DETERMINING THE BENEFICIARIES FOR WRONGFUL DEATH ACTIONS UNDER GENERAL MARITIME LAW

Until 1886 federal courts recognized a cause of action for wrongful death under general maritime law.[1] In that year, however, the United States Supreme Court held in *The Harrisburg* that the general maritime law did not provide for recovery of damages for wrongful deaths upon navigable waters.[2] The Court thus made statutory authorization a prerequisite to maritime wrongful death benefits.[3]

Two developments ensued from *The Harrisburg*. First, the Supreme Court afforded relief to decedents' survivors by extending the coverage of state wrongful death acts to admiralty cases. In 1907 the Court held that maritime law would recognize a cause of action for wrongful death occurring outside the territorial waters of a state when that state's wrongful death statute would have granted recovery had the death occurred on land.[4] The Court later expanded this principle, applying it to

1. *See, e.g.*, The Sea Gull, 21 F. Cas. 909 (C.C.D. Md. 1865) (No. 12,578). Article III, section 2, of the United States Constitution gives federal courts subject-matter jurisdiction over maritime, or admiralty, cases. Although Congress legislates on admiralty matters from time to time, "[n]o area of federal law is judge-made at its source to such an extent as is the law of admiralty." Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960) (Frankfurter, J., dissenting). In the United States, no separate courts are responsible for maritime issues. Nevertheless, maritime law is a separate body of law, with its own principles stemming from both English precedent and the law of nations. For a more detailed discussion of the history, background, and institutional setting of admiralty law, see G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 1-18 (2d ed. 1975).

2. The Harrisburg, 119 U.S. 199 (1886). The Supreme Court, noting that the common law did not provide a cause of action for wrongful death, believed that the maritime law should follow suit. *Id.* at 213-14.

The failure of English common law to afford a remedy for wrongful death probably grew out of the felony-merger doctrine, pursuant to which the possible civil suit for wrongful death merged into the criminal action. *See* Moragne v. States Marine Lines, 398 U.S. 375, 382 (1970). Although American jurisdictions almost unanimously adopted the common law rule precluding civil wrongful death remedies, they declined to accept the underlying felony-merger doctrine on which that rule rested. *Id.* at 384-86. The English Parliament passed the first wrongful death statute, Lord Campbell's Act, in 1846, creating a cause of action for the benefit of the decedent's survivors. *Id.* at 389. Every American jurisdiction has followed the English example and enacted its own wrongful death act. *Id.* at 390. A number of federal wrongful death statutes afford similar relief in areas of federal concern. *Id.* For a more detailed history of wrongful death remedies in Anglo-American law, see S. SPEISER, RECOVERY FOR WRONGFUL DEATH 2-60 (2d ed. 1975).

3. The Harrisburg, 119 U.S. 199, 213-14 (1886).

4. The Hamilton, 207 U.S. 398, 407 (1907).

cases in which the wrongful death occurred on navigable waters within a state's territory.[5]

Second, in 1920, Congress enacted two wrongful death statutes to assist survivors of persons killed on navigable waters. In the Jones Act,[6] Congress applied the Federal Employers' Liability Act[7] to actions for wrongful death suffered by seamen in the course of their employment. The Jones Act provided relief whether death occurred within or without a state's territorial waters.[8] Congress also passed the Death on the High Seas Act (DOHSA),[9] which allowed survivors to recover for deaths occurring outside the territorial waters of a state if the deaths resulted from neglect, default, or wrongful act.[10] Attempts to extend DOHSA's applicability to deaths occurring within state territorial waters have failed.[11]

From 1920 to 1970, survivors of non-seamen who died on navigable waters within the territory of a state had to rely upon the chance applicability of a state statute when suing for wrongful death in admiralty.[12] In addition, admiralty courts had to adopt all substantive elements of a state's wrongful death statute.[13]

The interaction of various court decisions and state and federal statutes created several anomalies that restricted beneficiaries' right to re-

5. Western Fuel Co. v. Garcia, 257 U.S. 233, 242 (1921).

6. Jones Act, ch. 250, § 33, 41 Stat. 1007 (1920) (currently codified at 46 U.S.C. § 688 (1982)).

7. 45 U.S.C. §§ 51-60 (1982).

8. 46 U.S.C. § 688 (1982).

9. Death on the High Seas Act, ch. 111, § 1, 41 Stat. 537 (1920) (currently codified at 46 U.S.C. §§ 761-767 (1982)).

10. DOHSA permits recovery "whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States." 46 U.S.C. § 761 (1982). DOHSA's final section reinforces this territorial limitation, stating: "Nor shall this Act apply to the Great Lakes or to any waters within the territorial limits of any State. . . ." 46 U.S.C. § 767 (1982).

11. During debate on the Act in 1920, Congress considered but rejected applying DOHSA to deaths occurring within state territorial waters. *See* Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 588 n.22 (1974); Greene v. Vantage S.S. Corp., 466 F.2d 159, 167 n.13 (4th Cir. 1972). Subsequent attempts to extend DOHSA's applicability also proved unsuccessful. *See also* Moragne v. States Marine Lines, 398 U.S. 375, 405 n.17 (1970) (legislative changes referred to in note do not appear in current version of code).

12. Survivors of seamen killed in the course of employment could, however, seek relief under the Jones Act, 46 U.S.C. § 688, which, unlike DOHSA, does not have geographical restrictions. *See supra* notes 6 & 8 and accompanying text.

13. The Tungus v. Skovgaard, 358 U.S. 588, 592 (1959).

cover for wrongful death. First, the general maritime law imposed liability on the owner of a vessel when the vessel's unseaworthiness caused personal injury.[14] Because the majority of states did not recognize a breach of the seaworthiness duty as a ground for liability, however, survivors could not recover when a vessel's unseaworthiness caused a death rather than a nonfatal injury.[15] Second, survivors could assert a claim under DOHSA when an owner's breach of the duty to provide a seaworthy vessel caused death outside the territorial waters of a state.[16] In contrast, an admiralty court would deny recovery if the same breach occurred within a state's waters and the state wrongful death act did not encompass claims based on unseaworthiness. Third, because a Jones Act claim arising out of a seaman's death within a state's territorial waters preempts the state's wrongful death act and requires a finding of negligence, survivors of a seaman could not recover for death due to unseaworthiness.[17] Survivors of a nonseaman would, however, recover under the state wrongful death act if the particular state statute recognized claims based on unseaworthiness.[18]

In 1970, the Supreme Court sought to resolve these incongruities and to reconcile the general maritime law with the policy that a claim should lie for wrongful death. In *Moragne v. States Marine Lines*, the Court declared a right of action for wrongful death under general mari-

14. Moragne v. States Marine Lines, 398 U.S. 375, 395 (1970); Seas Shipping Co. v. Sieracki, 328 U.S. 85, 94-95 (1946).

15. Moragne v. States Marine Lines, 398 U.S. 375, 395 (1970). Although the Court in The Tungus v. Skovgaard, 358 U.S. 588 (1959), reached unanimity with respect to most aspects of its opinion, four justices entered a strong dissent on the question of how to apply state law. The dissenting justices argued that admiralty courts should read the maritime standards of unseaworthiness into state wrongful death acts. *Id.* at 597-612 (Brennan, J., dissenting). *See infra* notes 24-32 and accompanying text (discussing *Moragne*).

16. Moragne v. States Marine Lines, 398 U.S. 375, 395 (1970). Courts have interpreted DOHSA to encompass claims based upon a shipowner's breach of duty to provide a seaworthy vessel. Chermesino v. Vessel Judith Lee Rose, Inc., 211 F. Supp. 36 (D. Mass. 1962). The duty to provide a seaworthy vessel "is essentially a species of liability without fault. . . a form of absolute duty owing to all within the range of its humanitarian policy." Seas Shipping Co. v. Sieracki, 328 U.S. 85, 94-95 (1946). Seaworthiness requires that the hull and gear of a ship be fit for the voyage in question, and that the operating personnel be capable of handling the ship. For a discussion of these and other aspects of the duty of seaworthiness, see GILMORE & C. BLACK, *supra* note 1, at 390-404. The cause of action for wrongful death under the general maritime law also allows a claim for death caused by unseaworthiness. Moragne v. States Marine Lines, 398 U.S. 375, 376-78, 409 (1970). The availability of unseaworthiness as a basis for liability does not prevent recovery for injury due to negligence in maritime cases unless there is a statutory bar. *Id.* at 376-78.

17. Moragne v. States Marine Lines, 398 U.S. 375, 395 (1970).

18. *Id.* at 396.

time law.[19] The Court refused, however, to go beyond creating a right of action, leaving the lower courts to determine the elements of the new cause, including the schedule of beneficiaries.[20]

In the fourteen years since *Moragne*, the lower courts have failed to produce a uniform schedule of beneficiaries. The first section of this Note examines the *Moragne* decision's suggestions regarding the schedule of beneficiaries for maritime wrongful deaths and the difficulties that lower courts have experienced in attempting to follow those suggestions.[21] The second and third sections of this Note analyze the policies of uniformity and liberality that underlay *Moragne* and its progeny.[22] The final section of this Note suggests a method for constructing a beneficiary schedule consistent with the policies of uniformity and liberality.[23]

I. THE *MORAGNE* DECISION AND ITS AFTERMATH

In *Moragne v. States Marine Lines*,[24] the Supreme Court held that the general maritime law provided a cause of action for death resulting from a breach of maritime duties including unseaworthiness.[25] The *Moragne* Court indicated that two policy considerations supported its decision to recognize a maritime wrongful death cause of action. First, replacement of the patchwork of case law and statutes in wrongful death would promote uniformity in admiralty law.[26] Second, the existing system of rules, which predicated recovery upon an accident of geography,[27] frustrated the maritime law policy of liberality—admiralty's "special solicitude" for those who work or travel on navigable waters.[28] The creation of a uniform cause of action ensured that mari-

19. *Id.* at 378 & 402-03.
20. *Id.* at 408.
21. *See infra* notes 24-50 and accompanying text.
22. *See infra* notes 51-81 and accompanying text.
23. *See infra* notes 82-103 and accompanying text.
24. 398 U.S. 375 (1970).
25. *Id.* at 409. In *Moragne*, a longshoreman died while working on board a ship within the territorial waters of Florida. His widow sued the owner of the vessel to recover for wrongful death caused by negligence and unseaworthiness. Because the Florida wrongful death act did not recognize unseaworthiness as a basis of liability, the lower courts dismissed that portion of the complaint. *Id.* at 376-78. For a review of the distinction between unseaworthiness and negligence as bases for liability, see *supra* note 16.
26. 398 U.S. at 400-02.
27. *See supra* notes 15-18 and accompanying text.
28. 398 U.S. at 387-88.

time law would afford recovery for a wrongful death regardless of the locus of the accident. In *Moragne*, then, the uniformity of the remedy simultaneously simplified the law and achieved liberality in recovery.

The *Moragne* Court, declining to establish the details of the new wrongful death action, instructed the lower courts to rely upon preexisting personal injury law.[29] Unlike an action for wrongful death, however, personal injury law does not provide a schedule of beneficiaries entitled to recover.[30] Although parties to the case urged the Court to adopt the schedule of beneficiaries from DOHSA, the Court refused, noting only that lower courts would not lack guidance.[31] The Court contended that the federal and state wrongful death statutes would provide "persuasive analogy" to guide the lower courts and to supplement the *Moragne* decision.[32]

The Supreme Court thus provided guidance on two levels to lower courts attempting to decide who should benefit under a *Moragne* cause of action. First, the Court directed the lower courts to look to various wrongful death statutes for model schedules of beneficiaries. Second, lower courts could fashion specific schedules in light of the underlying policies of uniformity and liberality.

After *Moragne*, lower courts could pursue one of four strategies for shaping beneficiary schedules. First, an admiralty court could create a beneficiary schedule *ex nihilo* pursuant to its constitutional power to

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29. *Id.* at 405-06.

30. *Id.* at 406.

31. *Id.* at 406-08. Both the petitioner and the United States, as amicus curiae, argued for adoption of the DOHSA schedule of beneficiaries. *Id.* at 408. They maintained that because the obligations of admiralty are primarily a federal concern, the search for a schedule of beneficiaries should focus first on congressional expressions on the subject. Three federal laws are pertinent to the inquiry: the Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 761-767; the Jones Act, 46 U.S.C. § 688 (which incorporates by reference the schedule of beneficiaries from the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51); and the Longshoreman's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 909. *See* 398 U.S. at 406-07. The United States pointed out that of the three statutes, only DOHSA explicitly applies to any person. *Id.* at 407-08. In contrast, the remaining two statutes are more restrictive, the Jones Act applying only to seamen killed in the course of their employment and the LHWCA applying only to longshoremen and allied workers. Of the three, moreover, only DOHSA awards relief based on a violation of the standards of care established by maritime law. *Id.* at 407-08. The Jones Act predicates recovery upon violation of a standard of negligence derived from FELA, and the LHWCA employs workmen's compensation principles to provide standardized amounts of compensation regardless of fault. *Id.* at 407. The United States argued, therefore, that the adoption of the DOHSA beneficiary schedule would apply a congressional standard of recovery to the new maritime law cause of action for wrongful death and promote uniformity in its application. *Id.* at 406-08.

32. *Id.* at 408.

determine maritime law.[33] Despite this ability, no court has created a beneficiary schedule without any reference to existing wrongful death statutes.[34] Second, a court could use a particular state statute's beneficiary schedule.[35] Third, a court could adopt a beneficiary schedule reflecting the approach of a majority of state wrongful death statutes.[36] Finally, a court could employ one of the federal statutory wrongful death beneficiary schedules.[37]

The beneficiary schedules of the two primary federal wrongful death statutes, DOHSA and the Jones Act, comprise two categories of beneficiaries.[38] First, a group of certain relatives (surviving spouses, children and parents) may recover regardless of dependancy.[39] Second, the

33. *See supra* note 1 (discussing the constitutional basis of the judiciary's power to declare maritime law). The Supreme Court has not permitted this grant of power to lie dormant. *See* Fitzgerald v. United States Lines Co., 374 U.S. 16, 20-21 (1963) ("[T]he Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law. This Court has long recognized its power and responsibility in this area and has exercised that power where necessary to do so."); Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960) (Frankfurter, J., dissenting) ("No area of federal law is judge-made at its source to such an extent as is the law of admiralty."); Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 314 (1955) ("[I]n the absence of controlling Acts of Congress this Court has fashioned a large part of the existing rules that govern admiralty.").

34. One court expressly declined to fashion a distinct schedule of beneficiaries. Ford v. American Original Corp., 475 F. Supp. 10, 14 (E.D. Va. 1979) (woman living with decedent cannot recover under *Moragne*). Other courts have implied that they will not simply create a beneficiary schedule, thus denying recovery to complainants who fall outside the scope of any existing beneficiary schedule. *See, e.g., In re* Cambria S.S. Co., 505 F.2d 517 (6th Cir. 1974), *cert. denied,* 420 U.S. 975 (1975) (nondependent brother is not a beneficiary for a *Moragne* action); Hamilton v. Canal Barge Co., 395 F. Supp. 978 (E.D. La. 1975) (fiancee lies outside any schedule of beneficiaries for purposes of a *Moragne* action). In most cases, the courts' refusal to construct their own beneficiary schedules manifests itself in a finding that a complainant is within the scope of beneficiaries in a *Moragne* action based on existing schedules. *See, e.g.,* Skidmore v. Grueninger, 506 F.2d 716 (5th Cir. 1975); Palmer v. Ribax, Inc., 407 F. Supp. 974 (M.D. Fla. 1976); Hebert v. Otto Candies, Inc., 402 F. Supp. 503 (E.D. La. 1975); Green v. Ross, 338 F. Supp. 365 (S.D. Fla. 1972), *aff'd,* 481 F.2d 102 (5th Cir.), *cert. denied,* 414 U.S. 1068 (1973).

35. *See* Moragne v. States Marine Lines, 398 U.S. 375, 408 (1970).

36. *Id.* (suggesting a consideration of any schedule approved by a majority of states).

37. *See supra* note 31.

38. DOHSA allows recovery "for the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative." 46 U.S.C. § 761 (1982). The Jones Act, 46 U.S.C. § 688, incorporates the following schedules from the Federal Employers' Liability Act: "[T]he surviving widow or husband and children of such employees; and, if none, then . . . such employee's parents; and, if none, then . . . the next of kin dependent upon such employee." 45 U.S.C. § 51 (1982).

39. DOHSA permits recovery for the following nondependent relatives: "decedent's spouse, parent, or child." 46 U.S.C. § 761 (1982). The Jones Act permits recovery by the same three types of nondependent beneficiary. 45 U.S.C. § 688 (1982).

schedules include a residual category made up of any other relatives who were dependant on the decedent.[40] The two statutes vary, however, in the application of their schedules. The Jones Act schedule operates according to a hierarchy in which recovery by a beneficiary in a particular category excludes recovery by all beneficiaries lower in the hierarchy.[41] DOHSA, in contrast, allows recovery by all persons within the ambit of the statutory schedule.[42]

Courts consistently hold a claimant to be a *Moragne* cause of action beneficiary if that claimant comes within the beneficiary schedule provided by one of the applicable federal wrongful death acts.[43] Even courts that look both to federal and state statutes grant recovery if a beneficiary comes within the ambit of a federal statute.[44] The federal wrongful death statutes' beneficiary schedules thus appear to operate as a minimum schedule, inclusion in which guarantees a right to recover under *Moragne*.[45]

When a claimant does not fit into one of the beneficiary schedules of the federal wrongful death statutes, a court is confronted with the question whether to adhere to the narrower beneficiary schedules from the federal statutes and deny recovery or to consider the broader[46] sched-

40. DOHSA allows "dependent relatives" to recover. 46 U.S.C. § 761 (1982). The Jones Act allows dependent "next of kin" to recover. 45 U.S.C. § 688 (1982).

41. A widow's recovery, for example, will cut off any possible recovery by surviving children, parents, or other dependent next of kin. Comment, *Monetary Recovery Under Federal Transportation Statutes,* 45 TEX. L. REV. 984, 986-88 (1967).

42. *Id.*

43. *See, e.g.,* Mungin v. Calmar S.S. Corp., 342 F. Supp. 479, 480 (D. Md. 1972) (those persons entitled to recover under DOHSA or the Jones Act are entitled to recover under a *Moragne* cause of action); *see also* Ford v. American Original Corp., 475 F. Supp. 10, 13 (E.D. Va. 1979) (citing *Mungin* with approval).

44. Spiller v. Thomas M. Lowe, Jr. & Assocs., Inc., 466 F.2d 903 (8th Cir. 1972) (both DOHSA and Arkansas statutes make parents and step-children beneficiaries).

45. A majority of courts prefer DOHSA over other federal statutes, *see, e.g.,* Spiller v. Thomas M. Lowe, Jr. & Assocs., Inc., 466 F.2d 908 (8th Cir. 1972), although one court has used the LHWCA. *In re* Industrial Transp. Corp., 344 F. Supp. 1311 (E.D.N.Y. 1972).

46. The additional classes of beneficiaries usually arise when state statutes omit dependency requirements. *Compare* KY. REV. STAT. § 411.130 (1963) ("If the deceased leaves no widow, husband or child, and if both father and mother are dead, then the whole of the recovery shall become a part of the personal estate of the deceased and . . . shall pass to his kindred more remote. . . ."); MICH. COMP. LAWS § 600.2922 (1980) ("Such person or persons entitled to such damages shall be of that class who, by law, would be entitled to inherit the personal property of the deceased had he died intestate."); VA. CODE § 8.01-53 (1979) ("The damages . . . shall be distributed . . . to (i) the surviving spouse, children of the deceased and children of any deceased child of the deceased, or (ii) if there be none such, then to the parents, brothers and sisters of the deceased. . . .") *with* 46 U.S.C. § 761 (1982) (DOHSA); 46 U.S.C. § 688 (1982) (Jones Act).

ules from the state statutes and grant relief. To resolve this question, the court can refer to the *Moragne* policies of uniformity and liberality.[47]

Paradoxically, the two policies that the *Moragne* Court harmonized so effectively when creating the right of recovery appear to work at cross purposes when a court attempts to determine the beneficiaries and the amount of damages due under the *Moragne* cause of action.[48] When courts opt for a state beneficiary schedule or for state-derived elements of damages, a desire to provide the most liberal scope of recovery conflicts with and overrides the policy of uniformity.[49] In contrast, those lower courts looking to the more restrictive DOHSA or Jones Act schedules invariably cite the need for uniformity in maritime law as the primary reason for following a federal statute.[50] The subsequent conflict between the two policies that coincided in *Moragne* requires further analysis to enable a reconciliation of these policies.

II. THE POLICY OF UNIFORMITY

Two types of uniformity are relevant to the choice of a schedule of beneficiaries. The courts, however, are not always careful to distinguish between them.[51] The first type of uniformity is a constitutional requirement; the second is an optional goal.

The Constitution includes maritime disputes among those cases subject to federal judicial power.[52] Congress, in the Judiciary Act of 1789,

47. *See supra* notes 26-28 and accompanying text.

48. The Supreme Court has felt the need to choose one policy over the other in several post-*Moragne* decisions. In one case, the Court rejected DOHSA's restriction of recovery to pecuniary loss, and after noting the trend among the states to permit recovery for loss of society, concluded that a *Moragne* action also permitted recovery for loss of society. The Court noted that the maritime policy of liberality and solicitude for seamen dictated a broader scope of recovery. Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 588 (1974). *See infra* notes 77-79 and accompanying text (discussing *Sea-Land*). In another case, however, the Court indicated in dictum that DOHSA should be the "primary guide" for courts dealing with a *Moragne* action to accomplish the goal of uniformity. Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 624 (1978).

49. *See, e.g.,* Dennis v. Central Gulf S.S. Corp., 453 F.2d 137, 140 (5th Cir.), *cert. denied,* 409 U.S. 948 (1972); Palmer v. Ribax, Inc., 407 F. Supp. 974, 978-79 (M.D. Fla. 1976); *In re* Sincere Navigation Corp., 329 F. Supp. 652, 657 (E.D. La. 1971).

50. *See, e.g.,* Futch v. Midland Enter., Inc., 471 F.2d 1195, 1196 (5th Cir. 1973); Mungin v. Calmar S.S. Corp., 342 F. Supp. 479, 480 (D. Md. 1972); Guilbeau v. Calzada, 240 So. 2d 104, 110 (La. Ct. App. 1970).

51. *E.g.,* Greene v. Vantage S.S. Corp., 466 F.2d 159, 165 (4th Cir. 1972).

52. *See supra* note 1. The original rationale for giving federal courts control over admiralty cases appears in the eightieth Federalist Paper: maritime causes of action "so generally depend on

gave federal district courts original jurisdiction over maritime actions, "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."[53] The Supreme Court has interpreted the "saving-to-suitors" clause, which is still in force,[54] to confer concurrent jurisdiction over admiralty cases upon state and federal courts.[55] Nevertheless, the Court also has held that the Constitution requires all courts trying admiralty cases to apply uniformly the general maritime law.[56] As a result, the courts cannot apply state law that might counter an "essential feature" of maritime law.[57]

The constitutional requirement of uniformity does not affect the schedule of beneficiaries under a *Moragne* cause of action. Constitutional uniformity operates only when state law differs from an already existent feature of maritime law. Because general maritime law lacks a specific beneficiary schedule for wrongful death claims,[58] no "existent feature" in the federal law could conflict with state beneficiary schedules. Courts refer to state law, moreover, only as a persuasive source. The law that a court declares pursuant to *Moragne*, regardless of its origins, becomes part of the general maritime law.[59]

Although the constitutional requirement of uniformity does not mandate the selection of one beneficiary schedule, uniformity in law serves other desirable policy goals, such as predictability and simplicity.[60] The lower courts, however, have divided over the need for uniformity when determining the details of a *Moragne* cause of action.

One line of cases holds that a *Moragne* action does not require uniformity in beneficiary schedules. Under this view, "uniformity is required only when the essential features of an exclusive federal

the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace." THE FEDERALIST, No. 80, at 405 (A. Hamilton) (Bantam ed. 1982).

53. Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 383 (1918) (quoting the Judiciary Act of 1789, 1 Stat. 76-77 (current version at 28 U.S.C. § 1333 (1982))).

54. Congress has altered the language slightly. The clause now reads, "saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333 (1982).

55. *See* Leon v. Galceran, 78 U.S. (11 Wall.) 185, 188-92 (1871); Taylor v. Carryl, 61 U.S. (20 How.) 583, 598-99 (1858).

56. *See* Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 383-84 (1918); Southern Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917).

57. Just v. Chambers, 312 U.S. 383, 392 (1941).

58. *See supra* note 29 and accompanying text.

59. Greene v. Vantage S.S. Corp., 466 F.2d 159, 165 (4th Cir. 1972).

60. W. GRAVES, UNIFORM STATE ACTION 3 (1934); Commentary, *Uniformity of the Commercial Code*, 8 B.C. INDUS. AND COMM. L. REV. 568, 592 (1967).

jurisdiction are involved."[61] These courts have found that the existence of a right of recovery is the only "essential feature" of the federal interest in maritime wrongful death cases.[62] Uniformity then becomes irrelevant to the resolution of "non-essential" features such as the schedule of beneficiaries.[63] The "essential feature" approach thus is tantamount to a claim that, beyond the constitutional requirement,[64] no policy reasons for uniformity exist. Courts following this analysis also place overriding emphasis on liberality and look to state wrongful death statutes for beneficiary schedules.[65]

Courts applying a uniformity requirement to the determination of the details of a *Moragne* cause of action rarely provide an elaborate rationale.[66] In most cases the policy stands as its own justification.[67] State courts in particular have relied on this talismanic use of uniformity.[68] Nevertheless, policy arguments implicit in these cases support the imposition of a uniform schedule of beneficiaries.

A single beneficiary schedule prevents problems in the selection of applicable state law.[69] Although a federal court sitting in admiralty

61. Just v. Chambers, 312 U.S. 383, 392 (1941).

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

63. *Id.*

64. *See supra* notes 52-59 and accompanying text.

65. *See supra* note 49.

66. *See* cases cited *supra* note 50.

67. *Id.*

68. *See, e.g.,* Smith v. Allstate Yacht Rentals, Ltd., 293 A.2d 805 (Del. Super. Ct. 1972); Strickland v. Nutt, 264 So. 2d 317 (La. Ct. App.), *cert. denied,* 262 La. 1124, 266 So. 2d 432 (La. 1972); Guilbeau v. Calzada, 240 So. 2d 104 (La. Ct. App. 1970).

69. Levinson v. Deupree, 345 U.S. 648, 651 (1953). Lower courts approach the selection of one of several states' laws in two distinct fashions. *In re* Canal Barge Co., 323 F. Supp. 805 (N.D. Miss. 1971), *aff'd in part and rev'd in part,* 480 F.2d 11 (5th Cir. 1972), *amended,* 513 F.2d 911 (5th Cir.), *cert. denied,* 423 U.S. 840 (1975), which addressed the scope of damages recoverable in a *Moragne* action, illustrates the first approach. *Canal Barge* involved a fatal accident that occurred on the Mississippi River along the Missouri-Illinois boundary. The decedent, an Arkansas resident, worked for an employer who was incorporated in Louisiana. The trial court convened in Mississippi. After noting that the wrongful death statutes of each of these states provided various elements of recovery for various classes of beneficiaries, the court decided that reliance on DOHSA offered the simplest solution and awarded damages accordingly.

Spiller v. Thomas H. Lowe, Jr. & Assocs., Inc., 466 F.2d 903 (8th Cir. 1972) provides an example of the contrary approach. The decedent, domiciled in Texas, died in an accident that occurred on navigable waters in Arkansas. In the ensuing *Moragne* action, parents and step-children of the decedent argued that Texas law should determine the appropriate beneficiaries. The court rejected this in favor of looking both to DOHSA and Arkansas law. The court then chose Arkansas law, primarily because of the liberality of recovery permitted by the state law.

does not need to rely on conflict of laws doctrines to ascertain applicable state law, it still must articulate a standard of choice.[70] Reliance solely on the forums' beneficiary schedules induces forum shopping.[71] A uniform beneficiary schedule obviates the benefits of forum shopping.

The use of a uniform schedule of beneficiaries would also provide a measure of predictability for the parties and the courts. The application of a uniform schedule prevents the uncertainty that arises when a court must decide whether a given state wrongful death statute is a suitable analogue for the maritime action.[72]

III. The Policy of Liberality

The liberality policy traditionally has been a primary consideration of courts seeking to determine the scope of remedies under maritime law. Justice Chase provided a classic formulation of admiralty's perference for liberality in remedies in 1865: "[I]t 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."[73] This liberality reflects the "special solicitude" that maritime law historically has held for the welfare of those who work or travel upon navigable waters.[74]

A court making a determination of beneficiaries under a *Moragne* action should begin its analysis of the scope of liberality by considering the nature of damages allowed in maritime wrongful death claims. Post-*Moragne* courts unanimously have held that beneficiaries can recover for pecuniary loss.[75] Allowing pecuniary damages in *Moragne* actions is consonant with the trend toward applying the elements of federal wrongful death statutes as a minimum level of recovery.[76]

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70. 466 F.2d at 908 n.6. Federal courts sitting in admiralty do not sit as diversity courts. *Id.* (citing Levinson v. Deupree, 345 U.S. 648, 651 (1953)).

71. *In re* Canal Barge Co., 323 F. Supp. 805, 821 (N.D. Miss. 1971), *aff'd in part and rev'd in part,* 480 F.2d 11 (5th Cir. 1973), *amended,* 513 F.2d 911 (5th Cir.), *cert. denied,* 423 U.S. 840 (1975).

72. *See supra* note 69 and accompanying text.

73. The Sea Gull, 21 F. Cas. 909, 910 (C.C.D. Md. 1865) (No. 12,578).

74. Moragne v. States Marine Lines, 398 U.S. 375, 387 (1970).

75. *See* Annot., 18 A.L.R. FED. 184, 197-207 (1974) (DOHSA expressly provides for the recovery of pecuniary loss).

76. *See supra* notes 43-44 and accompanying text.

In 1974, in *Sea-Land Services, Inc. v. Gaudet*,[77] the Supreme Court held that the remedy for a maritime wrongful death action encompassed nonpecuniary losses such as loss of society.[78] Recovery under the maritime action for wrongful death thus comprises two distinct types of harm: pecuniary loss and loss of society. Relief for pecuniary loss compensates beneficiaries for the loss of their financial dependency upon the decedent. Relief for loss of society compensates for the injury to the familial bonds between the decedent and individual beneficiaries.[79]

These two components of damages suggest that *Moragne* schedules of beneficiaries should include both those who are so closely related to the decedent to have suffered the loss of society that the *Gaudet* Court wished to compensate,[80] as well as those relatives who were financially dependent upon the decedent. Courts proposing a schedule of beneficiaries, therefore, must determine which relatives, regardless of dependency, are so closely related to the decedent that they deserve to recover damages. The Supreme Court's approach to determining damages in *Gaudet* suggests that courts would employ a sound method for allocating damages by supplementing federal statutory schedules with additional nondependent beneficiaries whom the majority of states include in their wrongful death statutes.[81] Consideration of the types of damages allowed and of the views of Congress and a majority of states

77. 414 U.S. 573 (1974).

78. *Id.* at 587-90. The Court defined "society" as a "broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection." *Id.* at 585. The Court was careful to distinguish loss of society, which is the loss of positive benefits that would have continued but for the fatality, from mental anguish, which is an emotional response to the death. *Id.* at 585 n.17. DOHSA does not allow recovery for loss of society. Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 622 (1978).

79. Recent Decisions, *Damages-Award Allowed for Emotional Distress of Surviving Spouses and Children, or Parents, Under General Maritime Law,* 5 VAND. J. TRANSNAT'L. L. 245, 249 (1971).

80. *See supra* notes 77-78 and accompanying text.

81. The *Gaudet* Court, drawing from the remedies afforded by the majority of state statutes, held that the general maritime action for wrongful death included recovery for loss of society. Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 587-88 (1974). Because those lower courts concerned with beneficiary schedules have treated the federal statutory schedules as foundations, *see supra* notes 43-44 and accompanying text, reference to the schedules of the majority of states becomes necessary only to supplement federal schedules. For a recent decision relying on the *Gaudet* Court's majority-of-states approach, see Glod v. American President Lines, Ltd., 547 F. Supp. 183 (N.D. Cal. 1982).

can provide the courts with a principled means to select a uniform beneficiary schedule consistent with the policy of liberality.

IV. A Proposed Approach to the Determination of a Schedule of Beneficiaries

The policies of uniformity and liberality provide a foundation for arriving at an appropriate beneficiary schedule for an admiralty wrongful death action. Because uniformity as a constitutional requirement is inapplicable to determining beneficiaries,[82] it is a governing concern only insofar as it advances other policies. A uniform schedule of beneficiaries would provide a measure of predictability and would avoid the problem of choosing between numerous state statutes.[83] To achieve uniformity, courts should avoid using individual state wrongful death statutes as a source of beneficiary schedules.[84] Instead, as a working principle, courts should adopt the DOHSA beneficiary schedule[85] supplemented by additional beneficiaries recognized by a majority of state schedules.

The DOHSA schedule is the most liberal in the federal wrongful death statutes. The DOHSA schedule's provisions for collective recovery by all persons within the schedule[86] afford a more liberal recovery than is available under the Jones Act's exclusionary approach, which limits recovery to only one category of its schedule.[87] In addition, although the DOHSA beneficiary schedule[88] does not initially appear to conform to the types of damages available under the general maritime

82. *See supra* notes 58-59 and accompanying text.

83. *See supra* notes 60 & 69-72 and accompanying text.

84. Lower courts have read the language of *Moragne* to permit reliance either on the trend reflected by the majority of states or on details of individual state statutes. *Compare* Spiller v. Thomas M. Lowe, Jr. & Assocs., Inc., 466 F.2d 903 (8th Cir. 1972) (court considered laws of Texas and Arkansas to determine beneficiaries) *with In re* Sincere Navigation Corp., 329 F. Supp. 652 (E.D. La. 1971) (court looked to the trend among states to grant recovery for emotional distress). Although the Supreme Court has not precluded either approach, in Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573 (1974), the Court looked to the trend exhibited by the majority of state statutes and awarded damages for loss of society under a *Moragne* action.

85. Courts generally have rejected the beneficiary schedule of the Jones Act, with its hierarchy of exclusive categories of beneficiaries. *See supra* note 45. Because the DOHSA schedule is less restrictive and therefore more liberal in its scope than the Jones Act schedule, DOHSA should provide the minimum schedule of beneficiaries.

86. *See supra* note 42 and accompanying text.

87. *See supra* note 41 and accompanying text.

88. For the details of the DOHSA schedule and the court's preference for the DOHSA schedule over the schedules of other federal statutes, see *supra* notes 38-42 & 45 and accompanying text.

law,[89] the two-tiered structure of the DOHSA schedule[90] affords a uniform schedule consistent with a principled liberal recovery policy.

First, the DOHSA schedule does not preclude recovery for pecuniary loss. The residual clause expressly requires a showing of dependency.[91] Furthermore, while the other DOHSA category of beneficiaries[92] lacks an express dependency requirement, an award for pecuniary loss compensates a beneficiary only to the extent of loss actually suffered.

Second, the structure of the DOHSA schedule is consistent with awarding damages for loss of society.[93] The first tier of the DOHSA beneficiary schedule, made up of relatives who need not show dependency,[94] indicates those persons likely to have suffered the loss of society that the general maritime law wishes to compensate.[95] The dependency requirement for all other relatives[96] functions as a reasonable means to mark the outer boundary of a liberal recovery policy. Dependency in this instance becomes a substitute for the closeness of the kinship tie. A distant relative who can show dependency probably had sufficiently close ties to the decedent to have suffered compensable loss of society.

At the present time, no clear majority of states recognizes nondependent beneficiaries beyond those included within the current DOHSA schedule.[97] The state wrongful death statutes that include nondependent relatives such as brothers and sisters among the schedule of beneficiaries[98] constitute a distinct minority.[99] Many other states allow recovery by siblings or other relatives either expressly or through a

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89. *See supra* notes 75-79 and accompanying text.

90. Under DOHSA, one set of beneficiaries includes the decedent's immediate family members and dependents. DOHSA's second tier is a residual category of dependent relatives. For further discussion, see *supra* notes 38-42 and accompanying text.

91. *Id.*

92. *Id.*

93. *See supra* notes 77-79 and accompanying text.

94. *See supra* note 39 and accompanying text.

95. *See supra* notes 77-79 and accompanying text.

96. *See supra* note 40 and accompanying text.

97. For the text of state wrongful death statutes and a discussion of the various classes of beneficiaries, see S. SPEISER, *supra* note 2, ch. 10 & app. A.

98. A list of those states expressly including brothers and sisters in beneficiary schedules appears in S. SPEISER, *supra* note 2, at 155 n.144.

99. Only five states—Arkansas, Louisiana, New Mexico, Virginia and Wisconsin—appear to allow recovery by siblings without a showing of dependency. *Id. See also* Annot., 31 A.L.R. 3d 379, 402-05.

residual "next of kin" or "heirs" class of beneficiaries.[100] These jurisdictions, however, frequently either require a showing of dependency or limit recovery to pecuniary loss, precluding relief for loss of society.[101] Because these state schedules do not expand significantly upon the collection of beneficiaries arising from the "dependent relative" clause of the DOHSA schedule,[102] courts should prefer the DOHSA schedule when considering general maritime wrongful death actions.

The DOHSA schedule, however, is only a persuasive analogue and does not bind the courts.[103] Should either Congress or a majority of state jurisdictions decide to allow additional nondependent relatives to recover for wrongful deaths, courts should exercise their option to supplement the DOHSA schedule.

V. CONCLUSION

In creating a right of recovery for wrongful death under general maritime law, the *Moragne* Court relied upon the policies of uniformity and liberality. Uncritical application of these policies by lower courts elaborating the *Moragne* cause of action resulted in the use of conflicting schedules of beneficiaries. A careful consideration of the interaction of the policies of uniformity and liberality, however, supports the determination of a single schedule of beneficiaries that achieves both uniformity and liberality: the DOHSA schedule of beneficiaries, subject to revision in accordance with any future trends among congressional- or state-created wrongful death beneficiary schedules.

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100. Annot., 31 A.L.R. 3d 379, 387-89, 397-99.

101. *Id.* at 409-30; S. SPEISER, *supra* note 2, at 153-62. In addition, many of the statutes are hierarchical like the Jones Act, *see supra* note 41 and accompanying text, allowing recovery by "next of kin" only if no other closer relative such as spouse or child is living. Annot., 31 A.L.R. 3d 379, 390; S. SPEISER, *supra* note 2, at app. A.

102. For a detailed discussion of DOHSA beneficiaries, see Annot., 15 A.L.R. Fed. 834.

103. *See supra* notes 29-42 and accompanying text.