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Recommended Citation

Wrongful Death Act Amended to Include Suit Against Vessel in Maritime Torts, 11 Md. L. Rev. 125 (1950)

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**WRONGFUL DEATH ACT AMENDED TO INCLUDE
SUIT AGAINST VESSEL IN MARITIME TORTS**

During the 1949 session of the General Assembly of Maryland, the Maryland "Lord Campbell's Act" was amended. Article 67, Section 1, of the Maryland Code, now provides:

"Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action

and recover damages in respect thereof, *the vessel* or person who would have been liable if death had not ensued, or the executor or administrator of the said person who would have been liable in case of death of the said person who would have been liable, shall be liable to an action for damages, not withstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony and *if death ensues as a result of a wrongful act, neglect or default of a vessel, suit may be brought in rem against said vessel in any court of competent jurisdiction*; provided, however, that any such action against the executor or administrator of the said person who would have been liable shall be commenced within six calendar months after the death of the said person who would have been liable."¹

The amendment of this act (as shown by the portion italicized above) adds merely the possibility of libeling the vessel as well as the owners of the vessel in certain cases of maritime torts. However it suggests the entire problem of whether the Maryland Act (or any state law for that matter) can apply to maritime torts, particularly because such torts are within the admiralty jurisdiction of the United States. This problem has had an interesting history and development.

"It is a singular fact that by the common law the greatest injury which one man can inflict on another, the taking of his life, is without a private remedy",² for at common law the cause of action died with the person injured.³ The rule in admiralty was the same as the common law and the Supreme Court of the United States, in the case of *The Harrisburg*,⁴ held that under the general maritime law as accepted and received by the maritime nations in general and by the United States in particular, there was no right of action in the case of death caused by negligence.⁵ How-

¹ Md. Laws (1949) Ch. 742.

² *Goodsell v. Hartford & New Haven R. Co.*, 33 Conn. 51 (1865).

³ "The rule is often viewed as a derivative of the formula '*actio personalis moritur cum persona*' a maxim which is one of some antiquity though its origin is obscure and post-classical." *Van Beeck v. Sabin*, 300 U.S. 342 (1937); Also see 25 C.J.S. 1072, Sec. 13; *Lindgren v. U.S.*, 281 U.S. 38 (1930); *State for Use of Dunnigan v. Cobourn*, 171 Md. 23, 187 A. 881 (1936); *Davis v. Ruzicka*, 170 Md. 112, 183 A. 569 (1936), *cert. den.*, 298 U.S. 671 (1936).

⁴ 119 U.S. 199 (1886).

⁵ Prior to the decision of the Supreme Court in *The Harrisburg* there had been trial court decisions and intimations to the contrary. See *Plummer v. Webb*, Fed. Cas. No. 11234, 1 Ware 75 (D. Me. 1825); *Cutting v. Seabury*,

ever, the Supreme Court went on to hold that where any one of the states of the United States has a "survival statute" similar to the English "Lord Campbell's Act",⁶ or, indeed any act which allows a remedy arising out of negligence causing death, that the admiralty courts will enforce those statutes wherever the law of the state can be made applicable.⁷

In the case of *The Corsair*,⁸ the Supreme Court was confronted for the first time with the problem of whether a District Court has the power to entertain a libel *in rem* for damages incurred by loss of life due to negligence, where by the local law a right of action survives to the administrator or relation of the deceased, but no lien is expressly created by the act. The court, in an excellent opinion, reviewed all of the English cases preceding and including *The Vera Cruz*,⁹ in which case the law of England was definitely settled that an action *in rem* could not be brought under the English "Lord Campbell's Act". The Supreme Court, putting great weight on the decision of the *Vera Cruz* since almost every state statute was substantially patterned after the English "Lord Campbell's Act", said:

"A maritime lien is said by writers upon maritime law to be the foundation of every proceeding *in rem* in the Admiralty. In much the larger class of cases, the lien is given by the General Admiralty law, but in other instances, such for example as insurance pilotage, wharfage, and materials furnished in the home port of the vessel, the lien is given, if at all, by the local law. As we are to look, then, to the local law in this instance for the right to take cognizance of this class of cases,

Fed. Cas. No. 3521, 1 Spr. 522 (D. Mass. 1860) ; The Sea Gull, Fed. Cas. No. 12578 (D. Md. 1865) ; David Reeves, Fed. Cas. No. 6,625, 5 Hughes 89 (D. Md. 1879) ; The Charles Morgan, Fed. Cas. No. 2,618 (D. Ohio 1878) ; The City of Brussels, Fed. Cas. No. 2,745 (D. N.Y. 1873).

⁶ 9 & 10 Vic. Ch. XCIII.

⁷ The Maryland statute giving a right of action for wrongful death may be enforced in a court of admiralty where the cause of action arises from a maritime tort; right of jury trial not being indispensable to enforcement of such cause of action. *Maryland v. Miller*, 180 Fed. 796 (D. Md. 1910) modified on other grounds, 194 F. 775 (4th Cir. 1911), *cert. den.*, 225 U.S. 703 (1912) ; *State, Use of Szczyzek v. Hamburg Co.*, 190 Fed. 240 (D. Md. 1911), *aff'd.*, 193 F. 1019 (4th Cir. 1912) ; *aff'd.*, 234 U.S. 63 (1914).

A right of action for a death caused by wrongful act, given by a state statute, may be enforced in admiralty. *The Highland Light*, Fed. Cas. No. 6,447 (C.C. Md. 1867) ; *State v. Hamburg-American Steam Packet Co.*, 190 F. 240 (D. Md. 1911), *aff'd.*, 193 F. 1019 (4th Cir. 1912), *aff'd.*, 234 U.S. 63 (1914) ; *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921).

⁸ 145 U.S. 335 (1892).

⁹ 10 App. Cas. 59 (1884).

we are bound to inquire whether the local law gives a lien upon the offending thing. If it merely gives a right of action *in personam* for a cause of action of a maritime nature, the District Court may administer the law by proceedings *in personam*, . . . but unless a lien be given by the local law, there is no lien to enforce by proceedings *in rem* in the Court of Admiralty."¹⁰

" 'Lord Campbell's Act' in Maryland was first enacted by the Maryland Act of 1852, Chapter 299. The original language imposing liability, which was not substantially changed until 1949, imposed the liability merely upon the person who would have been liable if death had not ensued (or the executor or the administrator of the said person). The effect of the amendment of Section 1, Article 67, merely adds the words 'the vessel' to the phrase 'person who would have been liable' and further provides 'and if death ensues as a result of wrongful act, neglect or default of a vessel, suit may be brought *in rem* against said court of competent jurisdiction'."¹¹ Thus, due to the recent amendment, the Maryland statute for the first time imposed liability *in rem* on a vessel where death of a person was the result of a wrongful act, neglect or default of a vessel.

That these state statutes may be the basis of a cause of action arising out of torts, causing death and occurring within the admiralty jurisdiction, without violating the Constitution of the United States, is now almost universally recognized.¹² However, the law was not always so well settled on this point. It was early argued (1) that exclusive power to regulate rights and liabilities within the admiralty jurisdiction was vested in the federal government, and (2) that enforcement of state statutes in admiralty would mar the uniformity of the general maritime law and therefore to do so would be unconstitutional. The argument that Congress has the exclusive power to legislate over all admiralty and maritime causes was based on the power of Congress to regulate commerce¹³ and from the clause of the Consti-

¹⁰ *The Corsair*, 145 U.S. 335, 347 (1892). See also *The Anglo-Patagonian*, 235 F. 92 (4th Cir. 1916), *cert. den.*, 242 U.S. 636 (1916); *Lewis v. Jones*, 27 F. 2d 72 (4th Cir. 1928); *Vancouver S.S. Co. v. Rice*, 288 U.S. 445 (1933).

¹¹ *State, Use of Maines v. A/S Nye Kristianborg & Motor Vessel Bowgran*, 1949 A.M.C. 1329, 84 F. Supp. 775 (D. Md. 1949).

¹² I BENEDICT, *ADMIRALTY* (1940), Sec. 148p., 391; ROBINSON, *ADMIRALTY* (1939), Ch. 5, Sec. 16, 137; *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921).

¹³ U. S. CONST., Art. 1, Sec. 8. Parenthetically, it is of interest to note that the Supreme Court of the United States relied on this provision of the Constitution authorizing Congress to regulate interstate commerce as part of the basis for extending the jurisdiction of admiralty to injuries suffered on land by seamen in connection with their employment. *O'Donnell v. Great*

tution extending the judicial power to "all cases of admiralty and maritime jurisdiction".¹⁴ The argument that Congress has sole power to legislate within the admiralty jurisdiction, however, has been rejected and in *Atlantic Fruit Co. v. Red Cross Line*¹⁵ it was said, "within certain limitations in the absence of congressional action, 'a state law may give a substantial right of such a character that . . . the right may be enforced in the proper federal tribunal whether it be a court of equity or admiralty or of common law'."¹⁶ Likewise the argument that a state cannot destroy the symmetry of the maritime law by creating maritime rights or conferring jurisdiction in any particular upon an admiralty court has been rejected when it was held that use of the state death acts did not mar the uniformity of the general maritime law.¹⁷

Lakes D. & D. Co., 1943 A.M.C. 149, 318 U.S. 36 (1943), thus overruling the Court of Appeals of Maryland in its decision in *Rudo v. Bull S.S. Co.*, 168 Md. 281, 177 A. 538 (1935), *cert. den.*, 295 U.S. 759 (1935), in which the Maryland Court refused to follow that argument.

¹⁴ U. S. Constr., Art. 3, Sec. 2.

¹⁵ 276 F. 319 (1921), *aff'd.*, 5 F. 2d 218 (2nd Cir. 1924). See *Just v. Chambers*, 312 U.S. 383, 388 (1941) saying, "With respect to maritime torts we have held that the State may modify or supplement the maritime law by creating liability which a court of admiralty will recognize and enforce when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation." *The City of Norwalk*, 55 F. 98 (1893); *Western Fuel Co. v. Garcia*, 257 U.S. 233, 242 (1921); *Great Lakes Dredge Co. v. Kierejewski*, 261 U.S. 479 (1923); *Vancouver Steamship Co. v. Rice*, 288 U.S. 445 (1933). See also *The Lottawana*, 21 Wall 558, 88 U.S. 558 (1874).

¹⁶ Italics supplied.

¹⁷ The Supreme Court in the case of *Western Fuel Co. v. Garcia*, 257 U.S. 233, 240-242 (1921), after reaffirming the rule that no suit to recover damages for the death of a human being caused by negligence may be maintained in the admiralty courts of the United States under the general maritime law stated:

"How far this rule of non-liability adopted and enforced by our admiralty courts in the absence of an applicable statute may be modified, changed or supplemented by state legislation has been the subject of consideration here but no complete solution of the question has been announced. . . .

"In *Southern Pac. Co. v. Jensen*, 244 U.S. 205; *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372; *Union Fish Co. v. Erickson*, 248 U.S. 308 and *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, we have recently discussed the theory under which the general maritime law became a part of our national law, and pointed out the inability of the States to change its general features so as to defeat uniformity — but the power of a State to make modifications or supplements was affirmed. And we further held that rights and liabilities in respect of torts upon the sea ordinarily depend upon the rules accepted and applied in admiralty courts which are controlling wherever suit may be instituted. Under this view, *Amer. Steamboat Co. v. Chase and Sherlock v. Alling*, support the right to recover under a local statute in an admiralty court for death occurring on navigable waters within the State when caused by tort there committed.

"As the logical result of prior decisions we think it follows that, where death upon such waters results from a maritime tort committed on

Thus, in the absence of conflicting congressional legislation, the Maryland statute may be enforced in the appropriate federal¹⁸ or state court.¹⁹

In 1920, Congress enacted the "Death on the High Seas Act".²⁰ This act provides as follows:

"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, the personal representative of the decedent may maintain a suit for damages in the district court of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person or corporation which would have been liable if death had not ensued."

In Section 7 of the "Death on the High Seas Act", it is provided "the provisions of any state statute giving or regulating rights of action or remedies for death shall not be affected by this chapter." As a result of Sec. 7, the Federal Act of 1920 does not apply to navigable territorial waters of a state.²¹ Under the "Death on the High Seas Act", an action can be brought either against the person responsible or against the vessel.²² Thus, at this point, if the cause of action arose beyond the three-mile limit as provided for in the Federal Act, the "Death on the High Seas Act" would be the applicable statute. If the cause of action arose within the territorial waters of Maryland, the suit would have to be based on the Maryland Act, and here also, since the 1949 amendment, suit may be brought against the offending person or *vessel*. However, it must be remembered that

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. The subject is maritime and local in character and the specified modification or supplement to the rule applied in admiralty courts, when following the common law, will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations. *Southern Pac. Co. v. Jensen, supra*" (Italics supplied.) See also *In Re Clyde S.S. Co.*, 134 F. 95 (D. N.Y. 1904).

¹⁸ See *supra*, n. 10.

¹⁹ See *infra*, ns. 24 and 26.

²⁰ 46 U.S.C. 761, *et seq.*

²¹ I BENEDICT, ADMIRALTY (1940) 375. ROBINSON, ADMIRALTY (1939), Ch. 5, Secs. 16, 139 and 140.

²² *The Windrush*, 286 Fed. 251 (1922), *aff'd.*, 5 F. 2d 425 (1925).

if suit is brought, either under the Maryland Act or the "Death on the High Seas Act", against the vessel, it *must* be brought in the Federal Admiralty Courts.²³ If suit is brought against the person, under the Maryland Act, suit may be brought either in the state court or the federal court.²⁴ Title 28, of the United States Code, Section 1333 provides:

"The District Court shall have original jurisdiction, exclusive of the courts of the state, of

(1) Any civil case of admiralty or maritime jurisdiction saving to suitors in all cases all other remedies to which he is otherwise entitled."²⁵

This provision of the judicial code clarifies the existence of concurrent remedies in the state and federal courts where the suit is *in personam*.²⁶

Several months after the passage of the "Death on the High Seas Act", Congress passed the "Seamen's Act of 1920"²⁷ commonly called the "Jones Act". This act gave to "Seamen injured through the negligence of their employers, and to their personal representatives, where the injuries result in death, the rights given to railway employees and their personal representatives by the 'Employers' Liability Act of 1908' and its amendments".²⁸ In effect the act created a cause of action either for injury to a seaman or death to a seaman caused by the negligence of the employer. This cause of action is *in personam* only and thus can be brought

²³ I BENEDICT, ADMIRALTY (1940) 38, "The right to proceed *in rem* is the distinctive remedy of the admiralty and hence administered exclusively by the United States courts in admiralty. . . ." Also see *The Moses Taylor*, 4 Wall 411, 431 (U.S. 1866); *Berton v. Tietjen & Lang Dry Dock Co.*, 219 F. 763 (D. N.J. 1915).

²⁴ *Steamboat Co. v. Chase*, 83 U.S. 522 (1872).

²⁵ The "saving to suitors" clause in secs. 41(3) and 371(3) of Title 28 U.S.C. (1940 ed.) was recently changed by the 1948 session of Congress by substituting the words "any other remedies to which he is otherwise entitled" for the words "the right of a c.l. remedy when the c.l. is competent to give it". In 1949, Congress amended Sec. 1333 to its present form "saving to suitors in all cases all other remedies to which they are otherwise entitled".

²⁶ Jurisdiction of the federal court is not exclusive where the relief sought is purely *in personam*. *N. Pa. Sea Products Co. v. Nieder*, 137 Wash. 85, 241 Pac. 632 (1925). A cause of action for death under a state statute is within the savings clause though not based on the common law, *Perry v. Stansfield*, 278 Mass. 563, 180 N.E. 514 (1932).

²⁷ 46 U.S.C. 688.

²⁸ ROBINSON, ADMIRALTY (1940) 312. Also see *Black Gull*, 82 F. 2d 758 (2nd Cir. 1936), *cert. den.*, 298 U.S. 684 (1935); *Escandon v. Pan Amer. Foreign Corp.*, 88 F. 2d 276 (5th Cir. 1937), *aff'g.*, 12 F. Supp. 1006 (1935).

in either the state or federal court.²⁹ The "Jones Act", however, has a limiting effect on the Maryland statute. In *Lindgren v. U.S.A. and Colonna's Shipyard, Inc.*,³⁰ it was said by the Supreme Court of the United States that "... we conclude that the Merchant Marine Act — adopted by Congress in the exercise of its paramount authority in reference to the maritime law and incorporating in that law the provisions of the Federal Employers' Liability Act — establishes as a modification of the prior maritime law a rule of general application in reference to the liability of owners of vessels for injuries to seamen extending territorially as far as Congress can make it go; that this operates uniformly within all of the States and is as comprehensive of those instances in which by reference to the Federal Employers' Liability Act it excludes liability, as of those in which liability is imposed; and that, as it covers the entire field of liability for injuries to seamen, it is paramount and exclusive, and supersedes the operation of all state statutes dealing with that subject". Under the *Lindgren* decision all suits by the personal representatives of a seaman against an employer based on negligence causing the death must be brought under the "Jones Act" whenever the tort occurred within the navigable territorial waters of the state. The court in the *Lindgren* case clearly stated that the effect of the "Jones Act" upon the "Death on the High Seas Act" was not under consideration and inferior federal courts and state courts have subsequently allowed suits involving seaman-employer relationship to be maintained under the "Death on the High Seas Act" whenever that act would otherwise be applicable.³¹ It may be said that the Mary-

²⁹ State courts have jurisdiction concurrently with the federal courts to enforce the right of action established by the "Jones Act". *Engel v. Davenport*, 271 U.S. 33 (1926); *Panama R.R. Co. v. Vasquez*, 271 U.S. 557 (1926). No suit *in rem* will lie under the "Jones Act". *Black Gull*, 82 F. 2d 758 (2nd Cir. 1936); *Baymead*, 88 F. 2d 144 (9th Cir. 1937). "Under sec. 33 of the 'Jones Act', the cause of action for negligence may at the election of the seaman be brought either in admiralty in the federal court (*Just v. Chambers*, 312 U.S. 383, 61 S. Ct. 687, 85 L. Ed. 903; *Panama R. Co. v. Johnson*, 264 U.S. 375, 390, 44 S. Ct. 391, 68 L. Ed. 748) or at law in the federal court (*De Zon v. American President Lines*, 318 U.S. 660, 63 S. Ct. 814, 87 L. Ed. 1065; *Panama R. Co. v. Johnson*, 264 U.S. 375, 44 S. Ct. 391, 68 L. Ed. 748), or at law in the state court (*Garret v. Moore McCormack Co.*, 317 U.S. 239, 63 S. Ct. 246, 87 L. Ed. 239; *Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 138, 49 S. Ct. 75, 73 L. Ed. 220)." *McDonald v. Cape Cod Trawling Co.*, 71 F. Supp. 888 (D. Mass. 1947).

³⁰ 1930 A.M.C. 399, 281 U.S. 38, 46 (1930).

³¹ Suit may be brought under the Death on the High Seas act even though seaman-employer relationship is involved: *The Four Sisters*, 75 F. Supp. 399 (D. Mass. 1947), 1947 A.M.C. 1623; *The Alice May* (D. Mass.) 1944 A.M.C. 392; *The Mohawk* (N.Y.) 1938 A.M.C. 396, 2 N.Y. Supp. 2d 309.

The following cases allowed a suit based on the "Death on the High Seas Act" to be maintained in the state courts: *The Juneal*, 1938 A.M.C.

land Act may be resorted to when the negligent act causing the death occurred within the navigable territorial waters of the State of Maryland and the relationship of the parties involved was not that of seaman and employer or that of stevedore and employer.³²

Soon after the amendment to Article 67, Section 1, of the Maryland Code went into effect, the question arose whether or not the amendment was to act retroactively. In *State of Maryland v. A/S Nye Kristianborg and M/V Bowgran*,³³ Judge Chesnut, sitting in the District Court of Maryland, after recognizing that this was a problem of first impression, held — “that the amendment is, under Maryland and federal law, prospective and cannot validly be made retroactive in effect”, since it affected substantive rights and did not merely change procedure. Judge Chesnut based his opinion firstly on the fictional concept which endows the ship with a personality stating “it seems to follow logically enough that when the amendment imposed upon the ship a liability not heretofore existing and further subjected the ship to a proceeding *in rem* to enforce that liability the substantive law was thereby changed. According to American admiralty law the conceptual origin of the maritime lien resulted from the personification of the ship as a judicial entity. So viewed it seems clear enough that a new substantive right was given the libellant, and a new substantive liability was imposed upon the ship as a personified entity.” Secondly, that apart from the fictional concept of personification a very substantial reason for holding that the substantive law is changed by the amendment is the fact that the amendment imposes liability on a vessel itself for a wrongful act, neglect or default notwith-

794, 4 N.Y. Supp. 2d 9 (1938); *Bugden v. Trawler Cambridge*, 319 Mass. 315 (1946); *Wyman v. Pan Amer. Airways, Inc.*, (N.Y.) 1941 A.M.C. 912.

The following cases allowed a suit based on the “Death on the High Seas Act” to be maintained on the civil side of the federal court: *Choy v. Pan American Airways Co.*, (D. So. D. N.Y.) 1941 A.M.C. 483; *The Four Sisters*, *supra*.

The following cases have construed the “Death on the High Seas Act” to mean the suit must be maintained in the Federal Admiralty Courts: *The Mohawk*, 1938 A.M.C. 396, 2 N.Y. Supp. 2d 309; *Dall v. Cosulich*, (S.D. N.Y.) 1936 A.M.C. 359; *The Chicago & Silverpalm*, 1935 A.M.C. 1506, 79 F. 2d 598 (C.C.A. 9); *Middleton v. Luckenbach S.S. Co.*, 1934 A.M.C. 649, 654, 5 F. Supp. 238, (S.D. N.Y. 1934), *mod.* C.C.A. 70 F. 2d 326 (1934), *cert. den.*, 293 U.S. 577 (1934).

³² In general, rights between stevedore-employer are governed by the “Longshoremen’s & Harbor Workers Compensation Act”, 33 U.S.C. 901, *et seq.*, and the “State Workmen’s Compensation Acts”, Md. Code Supp. (1949), Art. 101.

³³ 1949 A.M.C. 1329, 84 F. Supp. 775, 780, (D. Ct. Md. 1949).

standing there may be no fault or personal liability on the part of the shipowner.

Whether or not the amendment is retroactive in effect it will serve the purpose of filling a void in the admiralty law applicable to torts occurring within this state but which were in the admiralty jurisdiction. Let us suppose that a collision between two vessels occurs within the navigable territorial waters of the State of Maryland causing death to individuals aboard the innocent vessel. Also assume that the offending vessel is sailing under a foreign flag. The "Death on the High Seas Act" would not apply since the wrong occurred within the territorial waters of a state. Nor would the "Jones Act" be applicable since the wrongdoer was not the employer of the deceased persons. Therefore it would be necessary to rely on the Maryland wrongful death statute. Prior to its amendment, suit could only be brought against the owner or operator of the vessel since the statute provided no lien against the ship. If the owner or operator of the vessel sailing under a foreign flag, had no office or agent here and was not doing business here, then there is no way of enforcing the *in personam* cause of action except by going to the place where the owner or operator resides, or does business, which may be in some foreign country and attempt to file suit under our law. The expense, difficulty and hardships involved in many cases would deter those who had been dependent upon deceased from enforcing their *in personam* remedy. Now that our statute is broad enough to provide for a suit *in rem* against the offending vessel as well as a suit *in personam* against the owner or operator of the offending vessel, this injustice would be remedied. At small expense and with little hardship or difficulty, the dependent relatives of deceased could enforce their remedy by libeling the vessel while it is still within the territorial waters of Maryland.

This illustration shows the need for the amendment recently passed by the Maryland legislature and which has been in effect since June 1, 1949. It will prevent persons from using Maryland waters, committing wrongs and then going off "scot-free".