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Conflict of Laws - Death in State Territorial Waters

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justify the declaration of the Supreme Court of California that plaintiff's status will no longer be determinative.

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CONFLICT OF LAWS—DEATH IN STATE TERRITORIAL WATERS—The United States Court of Appeals for the Third Circuit held that Pennsylvania law governs an action commenced by the administrator of the estate of a Pennsylvania decedent killed in the crash of an aircraft into the harbor waters of Boston.

Scott v. Eastern Air Lines, Inc., 399 F.2d 14 (3d Cir. 1968), *cert. denied*, 37 U.S.L.W. 3208 (U.S. Dec. 9, 1968).

Plaintiff, administrator of the estate of a Pennsylvania resident killed in the crash of an Eastern Air Lines jet into Boston Harbor, filed suit on the "law side"[1] of the District Court for the Eastern District of Pennsylvania to recover damages for the death of the decedent. Jurisdiction was based on diversity of citizenship and an amount in excess of the statutory minimum. Plaintiff alleged that the fatality occurred as the result of Eastern's negligent operation of its jetliner and its breach of the contract with decedent for nonnegligent carriage.[2]

After hearing evidence as to liability, the jury returned a verdict for the plaintiff. The court then permitted testimony on damages, and over Eastern's objection, instructed the jury to award them in accordance with the law of Pennsylvania.[3] The jury returned with verdicts for plaintiff in the sum of $2,500 as compensation under the

1. Since the 1966 coalescence of civil and maritime procedure, this term has become somewhat imprecise. Today, all actions, whether cognizable as cases at law or in equity or in admiralty are governed by the same rules. FED. R. CIV. P. 1. However, cases brought pursuant to the admiralty jurisdiction of the district court are exempt from certain rules and subject to several others that do not affect other civil actions. For a complete discussion of the unification of the civil and admiralty procedures, *see* 7A J. MOORE, FEDERAL PRACTICE ¶ .01 *et seq.* (2d ed. 1966).

2. Plaintiff abandoned a breach of warranty theory before the case came to trial.

3. Eastern had requested the court to charge that damages were to be awarded in accordance with the law of Massachusetts. The Massachusetts statutes in effect at the time of the accident limited the liability of one whose negligence has caused the death of another to "damages in the sum of not less than two thousand dollars nor more than twenty thousand dollars to be assessed with reference to the degree of culpability" and also permitted recovery for expenses incurred as a result of the wrong. MASS. GEN. LAWS ANN. ch. 229, § 2 (1958). *See also*, MASS. GEN. LAWS ANN. ch. 228, § 1(2) (1958).

Wrongful Death Act,[4] and $45,000 payable to defendant's estate pursuant to the Pennsylvania Survival Act.[5]

On appeal this judgment was reversed. However a rehearing was granted, and the court of appeals, sitting en banc, reversed its prior decision and affirmed the trial court.[6]

The fundamental issue on rehearing was whether the trial court properly applied the substantive law of Pennsylvania.[7] In order to justify the application of Pennsylvania law, the court of appeals felt it necessary to conclude either (1) that the transaction in question involved a non-maritime contract of carriage, governed by the Pennsylvania law articulated in *Griffith v. United Air Lines;*[8] or (2) that the occurrence constituted a maritime tort which, by virtue of the conflicts of law approach of the Supreme Court in *Lauritzen v. Larsen*[9] and *Romero v. International Terminal Operating Co.*,[10] would justify application of Pennsylvania law. In the discussion that followed, the court of appeals seemingly reasoned that either alternative could justify the decision of the trial court.

Dealing first with the claim for breach of the contract of nonnegligent carriage, the court concluded that there was a sufficient basis for finding a contractual obligation between Eastern and the plaintiff's decedent, notwithstanding the absence of an official "contract of carriage," reasoning that the contractual duty was one imposed by law.[11]

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4. Under the Wrongful Death Act, PA. STAT. ANN. tit. 12, § 1601 (1953) *et seq.*, recovery is permitted for funeral expenses and expenses of administration necessitated by the death.

5. Under the Survival Act, PA. STAT. ANN. tit. 20, § 320.601 (1950), recovery is allowed for lost earnings from date of death to trial, less what would have been necessary for decedent's maintenance, plus future earnings reduced to present worth, less the cost of decedent's maintenance for his probable life span.

6. On a prior appeal, a panel of three judges had reversed the district court and remanded the case for a new trial. The court then granted a rehearing and heard the case en banc. The then Chief Judge Staley wrote the majority opinion in which Judge Kalodner joined. Judges Seitz and Freedman each wrote concurring opinions. Judge Hastie wrote a dissent in which Judges Ganey and McLaughlin joined. It is interesting to note that Judge Seitz was a member of the panel that had initially reversed the lower court's action.

7. 399 F.2d at 19.

8. 416 Pa. 1, 203 A.2d 796 (1964). In *Griffith*, the Pennsylvania Supreme Court had before it a situation very similar to that in *Scott;* a plane crash had killed a Pennsylvania resident whose personal representative then sued under the Pennsylvania Survival Act. After first holding that an action in assumpsit for breach of an implied by law contract for nonnegligent carriage is valid under Pennsylvania law, the court went on to hold that it was abandoning the rule that the law of the place of the injury always governs actions for personal injury in favor of a more flexible rule. The rule adopted allows the forum to apply the law of the jurisdiction having the most significant contacts with the issues and the parties.

9. 345 U.S. 571 (1953).

10. 358 U.S. 354 (1959).

11. 399 F.2d at 20.

In response to Eastern's contention that the cause of action was, in reality, a maritime tort transmuted into a suit on a civil contract by means of an "ancient device of common law pleading"—waiving the tort and suing in assumpsit—the court cited *Weinstein v. Eastern Airlines, Inc.*[12] There, in a case arising out of the identical factual situation, Chief Judge Biggs stated:

> a contract or warranty relating to the airframe or power plant of a land-based aircraft and a contract of carriage by air between two cities on the United States mainland are not maritime in substance, nor are such contracts and warranties made maritime by virtue of the fact that the aircraft in question flew briefly over navigable waters en route from Boston to Philadelphia.[13]

Thus, since the contract of carriage was not maritime in nature, the court concluded that it was governed by the law of Pennsylvania, as espoused by *Griffith*, and on this basis affirmed the district court's action.

Not content to base its decision solely on the ground that *Griffith* compelled the application of Pennsylvania law, the court held that the decision of the lower court could also be affirmed by principles of maritime law.[14] Referring again to *Weinstein* for its holding that tort claims for injuries sustained in a plane crash on navigable waters are maritime in nature,[15] the court ruled that maritime principles govern the tort aspects of the instant case, even though brought on the "law side" of the district court.[16] Reaching this conclusion, however, did not decide the question, because the general maritime law (as well as the common law) provides no remedy for wrongful death.[17] To fill this gap, Congress has enacted the Jones Act[18] (giving representatives of deceased seamen a cause of action for wrongful death); the Death on The High Seas by Wrongful Act[19] (giving a right to the representatives of those dying at sea) and maritime courts have, in certain causes within their jurisdiction, permitted recovery pursuant to

12. 316 F.2d 758, 3d Cir. 1963), *cert. denied*, 375 U.S. 940 (1963).
13. 316 F.2d at 766.
14. 399 F.2d at 25.
15. "We are of the opinion for the reasons stated that the tort claims *sub judice* lie within the admiralty jurisdiction of the court below." 316 F.2d at 766. (This case dealt with claims arising from the same plane crash involved in *Scott*.)
16. 399 F.2d at 25.
17. The Harrisburg, 119 U.S. 199 (1886).
18. 46 U.S.C. § 688.
19. 46 U.S.C. §§ 761-767.

state enacted statutes.[20] The problem confronting the court was whether maritime law compelled it to apply the survival and wrongful death statutes of Massachusetts or Pennsylvania.

Eastern contended it could find no wrongful death cases in the admiralty where "lex loci" had not been applied. The *Scott* court, however, felt that this did not result from application of a rigid maritime principle and that creation of such a principle would today be unwarranted. It decided instead to apply a "significant contacts" choice of law rule to the maritime tort aspects of the case, finding justification for its novel approach in a trend established by the Supreme Court in *Romero*[21] and *Lauritzen*.[22] The court observed that in each case the Supreme Court had reviewed the " '*connecting factors* which either maritime law or our municipal law of conflicts regards as significant in determining the law applicable to a claim of actionable wrong.' " (Emphasis added).[23] And though *Lauritzen* and *Romero* dealt with a United States—foreign law conflict rather than with a conflict between the survival and death statutes of two states, the court apparently did not deem this a significant distinction. The court of appeals also observed that jurisdiction after jurisdiction was abandoning a rigid adherence to the "lex loci" rule in civil tort cases, in favor of a more sophisticated, meaningful and realistic choice of law criterion which takes into account analysis of the interests of the involved parties and jurisdictions.[24] On these bases, the court decided that it had an obligation to refrain from applying the substantive law of a disinterested jurisdiction. Thus, use of a contacts interest analysis to decide the maritime choice of law question, resulted in the application of Pennsylvania law.[25]

The contract theory for affirming the district court in *Scott* is reasonable in light of the holding of the Pennsylvania Supreme Court in *Griffith*[26] that characterization of an action as *ex contractu* does not

20. The Tungus v. Skovgaard, 358 U.S. 558 (1959); The Harrisburg, 119 U.S. 199 (1886).
21. 358 U.S. 354 (1959).
22. 345 U.S. 571 (1953).
23. 399 F. 2d at 27, citing Lauritzen v. Larsen, 345 U.S. 571, 592 (1953).
24. 399 F.2d at 28. However, none of the cases cited by the court involved maritime torts.
25. 399 F.2d at 28.
26. Analysis of *Griffith* reveals that the court considered five factors to be relevant to the choice of law question: the place of the injury; the place where the relationship between the parties was created; the domicile of the decedent; the place of the administration of the decedent's estate; and the domicile of the decedent's surviving dependents. However, the very rigidity and mechanicalness that the court sought to escape can result from applying a set of factors like these to every case. It is submitted that rather than substitute one mechanical test for another, the court should have analyzed the various

prevent application of the tort choice of law rule, and the federal court decision in *Weinstein* holding that a contract of nonnegligent carriage is not maritime. The court thus treated the suit as a pure civil action, and under the holdings of *Klaxon v. Stentor Elec. Mfg. Co., Inc.* and *Erie R. Co. v. Tompkins*,[27] Pennsylvania conflicts and internal law was applied.

The conclusion by the Court of Appeals that the tort aspects of the case must be governed by maritime law because the fatal injuries occurred on navigable waters is, however, unsound. The court made the common error of overlooking "the strange principle" that substantive rules of law in maritime causes vary "depending on whether the conduct gives rise to fatal or non-fatal injuries."[28] Since the maritime law provides no remedy for wrongful death occurring on state navigable waters[29] and must borrow the wrongful death statute of a state,[30] the remedy borrowed is state created and not rooted in the maritime law.[31] Accordingly, while the action can be brought in admiralty, it is not a truly maritime action, but rather a state cause of action enforceable in admiralty, by virtue of the situs of the injury.[32] Admiralty courts enforce the cause as they would "one originating in any foreign jurisdiction,"[33] and they are required to treat it as an integrated whole, subject to those conditions and limitations which the creating state has attached.[34] This means that defenses such as contributory negligence and assumption of the risk may be asserted if recognized in the creating state, although they are not ordinarily

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state interests. Subsequent to *Griffith*, the Pennsylvania Supreme Court has indicated that it may in fact be using a pure interest analysis. In McSwain v. McSwain, 420 Pa. 86, 215 A.2d 677 (1966), the court explained that it will analyze the extent to which a state has demonstrated a priority of interest in the application of its rule of law. In this area generally, see Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L.Rev. 267 (1966).

27. Under the doctrine of Erie R. Co. v. Tompkins, 304 U.S. 54 (1938), in a diversity case a federal district court must apply the internal substantive law of the state in which it sits. Klaxon Co. v. Stentor Elec. Mfg. Co., Inc., 313 U.S. 487 (1941) held that state conflict of law rules are a part of this internal substantive law.

28. The Tungus v. Skovgaard, 358 U.S. 558, 611 (1959) (dissenting opinion). Mr. Justice Brennan was describing the majority's decision, a decision which controls the facts of the *Scott* case. If the injuries are not fatal, the admiralty will provide an exclusively maritime remedy. If they are fatal, it must borrow a state remedy to enforce. Thus the substantive law will vary depending on the nature of the injury.

29. Hess v. United States, 361 U.S. 314 (1960); The Harrisburg, 119 U.S. 199 (1886). However, if the fatal injuries are sustained by a seaman, there is an admiralty remedy under the Jones Act, 46 U.S.C. § 688.

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

31. The Tungus v. Skovgaard, 358 U.S. 558 (1959); The Harrisburg, 119 U.S. 199 (1886).

32. Just v. Chambers, 312 U.S. 383 (1941); Hess v. United States, 361 U.S. 314 (1960).

33. Levinson v. Deupree, 345 U.S. 648, 652 (1953).

34. The Tungus v. Skovgaard, 358 U.S. 558 (1959).

available in admiralty,[35] and certain defenses available only in maritime law are prohibited unless valid under the state's law.[36]

It is clear then, contrary to the court's ruling in *Scott* that maritime principles govern the tort aspects of the case, that state substantive law applies whether the action is brought in admiralty or at law.[37] This being so, it becomes imperative to determine whether the state choice of law rule is to be treated as a part of the state substantive law.

In this unique situation, where a state wrongful death statute must be borrowed by the admiralty, it must be determined precisely how much of the appurtenant state law must be adopted by the admiralty court in borrowing the state remedy. Particularly, the court must determine whether the state choice of law rule comes into the admiralty court together with its wrongful death statute. The Supreme Court has held in *The Tungus v. Skovgaard*[38] and *Hess v. United States*,[39] that, if a state law constitutes a "condition or limitation" on its wrongful death remedy, it is controlling on the admiralty.[40] Whether a state's choice of law rule constitutes a significant limitation on its wrongful death remedy thus is a critical determination in maritime actions for wrongful death.

Although this precise issue has not yet been judicially decided, choice of law rules in non-maritime areas have been traditionally regarded as procedural rather than substantive.[41] Applying this traditional approach to *Scott* would justify the conclusion of the Third Circuit that maritime choice of law rules are applicable. So construed they could not be deemed as conditions or limitations on the state created right.

It is suggested that a sounder approach would be to regard state choice of law rules as substantive. Yet, treating the problem solely as one of characterization of the matter as substantive or procedural is to stop at surface analysis. In cases brought pursuant to its diversity jurisdiction, a federal district court is compelled to apply the internal

35. *Id.*
36. *Id.*
37. Goett v. Union Carbide Corp., 361 U.S. 340 (1960); Hess v. United States, 361 U.S. 314 (1960); The Tungus v. Skovgaard, 358 U.S. 558 (1959).
38. 358 U.S. 558 (1959).
39. 361 U.S. 314 (1960).
40. The Tungus v. Skovgaard, 358 U.S. 558 (1959).
41. See Hill, *State Procedural Law in Federal Nondiversity Litigation*, 69 HARV. L. REV. 66, 84 (1955).

substantive law of the state in which it sits.[42] And the Supreme Court has stated that in determining whether a law is substantive or procedural it will put aside abstractions and will consider only whether the law will substantially affect the result.[43] Thus in diversity cases, if the application of a particular state law would significantly affect the outcome of the case in a state court, that principle must be applied by the federal court.

It is submitted that this "outcome determinative" test can logically be applied to maritime actions borrowing a state wrongful death statute. The Supreme Court has held in diversity cases that choice of law rules do significantly affect the outcome of a case[44] and it seems clear that when an admiralty court is enforcing a state created remedy, applying the "affect the result" test to the state's choice of law rule should produce an identical holding. The admiralty court would then treat the state choice of law rule as being a limitation or condition on the wrongful death statute and apply it to resolve any conflicts.

Application of this approach to the facts of *Scott* would produce a result identical with that reached by the court of appeals, but on more justifiable grounds. The court's effort to construe maritime conflicts law so as to free themselves from the shackles of the "lex loci delicti" rule, while commendable, was unnecessary. Had it recognized that maritime law need not exclusively govern all matters occurring on navigable waters, it would not have been compelled to extend the *Lauritzen* and *Romero* choice of law doctrines to areas arguably distinguishable from the facts of those cases. This is somewhat analogous to the position taken by Judge Seitz in his concurring opinion,[45] although he reached this point as a result of the "saving to suitors" clause,[46] rather than by concluding that the matters before him were not maritime in nature. Thus, his opinion is in reality only analogous because the injured party in *Scott* died, and because the admiralty

42. Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). An exception to this general rule is a maritime cause brought as a diversity action pursuant to the "saving to suitors" clause. (See note 46, *infra*). Even though brought as a civil action, maritime law will still apply. See G. GILMORE AND C. BLACK, THE LAW OF ADMIRALTY § 6-58-62, (1957).

43. Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1944).

44. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

45. 399 F.2d at 32 where Judge Seitz stated "I believe the judgment below can be affirmed without consideration of any issue of substantive maritime law. . . ."

46. 28 U.S.C. § 1333 (1) (1964). Originally a provision in the Judiciary Act of 1789, 1 Stat. 76, which, in conferring exclusive jurisdiction on the federal courts of all civil cases of admiralty and maritime substance, saved to suitors in all cases the right of a common law remedy where the common law is competent to give it.

provides no remedy for wrongful death. Had plaintiff sustained only personal injuries, ostensibly Judge Seitz would have, as did the majority, applied maritime substantive law regardless of whether the action was commenced within or without the admiralty jurisdiction.

Underlying the choice of law problems of *Scott* is a basic flaw that is perhaps the key to the whole case. The flaw stems from the earlier decision of the Third Circuit in *Weinstein v. Eastern Airlines, Inc.*,[47] that a tort claim for injuries sustained in a plane crash into state navigable waters was maritime.[48] Although there was substantial authority to justify the court's holding that locality is the sole criterion for maritime tort jurisdiction,[49] it is arguable that such should not be the case.[50] Indeed, recent cases have shown that a rigid adherence to the locality test of maritime tort jurisdiction is not necessary to insure admiralty jurisdiction in the areas where it has a traditional purpose and interest.[51] A departure from the "strict locality test" would rid the admiralty of cases like *Scott* and *Weinstein* where there is no sound reason for the application of maritime law.

If airplane crashes into state waters were treated as unrelated to maritime commerce, and thus not within the jurisdiction of the admiralty, many of the problems encountered by the court in *Scott* in attempting to use a modern flexible approach to the choice of law issues would be nonexistent.[52]

It is submitted that, not withstanding the soundness of its result, the reasoning in *Scott* furthers the confusion begun by *Weinstein* in the area of admiralty tort jurisdiction. The court failed to recognize that substantive maritime law does not apply to actions for wrongful death on navigable waters of a state, since whether the suit is brought in admiralty or as a diversity action as in *Scott*, the substantive issues are governed by state law.

47. 316 F.2d 758 (3d Cir. 1963), *cert. denied*, 375 U.S. 940 (1963).
48. *Id.* at 766.
49. *Id.* at 761-62, n.9, 10, 11.
50. *See*, Comment, *Admiralty Jurisdiction: Airplanes and Wrongful Death in Territorial Waters*, 64 COLUM. L. REV. 1084 (1964); Pelaez, *Admiralty Tort Jurisdiction—The Last Barrier*, 7 DUQUESNE L. REV. 1 (1968).
51. Two such cases are McGuire v. City of New York, 192 F. Supp. 866 (S.D.N.Y. 1961), and Chapman v. City of Grosse Pointe Farms, 385 F.2d 962 (6th Cir. 1967). Both cases dealt with injuries to swimmers and found them to be without the jurisdiction of the admiralty even though the injuries had occurred on navigable waters. These cases are the leading authorities for the so called "locality plus" test for admiralty jurisdiction, requiring locality "plus" some connection with maritime commerce. For an in depth treatment of these cases and several others and a discussion of admiralty tort jurisdiction, see Pelaez, *Admiralty Tort Jurisdiction—The Last Barrier* 7 DUQUESNE L. REV. 1 (1968).
52. *See generally*, Moore and Pelaez, *Admiralty Jurisdiction-The Sky's the Limit*, 33 J. AIR L. & COM. 3, 19-27 (1967).

In addition, choice of law rules in actions where the admiralty does not provide a remedy should be viewed as substantive. Once this determination is made the entire approach to the case changes. It then becomes unnecessary to construe cases like *Lauritzen* and *Romero* and the prevailing choice of law test can be applied without the need to go out on a limb to do so as did *Scott*. One forseeable problem with the *Scott* rationale is that the conflicts approach of *Lauritzen* and *Romero*, while in complete harmony with Pennsylvania conflicts law, may be unacceptable in other jurisdictions where similar actions may be litigated, resulting in splits between circuits on this point. If, however, each jurisdiction's own choice of law rule can be applied even though the tort claims are viewed as maritime actions, a uniform procedure will result.

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