No. 17) in the history of our jurisprudence.").

47. 436 U.S. at 619.

48. *Id.* The district court therefore awarded only pecuniary losses as authorized by section 762 of DOHSA. Higginbotham v. Mobil Oil Corp., 360 F. Supp. 1140, 1149 (W.D. La. 1973).

49. 436 U.S. at 618-19.

50. 46 U.S.C. § 762 (1976) (referring to "a fair and just compensation for the *pecuniary* loss sustained" (emphasis added)).

51. *Id.*

52. 436 U.S. at 625-26.

to claim damages for loss of society."[53] The most reasonable inference, although not the one drawn by the Ninth Circuit in *Nelson*, is that the Supreme Court in *Higginbotham* simply did not consider the issue of the validity of a negligence-based cause of action under general maritime law.

The two other cases cited by the Ninth Circuit Court of Appeals in support of its conclusion that *Moragne* recognized a negligence-based cause of action for wrongful death in general maritime law were both Fifth Circuit cases. In *Law v. Sea Drilling Co.*,[54] a ramp located between a seagoing tender vessel and a fixed platform in the Gulf of Mexico collapsed. The suit was based on the resultant death and injuries.[55] The issue in *Law* was whether general maritime law, as shaped by *Moragne*, allowed recovery for conscious pain and suffering and for loss of society.[56] The only discussion in *Law* of whether the decisional law of *Moragne* encompassed a cause of action for negligence was a quoted passage from Gilmore and Black's treatise.[57] Thus, the scholarly, but unsupported, analysis of Mr. Gilmore and Mr. Black appears to be the only support for the court's conclusion in *Nelson* that a negligence-based cause of action for wrongful death exists in general maritime law.

The other Fifth Circuit decision that was cited for support in *Nelson* was *In re S/S Helena*.[58] The actions in that case were based on a collision between the S/S Helena and the United States Coast Guard vessel the White Adler, which resulted in the deaths of seventeen crew members of the White Adler.[59] The case dealt with several issues,[60] none of which was whether the decision in *Moragne* recognized a negligence-based cause of action for a wrongful death claim under general maritime law. Perhaps the most pertinent point in *S/S Helena* that supports the decision of the court in *Nelson* was the holding that the remedy recognized in *Moragne* under general maritime law precluded recognition in admiralty of state wrongful death statutes.[61] The rationale for using *S/S Helena* in support

53. *Id.* at 619-20.

54. 510 F.2d 242, *reh'g denied*, 523 F.2d 793 (5th Cir. 1975). In *Higginbotham*, the Court commented that the Fifth Circuit Court of Appeals considered *Law* to have foreclosed the issue in their circuit that loss of society was compensable under general maritime law. 436 U.S. at 619 n.1.

55. 523 F.2d at 793.

56. *Id.* at 794-95.

57. *See supra* notes 39-42 and accompanying text.

58. 529 F.2d 744 (5th Cir. 1976).

59. *Id.* at 746.

60. The issues in the case were whether the *Moragne* decisional law was retroactive, *id.* at 747, whether that law precluded the recognition in admiralty of state wrongful death statutes, *id.*, whether an already existing decisional rule of comparative negligence was retroactive, *id.* at 753-54, and whether loss of society or mental anguish and grief were compensable under the general maritime law, *id.* at 753.

61. *Id.*

of the conclusion in *Nelson* appears to have been that since *Moragne* precluded recognition of the previously existing state wrongful death statutes and since those statutes had been passed by all fifty states and invariably had recognized negligence as a cause of action,[62] then *Moragne* must be read as recognizing a negligence-based cause of action. While that is a possible reading of the case, it should be noted that the Fifth Circuit in *S/S Helena* interpreted *Moragne* as saying that "an action lies under the general maritime law for death caused by the *unseaworthiness* of a vessel in state territorial waters."[63] The specific mention that *Moragne* concerned an unseaworthiness claim makes it less likely that the court in *S/S Helena* was interpreting *Moragne* to encompass a cause of action based on negligence.

IV. The Eleventh Circuit Refuses to Recognize Negligence Under *Moragne*.

The Eleventh Circuit in *Ford v. Wooten*[64] presented the rationale for not recognizing negligence as a cause of action in a wrongful death suit brought under general maritime law. In *Ford*, the mother of the seventeen year old decedent brought suit for wrongful death under DOHSA and later added a claim for loss of society under general maritime law. Plaintiff's claim alleged negligence on defendant's part in that he left two teenage boys alone at sea on his sailing ship and also alleged unseaworthiness of defendant's vessel.[65] The express holding in *Ford* "that where a cause of action exists for wrongful death under DOHSA, no additional action exists under general maritime law for wrongful death caused by negligence; the *Moragne* remedy applies only to unseaworthiness"[66] is clearly in conflict with the Ninth Circuit's decision in *Nelson*.[67] The court

62. *See* 1 S. Speiser, Recovery for Wrongful Death §§ 1.8 & 1.9 (2d ed. 1975).

63. 529 F.2d at 751 (emphasis added).

64. 681 F.2d 712 (11th Cir. 1982).

65. *Id.* at 713. The actual issue in this case was not the validity of plaintiff's general maritime claim based on negligence. It was a question of the extent of insurance coverage of the damages assessed against defendant. The issue of the validity of a negligence-based cause of action was raised by defendant's argument that the district court reached an erroneous conclusion that general maritime law encompasses only unseaworthiness as a cause of action. *Id.* at 714.

66. *Id.* at 716-17.

67. It might be possible to distinguish away the conflict. If the holding in *Ford* is applicable only to situations in which a remedy under existing federal statutes is allowed (for example, the Jones Act or DOHSA) and is not seen as controlling in fact situations in which those statutes are not applicable (for example, in territorial waters and not involving a Jones Act seaman), then the fact situation in *Nelson* is not within the ambit of the holding in *Ford* and the cases do not conflict. The tenor of the general discussion of the *Moragne* decisional law throughout the *Ford* opinion, however, does not appear to favor such a nar-

in *Ford* used its own analysis to define the parameters of the *Moragne* decisional law[68] and then supported that determination by reference to cases[69] decided after *Moragne*.

The Eleventh Circuit in *Ford* considered the earlier Fifth Circuit decision in *Ivy v. Security Barge Lines*,[70] to be "highly persuasive."[71] *Ivy* concerned an action brought by a seaman's father who alleged negligence under the Jones Act and unseaworthiness under general maritime law after his son was lost overboard and presumably drowned in the Mississippi River.[72] The vessel was ruled seaworthy and only the negligence claim was allowed. The specific issue in the case was whether the father of the Jones Act seaman was limited to a Jones Act remedy on a negligence-based claim or whether that remedy could be supplemented by a claim under general maritime law.[73] The court held: "The Jones Act remedy for negligence remains unaffected by either the rules governing damages recoverable for unseaworthiness in general maritime law or by changes in those rules."[74] In a footnote, the court stated: "General maritime law does not provide a cause of action for negligence to a seaman against his employer supplemental to that created by the Jones Act . . . ."[75] The court specifically pointed out that *Moragne* dealt only with an unseaworthiness claim and never discussed negligence.[76]

The Fifth Circuit, which decided *Ivy*, relied heavily on *Higginbotham*.[77] The court recognized that while the Jones Act issue was not discussed in *Higginbotham*, "it was raised squarely by the facts."[78] The court in *Ivy* concluded that the Supreme Court's refusal to allow recovery of a general maritime measure of damages with the negligence-based DOHSA claim in *Higginbotham* also foreclosed the possibility of recovering such damages

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row interpretation of the holding. (The characterization in *Ford* of Gilmore and Black's conclusion that wrongful death caused by negligence is actionable under *Moragne* as an "unsubstantiated assertion" is illustrative. 681 F.2d 716 n.4).

68. The court concluded: "Thus, the Supreme Court's opinion, which mentioned seaworthiness but never expressly discussed negligence, pertained only to an unseaworthiness claim." *Id.* at 715; *see also* Ivy v. Security Barge Lines, 606 F.2d 524 (5th Cir. 1979) (en banc), *cert. denied*, 446 U.S. 956 (1980).

69. Sea-Land Services v. Gaudet, 414 U.S. 573 (1974); Ivy v. Security Barge Lines, 606 F.2d 524 (5th Cir. 1979) (en banc), *cert. denied*, 446 U.S. 956 (1980).

70. 606 F.2d 524.

71. 681 F.2d at 716.

72. 606 F.2d at 525.

73. *Id.*

74. *Id.* at 528 (footnote omitted).

75. *Id.* at 528 n.8.

76. *Id.* at 527. The court used the same reasoning in *Ford*. *See supra* note 68.

77. *See supra* notes 44-52 and accompanying text.

78. 606 F.2d at 528.

in conjunction with a negligence-based Jones Act claim.[79] Chief Judge Brown, who dissented in *Ivy*, noted that the failure of the Supreme Court to discuss the Jones Act issue in *Higginbotham*, when the issue was raised by the facts, did not justify the affirmative conclusion that its holding was applicable to Jones Act questions as well as to DOHSA questions.[80] A striking similarity exists between the manner in which the Fifth Circuit in *Ivy* used *Higginbotham* to support its conclusion that a general maritime measure of damages could not be recovered in a negligence-based Jones Act claim and the manner in which the Ninth Circuit in *Nelson* used *Higginbotham* to support its conclusion that the *Moragne* decisional law recognized a negligence-based cause of action for wrongful death in general maritime law.[81] In both instances the failure of the Supreme Court to address an issue was interpreted as an affirmative finding on that issue. Because the Eleventh Circuit's opinion in *Ford* rested heavily on the logic in *Ivy*, and because the Fifth Circuit in *Ivy* did, as Chief Judge Brown said, "make a mountain of the Supreme Court's molehill of silence [in *Higginbotham*]," [82] the support provided to *Ford* by *Ivy* is somewhat suspect.

In addition to *Ivy*, the Eleventh Circuit in *Ford* cited[83] the Supreme Court's decision in *Sea-Land Services v. Gaudet*[84] for support. *Gaudet* concerned a wrongful death action brought by the widow of a *Sieracki* seaman who died as the result of severe injuries suffered while working as a longshoreman in the territorial waters of Louisiana. Shortly before his death, decedent recovered damages in an action based on unseaworthiness. Decedent's widow brought a wrongful death action.[85] The Supreme Court held that *Moragne* created a wrongful death action in decedent's dependents that is independent of any action decedent had during his lifetime.[86] *Gaudet* clearly supports a statement that the Supreme Court has applied the *Moragne* decisional law to cases in territorial waters when the death resulted from an unseaworthy condition. But the majority in *Ford* said: "Moreover, subsequent Supreme Court cases have indicated that *Moragne* applied the wrongful death remedy *only* where death resulted from unseaworthiness."[87] *Gaudet* is the only case cited in support of this statement, and the referenced portion of *Gaudet* merely says that

79. *Id.* at 528-29.
80. *Id.* at 532-33 (Brown, J., dissenting).
81. *See supra* text accompanying note 53.
82. 606 F.2d at 532 (Brown, J., dissenting).
83. 681 F.2d at 715.
84. 414 U.S. 573 (1974).
85. *Id.* at 574.
86. *Id.* at 578.
87. 681 F.2d at 715 (emphasis added).

Moragne is applicable to unseaworthiness-based claims but makes no mention of negligence.[88] Because the Supreme Court in *Gaudet* only cited unseaworthiness-based claims as being maintainable under federal maritime law, the court in *Ford* assumed that a negligence-based claim, which was not before the Court in *Gaudet*, was not maintainable under federal maritime law.

V. CONCLUSION

It appears that only the Ninth and Eleventh Circuits have addressed directly the issue of whether *Moragne* recognized a negligence-based cause of action for wrongful death under federal maritime law. Other circuits have dealt with the relationship between a DOHSA claim for wrongful death and a claim for a *Gaudet* measure of damages[89] when the underlying cause of action is negligence[90] and also have dealt with cases in which the cause of action, while unstated, is apparently negligence but which purport to be relying on the *Moragne* decisional law.[91] While some of these decisions can be read as assuming that a negligence-based cause of action for wrongful death exists under federal maritime law, none of them has expressly so held.

The holding in *Nelson* that *Moragne* applies to negligence-based claims has two major strengths. The first is that it would promote uniformity in litigation of maritime wrongful death actions.[92] No longer would recovery for a maritime wrongful death depend on varying state wrongful death statutes; it would be based on DOHSA, the Jones Act, or the federal maritime law. The second strength of the holding of the Ninth Circuit in *Nelson* is that it is more consistent with the general nature of the law of the sea, as characterized in *Moragne* by Justice Harlan's quotation of a portion of Circuit Justice Chase's opinion in *The Sea*

88. 414 U.S. at 574.

89. The Court in *Gaudet* allowed recovery under federal maritime law for loss of support, services, and society as well as for funeral expenses. 414 U.S. at 583-91.

90. *See, e.g.*, Barbe v. Drummond, 507 F.2d 794, 799 (1st Cir. 1974) (holding that a federal maritime survival action, created by *Moragne*, exists for pain and suffering prior to death).

91. *See, e.g.*, First Nat'l Bank v. Material Serv. Corp., 597 F.2d 1110 (7th Cir. 1979); Public Adm'r v. Angela Compania Naviera, 592 F.2d 58 (2d Cir.), *cert. dismissed*, 443 U.S. 928 (1979); Glenview Park Dist. v. Melhus, 540 F.2d 1321 (7th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977); Skidmore v. Grueninger, 506 F.2d 716 (5th Cir. 1975); Dennis v. Central Gulf S.S. Corp., 453 F.2d 137 (5th Cir.), *cert. denied*, 409 U.S. 948 (1972); Hornsby v. Fish Meal Co., 431 F.2d 865 (5th Cir. 1970).

92. In *Moragne*, the Court 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." 398 U.S. at 401.

Gull:[93] "[C]ertainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules."[94]

While uniformity and adherence to the humane and liberal character of admiralty law are factors in support of the decision in *Nelson*, counterpoints exist to both of those arguments. In his dissent to the majority opinion in *Gaudet*, Justice Powell, joined by Chief Justice Burger and Justices Stewart and Rehnquist, noted Justice Harlan's call for uniformity in *Moragne*, but also observed that Justice Harlan was not in favor of " 'the fashioning of a whole new body of federal law.' "[95] In fact, Justice Powell stated that *Moragne* was a limited response to provide a remedy for a specific wrong without a right,[96] and that *Moragne* explicitly counselled against a major restructuring of the law of admiralty.[97]

As for adherence to the humane and liberal nature of admiralty law, two countering arguments are obvious. First, allowance of a negligence-based cause of action under *Moragne* might not be in conflict with established and inflexible rules, but it definitely would be in conflict with many established state statutes. Just as the Supreme Court has refused to allow the *Moragne* remedy to invade the province of DOHSA[98] and as the Fifth Circuit has refused to allow it to intrude into the realm of the Jones Act,[99] the *Moragne* decisional law should not supplant the states' statutes. Second, disallowance of a *Moragne* remedy based on negligence is not the equivalent of a deprivation of a remedy because a negligence-based cause of action for wrongful death exists in territorial waters under the various states' statutes[100] or the Jones Act[101] and on the high seas under DOHSA.[102]

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93. 21 F. Cas. 909 (D. Md. 1865) (No. 12,578).

94. *Id.* at 910.

95. 414 U.S. at 596 (Powell, J., dissenting) (quoting *Moragne*, 375 U.S. at 405). Within this context, the new body of federal law would be the law resulting from the total replacement of the various state wrongful death statutes with a federal maritime remedy.

96. Although not specifically spelled out by Justice Powell, the wrong that needed to be remedied in *Moragne* was the wrongful death of a nontraditional seaman due to unseaworthiness within the territorial waters of a state that did not recognize unseaworthiness as a cause of action under its wrongful death statute. 414 U.S. at 596 (Powell, J., dissenting).

97. *Id.*

98. "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Higginbotham*, 436 U.S. at 625.

99. "The Jones Act remedy for negligence remains unaffected by . . . the rules governing damages recoverable for unseaworthiness in general maritime law . . . ." *Ivy*, 606 F.2d at 528.

100. *See supra* note 62 and accompanying text.

101. *See supra* note 14.

102. *See supra* note 13.

The major and overriding strength of the decision in *Ford* is simply that it represents a strict and literal reading of the holding in *Moragne*. As previously pointed out,[103] *Moragne* was designed to supply a remedy for a specific problem.[104] The Supreme Court has not indicated that the *Moragne* doctrine should be broadened, and the Eleventh Circuit in *Ford* quite properly refused to do so.

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103. *See supra* note 96 and accompanying text.

104. *See also* Maraist, *supra* note 6, at 96-97 (emphasizing, *id.* at 96 that the possibility of a wrongful death for which there was no recovery was "a result clearly counterproductive of federal maritime policy").