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COMMENT/Death on State Waters—The Unsinkable Doctrine of *Lex Loci*

The traditional choice of law rule, embodied in the original Restatement of Conflict of Laws (§ 384), and until recently unquestioningly followed in this court . . . has been that the substantive rights and liabilities arising out of a tortious occurrence are determinable by the law of the place of the tort. . . . It had its conceptual foundation in the vested rights doctrine, namely, that a right to recover for a foreign tort owes its creation to the law of the jurisdiction where the injury occurred and depends for its existence and extent solely on such law. . . . [T]he vested rights doctrine has long since been discredited. . . . More particularly, as applied to torts, the theory ignores the interest which jurisdictions other than that where the tort occurred may have in the resolution of particular issues. It is for this very reason that, despite the advantages of certainty, ease of application and predictability which it affords . . . there has in recent years been increasing criticism of the traditional rule by commentators and a judicial trend towards its abandonment or modification.¹

Death by wrongful act actions, arising from a tort committed on the territorial waters of a state, are not immune from the present dissatisfaction with the traditional choice of law rule of the "place of the injury." Yet courts have refused to recognize the recent trend in conflict of laws when dealing with a maritime tort on state waters which results in death. This refusal has created an anomalous situation whereby it is possible to obtain two completely different results in death actions arising out of torts committed within the same state, merely because one occurred on land and the other upon the state's territorial waters.

The purpose of this comment is to review the law applicable to death actions arising from torts committed on a state's territorial waters and to consider directly the conflict of laws problem mentioned above.

1. Judge Fuld in *Babcock v. Jackson*, 12 N.Y.2d 473, 475, 191 N.E.2d 279, 281, 240 N.Y.S.2d 743, 746-47 (1963).

I. Historical Development of Maritime Death Actions

The action for wrongful death in admiralty has had a long and tortuous history in the United States. As in the common law,² the death of a human being, although involving pecuniary loss, was not a ground for an action for damages; the right of action died with the injured party.³ The United States Supreme Court held in *The Harrisburg*,⁴ after an extensive review of the cases, that no suit for wrongful death would lie "in the courts of the United States under general maritime law."⁵ However, an action would lie if provided by a state statute.⁶ In 1872, in reviewing a state court decision for wrongful death resulting from injuries sustained on navigable waters brought under the "saving" clause,⁷ the Court stated:

Where no remedy exists for an injury in the admiralty courts the fact that such courts exist and exercise jurisdiction in other causes of action leaves the State courts as free to exercise jurisdiction in respect to an injury not cognizable in the admiralty as if the admiralty courts were unknown to the Constitution and had no existence in our jurisprudence.⁸

*The La Bourgogne*⁹ sustained a claim for wrongful death occurring on the high seas as maintainable in limitation proceedings pending in a federal admiralty court since French law (the ship had a French registry) provided for such an action. This holding was essentially a generalization of the rationale of *The Hamilton*¹⁰—wrongful death claims were cognizable in admiralty in federal court limitation proceedings, where the law of both ships (Delaware) involved in a collision on the high seas countenanced wrongful death suits. Thus, revival of tort actions was recognized in admiralty, even though revival was not an accepted maritime doctrine, because it existed outside admiralty.¹¹ Hence, the Court, in *Western Fuel Co. v. Garcia*,¹² deemed it to be the logical consequence of prior decisions that where death "results from

2. See, e.g., *Insurance Co. v. Brame*, 95 U.S. 754, 756 (1877). For early decisions stating that the wrongful death was cognizable at common law, see cases collected in Annot., 1916A L.R.A. 1157 n.4.

3. *Insurance Co. v. Brame*, *supra* note 2, at 757.

4. 119 U.S. 199 (1886).

5. *Id.* at 213.

6. *Ibid.*; *Sherlock v. Alling*, 93 U.S. 99 (1876) (applying the Indiana statute to a death occurring on the Ohio River opposite the mainland of Indiana); *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921) (applying the California statute).

7. 28 U.S.C. § 1333 (1) (1964). Although the Congress has conferred exclusive jurisdiction on the federal district courts in cases arising in admiralty, all other remedies were "saved" to suitors where the common law was competent to give it. For a more complete discussion of this point, see text *infra* at notes 37-41.

8. *Steamboat Co. v. Chase*, 83 U.S. (16 Wall.) 522, 530 (1872).

9. 210 U.S. 95 (1908).

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

11. See cases cited *supra* notes 4-10.

12. 257 U.S. 233 (1921).

a maritime tort committed on navigable waters within a State whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel *in personam* for the damages sustained by those to whom such right is given."¹³ Judge Learned Hand attempted to give theoretical breadth to this concept in *The James McGee*¹⁴ by extending the flag analysis to allow recovery in a collision case for the death of one aboard a ship, the law of which did not grant a wrongful death action, where the state law governing the second ship, which was at fault, did allow a right of action. Judge Hand discarded the approach of *The Hamilton*, *i.e.*, that recovery depended on the idea that a ship was the extension of the territory of its sovereign, and grounded the result on the legislative power of the sovereign of the forum to impose obligation and liability as a part of its conflict of laws.

In 1920, Congress enacted the federal Death on the High Seas Act (DOHSA),¹⁵ which provided a remedy for death occurring on the high seas. Irrespective of whether death occurred on the high seas or on territorial waters of a state subject to admiralty jurisdiction, the Jones Act of 1915¹⁶ gave a remedy for the death of a seaman resulting from injuries received in the course of employment. This statute was held to supersede the application of all the state statutes.¹⁷ The federal statutes thus give a remedy for the death of anyone resulting from a tort committed on the high seas, and for the death of seamen whether the tort be on high seas or on territorial waters.¹⁸ The statutes do not, however, provide for the situation where the death of one not covered by the Jones Act, *i.e.*, a non-seaman, results from a maritime tort committed on the territorial waters of a state.¹⁹

II. Jurisdiction of Federal and State Courts

While general maritime law, like the common law, gives no right of action for a wrongful death, it is well settled that an action *in personam* for wrongful death, resulting from a maritime tort committed on the territorial waters of a state, will be entertained by an appropriate court, federal²⁰ or state,²¹ when

13. *Id.* at 242.

14. 300 F. 93 (S.D.N.Y. 1924).

15. Death on the High Seas Act, ch. 111, 41 Stat. 537-38 (1920), 46 U.S.C. §§ 761-67 (1964).

16. Jones Act § 20, 38 Stat. 1185 (1915), 46 U.S.C. § 688 (1964).

17. *See Lindgren v. United States*, 281 U.S. 38, 44 (1930).

18. *E.g.*, *McKie v. Diamond Marine Co.*, 204 F.2d 132 (5th Cir. 1953).

19. The Jones Act pertains *only* to seamen. *See Young v. Clyde S.S. Co.*, 294 F. 549 (S.D. Fla. 1923). The Death on the High Seas Act can be invoked *only* when the tort occurred on the high seas. *See, e.g.*, *Middleton v. Luckenbach S.S. Co.*, 70 F.2d 326 (2d Cir. 1934), *cert. denied*, 293 U.S. 577 (1934); *Just v. Chambers*, 312 U.S. 383 (1941).

20. *E.g.*, *Western Fuel Co. v. Garcia*, *supra* note 12; *American Stevedores, Inc. v. Porello*, 330 U.S. 446 (1947); *Levinson v. Deupree*, 345 U.S. 648 (1953); *The Tungus v. Skovgaard*, 358 U.S. 588 (1959); *Hess v. United States*, 361 U.S. 314 (1960).

21. *See, e.g.*, *Warren v. Morse Dry Dock & Repair Co.*, 235 N.Y. 445, 139 N.E. 569, *cert.*

a statute of the state gives such a right of action.²² The action may be brought either in admiralty or at law;²³ and if the action is at law, it may be brought in either a state or federal court.²⁴ Courts of admiralty, when assuming jurisdiction in a death case, do not enforce a right of action existing under the general maritime law, but rather enforce a right created by a state statute which supplements the maritime law in respect to torts committed upon local waters.²⁵

The jurisdiction of the federal district courts to entertain a death action based on a state statute is grounded on the admiralty jurisdiction of the federal courts²⁶ or on diversity of citizenship,²⁷ but not on their jurisdiction over controversies arising under the Constitution and laws of the United States.²⁸ If the action is one at law, the requirements of diversity and amount in controversy must be met before the federal court has jurisdiction.²⁹

Even though federal admiralty courts have exclusive jurisdiction of all maritime claims in rem,³⁰ state courts may have concurrent jurisdiction of in personam maritime claims.³¹

Admiralty Jurisdiction

The Constitution of the United States provides in Article 3, Section 2, that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." Title 28, United States Code, Section 1333, provides the federal district courts with original jurisdiction, exclusive of state courts, of all civil cases of admiralty or maritime jurisdiction, "saving to suitors in all cases all other remedies to which they are otherwise entitled."

denied, 262 U.S. 756 (1923); *Roswall v. Grays Harbor Stevedore Co.*, 132 Wash. 274, 231 P. 934 (1925).

22. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 229 (1958).

23. 1 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 32, at 179 (rev. ed. 1960).

24. *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36 (1943).

25. *Warren v. Morse Dry Dock & Repair Co.*, *supra* note 21, at 446, 139 N.E. at 569.

26. U.S. CONST. art. III, § 2; 28 U.S.C. § 1333 (1964).

27. 28 U.S.C. § 1332 (1964); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 82 (1821) (holding that the subject of controversy is immaterial in that class of cases in which jurisdiction is based on diversity of citizenship); *Gaines v. Fuentes*, 92 U.S. 10 (1875) (holding that the Constitution places no limitation on those cases based on diversity of citizenship); *Maryland Cas. Co. v. Cushing*, 347 U.S. 409 (1954) (holding that where there is diversity in an action based on a maritime tort, it was not necessary to plead the Jones Act as a basis for jurisdiction).

28. *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959).

29. 1 W. BARRON & A. HOLTZOFF, *supra* note 23, at 179. In such a case the only basis for jurisdiction could be diversity and then, of course, the usual requirements must be met in accordance with 28 U.S.C. § 1332 (1964).

30. *Bloom v. Furness-Withy & Co.*, 293 F. 98 (S.D. Cal. 1923).

31. *Steamboat Co. v. Chase*, *supra* note 8. *See also* *Sherlock v. Alling*, *supra* note 6 (affirming a judgment of the Supreme Court of Indiana in favor of a plaintiff in an action under the wrongful death statute of Indiana, for a death occurring on its territorial waters); cases collected in Annot., 71 A.L.R.2d 1296, 1308n.1 (1960).

From these provisions, it is clear that if there is a remedy in admiralty for wrongful death, a federal admiralty court has jurisdiction of the death action resulting from a maritime tort committed on the territorial waters of a state.³²

Diversity of Citizenship Jurisdiction

An action based on a maritime tort may also be entertained on the law side of a federal district court.³³ In a death action, however, where the state statute specifically deals with ships and provides for a libel in rem against the ship and a libel in personam against the owners or those responsible for the tort, it has been held that such an action is primarily maritime in nature and must be brought in admiralty.³⁴

It should be noted, however, that maritime claims are not cognizable in federal courts when jurisdiction is based on the "federal question" jurisdiction of the district courts. In this regard, it was held in *Turner v. Wilson Line, Inc.*,³⁵ that an action for death occurring on the navigable waters of Massachusetts was not one arising under the Constitution or laws of the United States. The court observed that the plaintiff's cause of action was one arising under Massachusetts law, which provided both the right to recover and the scope of the remedy.³⁶

State Court Jurisdiction

Although within the jurisdiction of federal admiralty courts, death actions arising from a tort on state waters are also maintainable in the state courts under the pertinent state death statute.³⁷ This concurrent jurisdiction is authorized by the "saving clause" of Title 28, United States Code, Section 1333 (1), but is derived from a provision of the Judiciary Act of 1789.³⁸ In conferring exclusive jurisdiction on the federal courts in all civil cases of admiralty, Congress fittingly saved to suitors, in all cases, the right of a common law remedy where the common law was competent to give it.³⁹ This was interpreted to mean that the remedy or right of action was saved in those courts which proceeded according to the common law, as distinguished from those proceeding in admiralty.⁴⁰ This is not to say that only those rights and remedies cognizable in the common law prior to 1789, when the first clause was

32. See *Hess v. United States*, *supra* note 20.

33. Cases cited *supra* note 27.

34. *Young v. Clyde S.S. Co.*, *supra* note 19. *But see Bigelow v. Nickerson*, 70 F. 113 (7th Cir. 1895).

35. 242 F.2d 414 (1st Cir. 1957).

36. *Id.* at 418. See also *Beck v. Johnson*, 169 F. 154 (W.D. Ky. 1909).

37. See case cited *supra* note 31.

38. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 76.

39. *E.g.*, *Perry v. Stanfield*, 278 Mass. 563, 180 N.E. 514 (1932); *Billings v. Breinig*, 45 Mich. 65, 7 N.W. 722 (1881).

40. *Steamboat Co. v. Chase*, *supra* note 8.

adopted, are "saved."⁴¹ The Supreme Court, in *Steamboat Co. v. Chase*,⁴² held that it was immaterial that the death action was not known to the common law at the time of the passage of the Judiciary Act. A federal court, in *O'Leary v. United States Lines Co.*,⁴³ stated: "[I]t has long been settled that a state-created remedy for wrongful death will be enforced both in the admiralty courts and in proceedings under the saving clause when death results from a tort committed on navigable waters within a state whose statute provides such a remedy."⁴⁴

Thus, an action for wrongful death upon a state's territorial waters is cognizable in a federal admiralty court, a federal court upon diversity of citizenship grounds, or a state court. This then presents the question: What law, federal or state, are these courts to apply?

III. What Law Controls?

The doctrine of *Erie R.R. v. Tompkins*,⁴⁵ under which a federal court in a diversity case is bound to follow the law of the state in which the court is sitting, is considered to be inapplicable in maritime cases.⁴⁶ It is said that when an admiralty court enforces an obligation created by a state statute, it enforces it as it would a statute originating in any foreign jurisdiction.⁴⁷

Today, it has become settled law that when a federal court 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 state creating it has attached.⁴⁸ There is impressive authority supporting the proposition that one who seeks to recover under a state wrongful death statute for a tort occurring on the navigable waters of a state may do so only in accordance with the substantive law of the state.⁴⁹ In fact, it would seem that cases which hold that

41. *Panama R.R. v. Vasquez*, 271 U.S. 557 (1926); *Johnson v. Westerfield's Adm'r*, 143 Ky. 10, 135 S.W. 425 (1911).

42. *Supra* note 8.

43. 215 F.2d 708 (1st Cir. 1954), *cert. denied*, 348 U.S. 939 (1955).

44. *Id.* at 711.

45. 304 U.S. 64 (1938).

46. *Levinson v. Deupree*, 345 U.S. 648 (1953).

47. *Id.* at 651; *The Tungus v. Skovgaard*, *supra* note 20; *Hess v. United States*, *supra* note 20.

48. *See The Tungus v. Skovgaard*, *supra* note 20; *Lee v. Pure Oil Co.*, 218 F.2d 711 (6th Cir. 1955); *Continental Cas. Co. v. The Benny Skou*, 200 F.2d 246 (4th Cir. 1952), *cert. denied*, 345 U.S. 992 (1953) (holding, in an action for the death of a stevedore loading cargo in a Virginia harbor, that a plaintiff grounding his action on a state wrongful death statute must accept it as construed by the highest court of the state).

49. *See, e.g., Feige v. Hurley*, 89 F.2d 575 (6th Cir. 1937) (an action under the Kentucky statute, in which it was held that such a right is enforced in admiralty according to the common law and contributory negligence is a bar to recovery unless it has been abolished by statute); *Klingseisen v. Costanzo Transp. Co.*, 101 F.2d 902 (3d Cir. 1939) (recognizing rule when applying the Pennsylvania statute); *The H.S., Inc.*, 130 F.2d 341 (3d Cir. 1942) (holding the New Jersey master-servant law was applicable when suing under the New Jersey wrongful death statute); *Puleo v. H. E. Moss & Co.*, 159 F.2d 842 (2d Cir. 1947) (under New

general maritime law provides the substantive law and the state statute provides the remedy in actions for wrongful death on state territorial waters can no longer be regarded as authority.⁵⁰

When the action is brought in a state court, the court may interpret the controlling statute as incorporating the substantive principles of maritime law, but the question remains: Is it bound to do so? According to *The Tungus v. Skovgaard*,⁵¹ the state court may reject the principles of maritime law and apply its own substantive principles. This doctrine was greatly substantiated in the later case of *Goett v. Union Carbide Corp.*,⁵² where the Court specifically stated that the state court might apply its own substantive law applicable to the statute invoked or it might incorporate the general maritime concepts of unseaworthiness or negligence. Even prior to *The Tungus*, state courts had held that where state wrongful death statutes were invoked, the rights of the parties were to be determined by state substantive law.⁵³ Among the questions of substantive law which have been held to be governed by state law are questions concerning the negligence of the tortfeasor,⁵⁴ the availability of the doctrine of seaworthiness,⁵⁵ the measure of damages,⁵⁶ the availability of the defense of contributory negligence as a complete bar to recovery,⁵⁷ and the question whether time limitations or laches bars recovery.⁵⁸

Actions for wrongful death resulting from torts committed on a state's territorial waters may be maintained in either a federal court—in admiralty or at law, based upon diversity—or a state court, by virtue of the saving clause—under the pertinent state death statute. The current decisions hold that

York law, owner of tanker owed employee same duty which it would have owed to him had he entered owner's factory or shop to make repairs); *Continental Cas. Co. v. The Benny Skou*, *supra* note 48.

50. For cases whose validity is now questioned, *see, e.g.*, *Great Lakes Dredge & Dock Co. v. Kierejewski*, 261 U.S. 479 (1923); *O'Leary v. United States Lines Co.*, *supra* note 43; *The Devona*, 1 F.2d 482 (1st Cir. 1924).

51. 358 U.S. 588, 590-91 (1959) (holding that the doctrine of unseaworthiness was encompassed by the New Jersey death statute).

52. 361 U.S. 340, 341-44 (1960).

53. *Roswall v. Grays Harbor Stevedore Co.*, *supra* note 21 (action under the Washington death statute). *But see* *Riley v. Agwilines, Inc.*, 296 N.Y. 402, 73 N.E.2d 718 (1947) (relying on *Robins Dry Dock & Repair Co. v. Dahl*, 266 U.S. 449 (1925), an *injury* case).

54. *Goett v. Union Carbide Corp.*, *supra* note 52; *Puleo v. H. E. Moss & Co.*, *supra* note 49; *Cromartie v. Stone*, 194 N.C. 663, 140 S.E. 612 (1927).

55. *The Tungus v. Skovgaard*, *supra* note 51; cases collected in Annot., 71 A.L.R.2d 1296, 1317 n.18 (1960).

56. *Quinette v. Bisso*, 136 F. 825 (5th Cir. 1905), *cert. denied*, 199 U.S. 606 (1905).

57. *Halecki v. United New York & N.J.S.H.P. Ass'n*, 251 F.2d 708 (2d Cir. 1958), *vacated on other grounds*, 358 U.S. 613 (1959); cases collected in Annot., 71 A.L.R.2d 1296, 1319 n.2 (1960).

58. *The Harrisburg*, 119 U.S. 199 (1886); *Western Fuel Co. v. Garcia*, *supra* note 12; *Levinson v. Deupree*, *supra* note 46; cases collected in Annot., 71 A.L.R.2d 1296, 1322 n.6 (1960).

when a state statute is used, the rights of the parties are determined by the substantive state law applicable to that statute. General maritime law principles are employed only where the controlling statute can be interpreted as incorporating them.

IV. *The Conflict of Laws Problem*

The nature and importance of this question is clearly manifested in the recent case of *Scott v. Eastern Air Lines, Inc.*⁵⁹ This was an action arising out of the crash of an Eastern Air Lines plane into the navigable waters of Boston harbor after its takeoff from Boston's Logan Airport. The flight was to terminate at Atlanta, Georgia, with its first stop at Philadelphia. Plaintiff's decedent, who was killed in the crash, was a resident of Pennsylvania and was returning home on the flight. Suit was brought on the law side of the federal District Court for the Eastern District of Pennsylvania. That court refused the defendant's request for an instruction to the effect that the nature and extent of plaintiff's recovery should be determined in accordance with the provisions of Massachusetts law.⁶⁰ At that time, the Massachusetts statutes limited damages to a maximum of \$20,000; however, the Pennsylvania statutes⁶¹ authorized recovery of the present worth of the anticipated value of the decedent's estate as it would be valued at the end of a normal life span. The jury was allowed to determine damages in accordance with the Pennsylvania statutes. The district court's ruling was challenged on appeal, and the Court of Appeals for the Third Circuit reversed, holding that Massachusetts law applied. This was so, said the court, because the wrongful death action was for a maritime tort; a maritime tort action is governed by general maritime law; the maritime conflict of laws rule for wrongful death actions is simple—apply the law of the place of the tort. The accident occurred in Massachusetts, therefore, Massachusetts law applied.⁶²

To buttress its holding, the court stated: "The maritime law will accord dependents and survivors rights of recovery neither more nor less extensive than they would enjoy under the law of the state within whose territorial waters the fatal maritime tort occurred."⁶³ In support of this proposition, the court cited *Hess v. United States*,⁶⁴ *The Tungus v. Skovgaard*,⁶⁵ *Western Fuel Co. v. Garcia*,⁶⁶ and *The H. S., Inc.*⁶⁷ Yet, in none of these cases, was the court faced with the choice of applying one state death statute over another.

59. No. 16328 (3d Cir., March 30, 1967).

60. MASS. GEN. LAWS ANN. ch. 228, § 1(2) and ch. 229, § 2 (1958).

61. PA. STAT. ANN. tit. 12, §§ 1601-04 (1953); PA. STAT. ANN. tit. 20, § 320.601 (1950).

62. *Scott v. Eastern Air Lines, Inc.*, *supra* note 59, at 5.

63. *Id.* at 4.

64. 361 U.S. 314 (1960).

65. 358 U.S. 588 (1959).

66. 257 U.S. 233 (1921).

67. 130 F.2d 341 (3d Cir. 1942).

In each case, the issue pertaining to state law was whether to apply the substantive law of the particular state or federal maritime law. After an extensive review of the cases, it appears that the Supreme Court has never directly faced the question of which state statute to apply where there were two or more statutes pleaded or brought before the court. It seems that the Court has always assumed, without actually deciding, that the appropriate statute was that of the state within whose territory the tort occurred.⁶⁸

Lower federal courts, when deciding survival of tort actions arising out of maritime torts, have not always applied the law of the place of the tort. The courts have sustained survival actions where they were permitted by the law of the tortfeasant-shipowner's domicile,⁶⁹ or the domicile of the tortfeasor, even though he was not the shipowner or operator.⁷⁰ These actions have also been sustained where permitted by the law of the forum, at least where the alleged tortfeasor had substantial contacts with the forum,⁷¹ and where survival was the law of a forum that would have been available to claimants had they not become parties in a limitation proceeding in another forum.⁷²

Apparently the rule of "place of the tort" enunciated by the court in *Scott* finds its basis in the age-old conflict of laws rule of torts. In general, this is still the principle held to by a majority of the courts.⁷³ However, a trend has developed under which the plaintiff, depending upon his "contacts" with the forum,⁷⁴ is allowed to sue and recover there, applying forum law, despite the fact he would have lost, or his recovery would have been greatly limited, had he sued in the state where the accident took place.⁷⁵

One of the states following this trend is Pennsylvania. The Supreme Court of Pennsylvania, reviewing an action for wrongful death of one of its domi-

68. See cases cited *supra* notes 6, 8, 20 and 64-67.

69. *United States v. The S.S. Washington*, 172 F. Supp. 905 (E.D. Va.), *aff'd, upon opinion below, sub nom. United States v. Texas Co.*, 272 F.2d 711 (4th Cir. 1959); *In re Gulf Oil Corp.*, 172 F. Supp. 911 (S.D.N.Y. 1959).

70. *Abbott v. United States*, 207 F. Supp. 468 (S.D.N.Y. 1962).

71. *Williams v. Moran*, 205 F. Supp. 208 (S.D.N.Y. 1962).

72. *In re Gulf Oil Corp.*, *supra* note 69. See also *Safir v. Compagnie Generale Transatlantique*, 241 F. Supp. 501 (E.D.N.Y. 1965) (holding that the New York death statute could be applied extra-territorially to a tort committed on the high seas, notwithstanding the federal statute).

73. *Richards v. United States*, 369 U.S. 1, 11 (1962).

74. Although most writers are opposed to the retention of the place of the tort rule, there is disagreement as to its successor. Some favor the law of the forum: See, e.g., Currie, in *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1233 (1963); A. EHRENZWEIG, *CONFLICT OF LAWS* § 122 (1962); Comment, *The Second Conflicts Restatement of Torts: A Caveat*, 51 CALIF. L. REV. 762, 769-82 (1963). Others favor the "most significant contacts" doctrine: See, e.g., Cheatham, in *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws, supra* at 1229; Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROB. 679 (1963).

75. See Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958). See, e.g., *George v. Douglas Aircraft Co.*, 332 F.2d 73 (2d Cir. 1964); *Lowe's North Wilkesboro Hardware, Inc. v. Fidelity Mut. Life Ins. Co.*, 319 F.2d 469 (4th Cir. 1963); *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

ciliaries arising out of a plane crash in Colorado, held that the Pennsylvania wrongful death statute was applicable.⁷⁶ After a thorough discussion of the current trend the court concluded:

Pennsylvania's interest in the amount of recovery . . . is great. The relationship between the decedent and United was entered into in Pennsylvania. Our Commonwealth, the domicile of the decedent and his family, is vitally concerned with the administration of decedent's estate and the well-being of the surviving dependents to the extent of granting full recovery⁷⁷

The United States Supreme Court, in *Richards v. United States*,⁷⁸ has favorably acknowledged this recent tendency to depart from the place-of-the-injury rule in an action under the federal Tort Claims Act,⁷⁹ which provides that the Government shall be liable for tortious conduct committed by its employees acting within the scope of their employment "under circumstances where the United States . . . would be liable to the claimant in accordance with the law of the place where the act or omission occurred."⁸⁰ In *Richards*, the Tort Claims Act, considered alone, would have made the Oklahoma death statute applicable. However, in applying the "whole" law of Oklahoma, the Court agreed with the district court and the court of appeals, that the Oklahoma conflicts rule precluded the application of Oklahoma law, because Oklahoma was not the state where the injury occurred as was required by that rule. The Court did state, however, that had the Oklahoma conflict of laws rule allowed the application of law other than that of the place of the injury, it would have been permissible to apply it.

In light of the recent cases, and especially the Supreme Court's favorable attitude toward the new choice of law doctrines, it is quite likely that the traditional rule of the place-of-the-tort will soon be discarded.

V. Conclusion

The new choice of law doctrines can and should be applied in death actions arising from maritime torts committed on the navigable waters of a state. If the traditional rule is, in fact, the settled law, as the court in *Scott* held it to be, it should be discarded and replaced with a rule which gives deference to the legitimate interests of the state of the plaintiff's domicile.

The action for wrongful death arising from a tort occurring on a state's territorial waters is *not* the typical admiralty action and is *not* subject to the arguments usually made for the application of general maritime law. The

76. *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964).

77. *Id.* at 10, 203 A.2d at 807.

78. *Supra* note 73, at 12-13.

79. 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2411, 2412 & 2677-80 (1964).

80. 28 U.S.C. § 1346 (b) (1964).

Scott court attempted to substantiate its decision by observing that the maritime law was national law and that "its principles should, to the best of judicial ability, be recognized and applied uniformly."⁸¹ Yet, how can there be uniformity when 50 state statutes, each with its own peculiarities, are applied, depending upon the place where the tort was committed? There can be no uniformity in this area without a federal death statute or a uniform wrongful death act.

The legislative history of the federal Death on the High Seas Act is particularly pertinent here. It discloses a clear Congressional intent to leave "unimpaired the rights under State statutes as to deaths on waters within the territorial jurisdiction of the States."⁸² The record of debate in the House of Representatives preceding passage of DOHSA reflects deep concern that the power of the states to create actions for wrongful death in no way be affected by enactments of federal law.⁸³ What can be more crucial to the states than how and when their death statutes are to be applied? To be sure, Congress' expressed intent as to legislation must extend to judicial decisions also.

If state statutes are applied and state substantive law is applied, why should not state conflicts rules be applied? To the state, what can be of more substance than the question: When is its own statute to be employed?

81. *Scott v. Eastern Air Lines, Inc.*, *supra* note 59, at 5.

82. S. REP. NO. 216, 66th Cong., 1st Sess. 3 (1919); H.R. REP. NO. 674, 66th Cong., 1st Sess. 3 (1919).

83. 59 CONG. REC. 4482-86 (1920).