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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

RICHARD DONALDSON, Plaintiff and Appellant, v. NATIONAL MARINE, INC., Defendant and Respondent.	A092876/A093705 (San Francisco County Super. Ct. No. 998145)

National Marine, Inc., appeals from a judgment, entered after a jury trial, awarding Richard Donaldson $1,616,400 on an action for the wrongful death of Donaldson's adoptive father, Albert Pavolini.

FACTUAL/PROCEDURAL BACKGROUND

Mr. Pavolini spent his adult working life on or around boats and ships. He served in the Navy from 1942 until 1964. He worked for Military Sea Transport from 1966 to 1967, he worked for National Marine (then Cardinal Carriers) from 1967 to 1981 and he worked for other private shipping companies from 1980 until he retired, a few years later. Mr. Pavolini's duties both for the Navy and for the private shipping companies included installing or repairing insulation around pipes and waterlines, and it is undisputed that Mr. Pavolini was exposed to asbestos during his Naval career, and later, while working for the private companies. Mr. Pavolini also began smoking at age 16, and smoked until 1984.

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II and III.

In May 1997, Mr. Pavolini was diagnosed with lung cancer. He died in 1998 of complications resulting from the cancer.

These proceedings began prior to Mr. Pavolini's death, when Mr. Pavolini filed suit against multiple defendants, including several tobacco companies, on the theory that his lung cancer was caused by a combination of his use of tobacco and his exposure to asbestos during his naval career and his employment with the private companies. Although it is not clear from the record, it appears that the defendants originally included companies that manufactured or supplied products containing asbestos to the Navy or to the private shipping companies. In all events, the parties ultimately stipulated to orders severing the tobacco defendants from the asbestos defendants for separate trial.

In the case against the tobacco defendants, the trial court sustained a demurrer to the complaint without leave to amend, and entered judgment in favor of the tobacco defendants. Mr. Pavolini appealed. We consolidated that appeal with a second appeal, filed by Edwin Brigham. (A084371 and A084367.) After Mr. Pavolini died, on July 17, 1988, we permitted his adoptive son, Richard Donaldson,[1] to substitute for Mr. Pavolini. (Mr. Brigham also died while the appeal was pending, and we permitted Joseph Naegele and David Wheeler as co-trustees of the Edwin Naegele trust, and Alicia Ojeda Brigham, to substitute for Mr. Brigham.) We affirmed the judgment of the trial court in both cases, finding that the tobacco defendants were immune from suit under the version of Civil Code section 1714.45 in effect at the time Mr. Pavolini's causes of action accrued.[2] (*Naegele v. R.J. Reynolds Tobacco Co.* (2000) 81 Cal.App.4th 503.) Donaldson did not seek review of our decision, but the Supreme Court granted review in *Naegele*, and has reversed our decision in that case. (*Naegele v. R.J. Reynolds Tobacco Co*. (Aug. 5, 2002, SO90402) ____ Cal.4th ____.)

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[1] Pavolini was the stepfather of Donaldson and his brother, Larry Donaldson, but did not formally adopt Donaldson until shortly before his death. Larry Donaldson passed away before these proceedings.

[2] Civil Code section 1714.45 bars actions for damages due to injuries or death resulting from the use of specified consumer products.

In the meantime, on September 25, 1999, Donaldson filed suit against National Marine, Inc., as the successor to Cardinal Carriers, seeking damages for Mr. Pavolini's death under the Jones Act, title 46 United States Code section 688, and under the maritime doctrine of unseaworthiness. National Marine moved to dismiss the case against it on the theory that the San Francisco Superior Court lacked subject matter jurisdiction over Donaldson's maritime claims because Mr. Pavolini's work for Cardinal Carriers took place outside of California's territorial waters. The motion was denied, and the matter went to trial.

At trial, National Marine did not dispute that Mr. Pavolini died of lung cancer. It defended on the theory that Mr. Pavolini's lung cancer was not related to his exposure to asbestos, but resulted from his history of smoking tobacco. National Marine also theorized that even if Mr. Pavolini's exposure to asbestos was a factor in his lung cancer, tobacco was a greater factor. Finally, it argued that in all events Mr. Pavolini's exposure to asbestos during his naval career was far greater than his exposure to asbestos while working for Cardinal Carriers.[3]

The jury rejected Donaldson's unseaworthiness claims. It found, however, that National Marine was negligent under the Jones Act, and that its negligence was a cause of Mr. Pavolini's death. The jury further fixed the damages for Mr. Pavolini's death at $1,796,000, and apportioned fault between Mr. Pavolini, National Marine, the Navy and the tobacco companies, at 10 percent for Mr. Pavolini, and 30 percent each for National Marine, the Navy and the tobacco companies.

National Marine appealed from the judgment, entered on the jury's verdict, of "at least $538,800.00."

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[3] Donaldson did not bring suit against the Navy, and National Marine did not cross-complain against the Navy, apparently because all parties believed the Navy to be immune from Donaldson's claims. It also appears that although Donaldson's complaint named only National Marine and its predecessors, at least some of the other asbestos defendants were involved in the proceedings as late as May 23, 2000. It does not appear that National Marine cross-complained against these other defendants.

The trial court later denied National Marine's motions for a new trial and for judgment notwithstanding the verdict, but granted Donaldson's motion to amend the judgment to make National Marine liable for 90 percent of the jury's verdict. The court found that the Navy and the tobacco companies were immune from Donaldson's claims, and that National Marine, accordingly, was liable for the full amount of damages, less the 10 percent attributable to Mr. Pavolini's fault. The court therefore corrected its judgment to increase Donaldson's award against National Marine to $1,616,400.

National Marine filed a second appeal from the court's order. The appeals have been consolidated, and we consider both here.

DISCUSSION

I.

Subject Matter Jurisdiction[4]

National Marine contends that the San Francisco Superior Court lacked subject matter jurisdiction over Donaldson's claims, and that the trial court, accordingly, erred in denying National Marine's motion to dismiss. The contention is based on an interpretation of maritime law, and a split in California authority as to whether the State's courts have subject matter jurisdiction over actions brought for the death of a seaman outside of the State's territorial waters. After reviewing the historical development of maritime law and its application to actions for negligence and wrongful death, we conclude that California's courts do indeed have subject matter jurisdiction over such actions, even when the actionable wrong or the death occurred outside of the State's territorial limits.

It is well-settled that state courts are competent to try civil maritime suits for injuries to seamen, although they will be required to apply federal maritime law to the seaman's claims. (See, e.g., *Engel v. Davenport* (1926) 271 U.S. 33.) At first, however, maritime law afforded no cause of action for wrongful death. (*The Harrisburg* (1886)

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4 It is not contested that the superior court had personal jurisdiction over National Marine.

119 U.S. 199, 214.) In addition, although the point later was questioned in *Moragne v. States Marine Lines* (1970) 398 U.S. 375, 377-388), it was believed that no federal common law action for wrongful death existed in the United States. Plaintiffs seeking damages as a result of the wrongful death of a seaman, therefore, were relegated to such relief as might be available under a state's wrongful death statute. (*Moragne v. States Marine Lines, supra,* 398 U.S. 375, 377; *The Tungus v. Skovgaard* (1959) 358 U.S. 588, 590-591.)

In 1920, however, Congress passed two landmark acts: (1) The Death on the High Seas Act, title 46 United States Code sections 761 et seq. (DOSHA), which established an action for a death occurring beyond a marine league from the shore of any state, and (2) the Jones Act, title 46 United States Code section 688, which extended the protections of the Federal Employers' Liability Act (FELA) to seamen, and thereby provided a right of recovery against employers for negligence resulting in injury or death. (46 U.S.C. §§ 688, 761; *Moragne v. States Marine Lines, supra,* 398 U.S. at p. 394.) Problems arose when suit was brought not for negligence, but for unseaworthiness, and the death occurred within a state's territorial waters. In such cases, the death was not covered by DOSHA, which was limited to deaths occurring on the high seas, or by the Jones Act, which was limited to actions arising from negligence. If recovery could be had for such claims, therefore, it still could be had only under state wrongful death statutes, a situation that fostered a lack of consistency in the adjudication of wrongful death claims. Moreover, because the Jones Act preempts state law remedies for the death or injury of a seaman, state statutes could provide no relief to true seamen, with the result that, within a state's territorial waters, recovery was available under a state's wrongful death statute for the death of a longshoreman but not for the death of a Jones Act seaman. (*Miles v. Apex Marine Corp.* (1990) 498 U.S. 19, 25; *Moragne v. States Marine Lines, supra,* 398 U.S. at pp. 395-396.)

The Supreme Court, in *Moragne,* remedied the situation by overruling *The Harrisburg,* and creating a general maritime remedy for wrongful death. (*Moragne v. States Marine Lines, supra,* 398 U.S. at p. 409; and see also *Miles v. Apex Marine Corp.,*

supra, 498 U.S. at pp. 25-27.) After *Moragne*, the Jones Act provided a cause of action for the negligent death of a seaman, irrespective of the place at which the injury occurred or the death took place. In addition, DOSHA provided a cause of action for wrongful death on the high seas, and a general maritime remedy existed for wrongful death caused by unseaworthiness, also irrespective of the location of the injury or death.

That these causes of action exist, of course, does not mean that a state court has subject matter jurisdiction to entertain them. Article III, section 2 of the United States Constitution confers jurisdiction on the federal courts to hear "all cases of admiralty and maritime jurisdiction." Title 28 United States Code section 1333, part of the Judiciary Act of 1789, provides that the district courts "shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled.*" (Italics added.) Thus, the federal courts have exclusive jurisdiction over civil maritime cases unless the remedy is one that is saved to suitors.

National Marine, citing *Chromy v. Lawrance* (1991) 233 Cal.App.3d 1521, contends that the savings to suitors clause permits state courts to entertain admiralty or maritime actions only if the state's wrongful death statute provides a remedy for that action. The contention assumes that the term "remedy," for purposes of the clause, means that the state's wrongful death statute must itself establish the right to sue for the death at issue. California's wrongful death statutes, Code of Civil Procedure section 377.10 et seq., do not specifically establish a right to sue for maritime deaths occurring outside of the state's territorial limits. Mr. Pavolini died in Tennessee, of injuries alleged to have been received, in part, while working for National Marine as a seaman on or around the Mississippi River. It follows, under National Marine's analysis, that California's wrongful death statute cannot provide a basis for the exercise of state court subject matter jurisdiction over Donaldson's maritime claim.

National Marine's contention, however, is based on two premises that we reject: (1) that California's wrongful death statutes do not apply to deaths occurring outside of the State's territories; and (2) that title 28 United States Code section 1333 allows state

courts to entertain only those rights of action specifically recognized by the state in question.

Although California's wrongful death statutes do not specifically apply to deaths occurring outside of California's territories, there is no question but that its courts have subject matter jurisdiction over out-of-state injuries or deaths, assuming a basis for the exercise of personal jurisdiction over the parties. Nothing in the wrongful death statutes suggests that they are limited to deaths on waters only when those waters exist within the state's territorial limits.[5] It is true that state courts traditionally have been reluctant to provide a remedy for a maritime death occurring outside of the state's territorial waters. (See *Miles v. Apex Marine Corp.* (1990) 498 U.S. 19, 24-25; *Moragne v. States Marine Lines, supra,* 398 U.S. at p. 393, including fn. 10; and *The Hamilton* (1907) 207 U.S. 398.) This reluctance, however, arises from issues of choice of law rather than from issues of the competence of a state court to hear the claim. The reasoning is that because the remedy of wrongful death is a creature of statute, not recognized in all jurisdictions, it would be improper to impose it on a claim arising in a jurisdiction that does not itself recognize that remedy.

This point was discussed in *McDonald v. Mallory et al.* (1879) 77 N.Y. 546, a case often cited for its discussion of the reach of state wrongful death statutes. A vessel, registered in New York, was destroyed by fire while anchored on the high seas, outside of the territory of any jurisdiction. A citizen of New York was killed as a result of the fire, and an action for wrongful death was brought in the New York state court. The defendant argued that New York's statute provided no right of action to recover for wrongs committed outside of the state's territorial limits. The court recognized, as is particularly relevant here, that as a general rule, the law of the jurisdiction where an accident occurred applies to any claim arising from that accident. This meant that if an

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5 Contrast the situation where the exercise of *personal* jurisdiction over a defendant is based on an act committed by that defendant in the forum state, or where the presence of real or personal property within the state's boundaries provides a basis for jurisdiction *in rem* or *quasi in rem*. (See *Hanson v. Denckla* (1958) 357 U.S. 235, 246-247, 251.)

accident took place in a jurisdiction that did not recognize a claim for wrongful death, the State Court of New York, applying the law of the jurisdiction in which the accident occurred, would not provide a remedy for wrongful death. The court reversed, in essence, that it should apply the law of the jurisdiction where the death occurred. It did not find that it lacked competence to hear a claim arising from a death resulting from a wrong committed outside of the state's territorial waters. (*Id.* at pp. 550-551.)[6] The court also recognized that a vessel while at sea constructively is part of the territory of the state to which the vessel belongs, and subject to that state's laws. (*Id.* at pp. 552-553.) It concluded that the New York wrongful death statute applied unless it was displaced by the law of the jurisdiction where the wrong occurred. As the claim arose on the high seas, outside of any state's territorial waters, and as maritime law at that time did not provide an exclusive remedy for a death occurring on the high seas, the court found that the New York statute applied. (*Id.* at p. 556.) It also found that the state court had jurisdiction to hear the claim. (*Ibid*.)

Under this analysis, California's courts have subject matter jurisdiction over deaths occurring outside of the State's territorial limits, although they may be required to

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6 The court held: "It is settled by the adjudications of our own courts that the right to action for causing death by negligence exists only by virtue of the statute, and that where the wrong is committed within a foreign State or country, no action therefor can be maintained here, at least without proof of the existence of a similar statute in the place where the wrong was committed. [Citations.] These decisions rest upon the plain ground that our statute can have no operation within a foreign jurisdiction, and that with respect to positive statute law it cannot be presumed that the laws of other States or countries are similar to our own. The liability of a person for his acts depends, in general, upon the laws of the place where the acts were committed, and although a civil right of action acquired, or liability incurred, in one State or country for a personal injury may be enforced in another to which the parties may remove or where they be found, yet the right or liability must exist under the laws of the place where the act was done. Actions for injuries to the person committed abroad are sustained without proof in the first instance of the lex loci, upon the presumption that the right to compensation for such injuries is recognized by the laws of all countries. But this presumption cannot apply where the wrong complained of is not one of those thus universally recognized as a ground of action, but is one for which redress is given only by statute." (*McDonald v. Mallory et al., supra,* 77 N.Y. at pp. 550-551.)

apply the law of the jurisdiction where the wrong occurred. For purposes of this case, that law is the Jones Act. As the Jones Act recognizes a claim for wrongful death, the superior court was entitled to hear Donaldson's claims.

The second premise in National Marine's argument that we reject is that the "savings to suitors" clause "saves" only those rights of action recognized by state law. The clause refers to remedies, not to rights of action. The difference between the two was explained by the United States Supreme Court in *Knapp, Stout & Company v. McCaffrey* (1900) 177 U.S. 638). *Knapp* was a suit brought to enforce a lien for towage. In finding that an Illinois court had jurisdiction over the case, notwithstanding the limitations on jurisdiction imposed by the Judiciary Act of 1789, the Supreme Court distinguished between actions brought against a vessel itself and actions brought against a personal defendant to enforce a lien against a vessel. The court concluded that admiralty courts have exclusive jurisdiction over the first type of action because the remedy—an action against the vessel itself—has all the features of an admiralty proceeding *in rem.*[7] Suit may be maintained against the owner, however, even though the plaintiff seeks to enforce a lien against the vessel for towage charges, because the remedy—a suit brought *in personam*—is a state remedy "saved to suitors." (*Id.* at pp. 646-648.)

An additional issue arose from the fact that the suit in *Knapp, Stout & Company v. McCaffrey, supra,* was a suit in equity, and therefore "certainly not a common-law action." (*Id.* at p. 644.) The court held: "But it will be noticed that the reservation is not of an *action* at common law, but of a common-law *remedy;* and a remedy does not necessarily imply an action." (*Ibid.*) "The true distinction between such proceedings as are and such as are not invasions of the exclusive admiralty jurisdiction is this: If the

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7 And even then, admiralty jurisdiction would not extend to all *in rem* actions. Admiralty jurisdiction, for example, does not extend to a contract for building a vessel or to work done or materials furnished in its construction. As to such contracts, therefore, it is "competent for the states to enact such laws as their legislatures might deem just and expedient, and to provide for their enforcement *in rem.*" (*Knapp, Stout & Company v. McCaffrey, supra,* 177 U.S. at p. 643.)

cause of action be one cognizable in admiralty, *and* the suit be *in rem* against the thing itself, though a monition be also issued to the owner, the proceeding is essentially one in admiralty. If, upon the other hand, the cause of action be not one of which a court of admiralty has jurisdiction, *or* if the suit be *in personam* against an individual defendant, with an auxiliary attachment against a particular thing, or against the property of the defendant in general, it is essentially a proceeding according to the course of the common law, and within the saving clause of the statute . . . of a common-law remedy. The suit in this case being one in equity to enforce a common-law remedy, the state courts were correct in assuming jurisdiction." (*Id.* at p. 648.)

In the present case, it is true, as National Marine contends, that California, although recognizing an action for wrongful death (Code Civ. Proc., § 377), does not specifically recognize an *action* for wrongful death occurring outside of its territorial limits. Under *Knapp,* however, that fact is of little importance. The question is whether California law recognizes a *remedy* of an *in personam* suit for wrongful death. It does, and that remedy is saved to suitors by section 7 of the Judiciary Act. Finally, it is of no consequence that the remedy of a suit for wrongful death was established only after the adoption of the Judiciary Act of 1789. The court in *Knapp,* citing its earlier opinion in *Steamboat Company v. Chase* (1872) 83 U.S. 522, rejected the argument that the savings clause must be limited to such remedies as were known to the common law at the time of the passage of the judiciary act. (*Knapp, Stout & Company v. McCaffrey, supra,* 177 U.S. at pp. 646-647.)

In conclusion, where a state, such as California, provides a remedy—such as an action in personam—for a claim, such as a wrongful death claim, the State courts have subject matter jurisdiction over that claim even though the claim is brought under maritime law, and even though the actionable wrong took place outside of California's territorial limits.

In reaching this conclusion we place ourselves squarely in the camp of *Garofalo v. Princess Cruises, Inc.* (2000) 85 Cal.App.4th 1060, where it was found that California courts have jurisdiction over maritime wrongful death actions arising outside of the

State's territorial limits. We also find that we disagree with *Chromy v. Lawrance, supra,* 233 Cal.App.3d 1521.[8]

The decisions in *Chromy* and in *Garofalo* were based on different interpretations of the opinion in *Offshore Logistics, Inc. v. Tallentire* (1986) 477 U.S. 207, which involved a DOSHA action, brought in federal court, and the question of whether state or federal law governed the suit. The court in *Offshore Logistics* concluded, essentially, that while the savings to suitors clause acts as a jurisdictional savings clause allowing state courts to entertain actions and provide wrongful death remedies for accidents occurring both on state territorial waters and on the high seas, it does not authorize the application of state law to those actions. Rather, "the 'saving to suitors' clause allows state courts to entertain *in personam* maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by a so-called 'reverse-*Erie'* doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards." (*Id.* at pp. 222-223.)

The court in *Chromy* found that *Offshore Logistics* held that the saving to suitors clause confers concurrent jurisdiction on the states to adjudicate maritime causes of action provided that the jurisdictional requirements of the state court are met. The court then characterized this holding as meaning that DOSHA actions could be tried in state courts only if the state's wrongful death statute expressly extends to deaths on the high seas. (*Chromy v. Lawrance, supra,* 233 Cal.App.3d at pp. 1526-1527.) *Offshore Logistics,* however, was a federal court action. The Supreme Court, therefore, had no reason to decide whether the action might have been brought in state court, and did not address that question. It decided only that federal law governed DOSHA claims whether suit was filed in federal or state courts.

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8 Our conclusion also differs from that reached by the court in *Gordon v. Reynolds* (1960) 187 Cal.App.2d 472. The court in that case concluded that the federal courts have exclusive jurisdiction over wrongful death actions arising outside of state territorial waters. The court, however, did not consider the effect of the saving to suitors clause on the plaintiff's claim. A decision is not authority for a proposition not considered in the court's opinion. (*People v. Myers* (1987) 43 Cal.3d 250, 265, fn. 5.)

In addition, as recognized by the court in *Garofalo,* although the court in *Offshore Logistics* discussed the concurrent jurisdiction of the state courts over DOSHA actions, it said nothing from which it might be concluded that "the exercise of concurrent jurisdiction was to be premised upon a state-by-state analysis of whether a wrongful death statute had been given extraterritorial effect at the time DOSHA was enacted." (*Garafalo v. Princess Cruises, Inc., supra,* 85 Cal.App.4th at p. 1082.) To the contrary, "[h]ad the Supreme Court intended the exercise of concurrent jurisdiction to turn on such an inquiry, we would have expected the court to provide a fuller and clearer statement to that effect. Federal courts routinely cite *Offshore Logistics* for the proposition that state courts have concurrent jurisdiction over DOSHA actions, without any additional analysis of the extraterritorial reach of the state wrongful death statute. [Citations.]" (*Id.* at pp. 1082-1083.) Finally, as also recognized by the court in *Garofalo,* the desire for uniformity was a factor in the *Offshore Logistics* court's determination that federal law should apply to all suits irrespective of forum. This desire would be frustrated by a conclusion that the "exercise of concurrent jurisdiction depended upon the extraterritorial reach of each state's wrongful death law." (*Id.* at p. 1083.)[9]

In conclusion, we, like the court in *Garafalo,* respectfully disagree with the decision in *Chromy*, and find that California's courts have concurrent jurisdiction to hear *in personam* maritime actions for wrongful death, although they are required to apply federal law to such actions.

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9 In *Yamaha Motor Corp., U.S.A. v. Calhoun* (1996) 516 U.S. 199, the United States Supreme Court held that while federal law governs actions brought under DOSHA and the Jones Act, Congress has not proscribed remedies for the wrongful death of nonseafarers in territorial waters. The court, seemingly retreating somewhat for its earlier stance on the need for uniformity, held that state law could apply to claims arising from such deaths. (*Id.* at pp. 215-216.)

II.

Apportionment

National Marine contends that the trial court erred in entering judgment against it for greater than 30 percent of the damages; i.e., that amount representing the jury's finding of National Marine's proportionate share of fault for Mr. Pavolini's death.

It is settled that defendants under the Jones Act are jointly and severally liable for the plaintiff's damages.[10] Under this rule, an award of damages will be reduced by that portion of the damages assignable to the plaintiff's own negligence (or that of the plaintiff's decedent in a wrongful death case), but a shipowner, such as National Marine, remains responsible for the full remainder, even if the concurrent negligence of others contributed to the incident. (*McDermott, Inc. v. AmClyde* (1994) 511 U.S. 202, 220-221; *Edmonds v. Compagnie Generale Transatl.* (1979) 443 U.S. 256, 259-260, 269, 271.)

In *Edmonds*, the plaintiff, a longshoreman, was injured in the course of his work. His right to seek damages from his employer, the stevedore, was limited by the Longshoremen's and Harbor Workers' Compensation Act (the Act). The plaintiff, accordingly, did not file suit against the stevedore, but did file suit against the shipowner. A jury returned a verdict finding that the plaintiff was 10 percent at fault for his injuries, the stevedore was 70 percent at fault for those injuries and the shipowner was 20 percent at fault for the injuries. The Supreme Court rejected the shipowner's arguments that it should have been held liable only for that share of the total damages equivalent to the ratio of its fault to the total fault, holding further that shipowner's responsibility for the full amount of the plaintiff's damages (less that amount attributable to the plaintiff's own fault) was not affected by the statutory inability of the plaintiff to seek damages from his employer. "Under this arrangement, it is true that the ship will be liable for all of the

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10 In Civil Code section 1431 et seq., California has modified the traditional doctrine of joint and several liability. California's approach, however, may not be applied in suits brought under the Jones Act where, as here, such a procedure would bear on the substantive right of the plaintiff to recover. (*Hutchins v. Juneau Tanker Corp.* (1994) 28 Cal.App.4th 493, 500-502.)

damages found by the judge or jury; yet its negligence may have been only a minor cause of the injury. The stevedore-employer may have been predominantly responsible; yet its liability is limited by the Act, and if it has lien rights on the longshoreman's recovery it may be out-of-pocket even less. . . . [¶] . . . [¶] Some inequity appears inevitable in the present statutory scheme, but we find nothing to indicate and should not presume that Congress intended to place the burden of the inequity on the longshoreman whom the Act seeks to protect." (*Edmonds v. Compagnie Generale Transatl., supra,* 433 U.S. at pp. 269-270.) The shipowner, therefore, was held to be jointly and severally liable for the full amount of the damages suffered by the plaintiff, save that amount attributable to the plaintiff's own fault. (*Id.* at p. 271.)

As National Marine points out, the rule of joint and several liability is modified when the plaintiff settles its case with one of several joint defendant-tortfeasors. In such cases, the amount of the settlement will be applied to diminish the claim that the plaintiff has against the other defendants by the amount of the equitable obligation of the released tortfeasor. (*McDermott, Inc. v. AmClyde, supra,* 511 U.S. at pp. 209, 217.) The court in *McDermott* found that this procedure, characterized as the "proportionate share rule," is not inconsistent with *Edmonds,* holding that "[u]nlike the rule in *Edmonds*, the proportionate share rule announced in this opinion applies when there has been a settlement. In such cases, the plaintiff's recovery against the settling defendant has been limited not by outside forces, but by its own agreement to settle. There is no reason to allocate any shortfall to the other defendants, who were not parties to the settlement." (*Id.* at p. 221.)

In the present case, there was no settlement between Donaldson and the Navy or the tobacco companies. The exception recognized by the court in *McDermott*, therefore, does not apply. It is irrelevant that the Navy and/or the tobacco companies may be immune from Donaldson's claims. The *McDermott* court held: "Joint and several liability applies when there has been a judgment against multiple defendants. It can result in one defendant's paying more than its apportioned share of liability when the plaintiff's recovery from other defendants is limited by factors beyond the plaintiff's

control, such as a defendant's insolvency. When the limitations on the plaintiff's recovery arise from outside forces, joint and several liability makes the other defendants, rather than an innocent plaintiff, responsible for the shortfall. [Citation.]" (*McDermott, Inc. v. AmClyde, supra,* 511 U.S. at pp. 220-221.)[11] The proportionate-share rule recognized by the court in *McDermott* consequently has no application when a plaintiff is unable to recover damages from one of several joint tortfeasors as a result of a statutory immunity. In such cases the other defendants, such as National Marine, here, are responsible for the shortfall.

National Marine cites *Trevino v. General Dynamics Corp.* (5th Cir. 1989) 865 F.2d 1474 as authority for adopting the proportionate-share rule in cases where the Navy is a tortfeasor. It is true that the trial court in that case attributed 80 percent of the fault of an accident to a private company, and 20 percent of the fault to the Navy. Nothing in *Trevino,* however, indicates either that the trial court then entered judgment against the private company in the amount of only 80 percent of the damages or that the appellate court affirmed any such award.[12]

It is not persuasive that the immunity of the tobacco companies is based on a California statute, and Donaldson chose to bring suit in California. The court in *McDermott* recognized that where a plaintiff settles with a defendant, that plaintiff has agreed to accept the settlement amount as representing the full extent of the settling

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[11] The court in *Coats v. Penrod Drilling Corp.* (5th Cir. 1995) 61 F.3d 1113, 1123, suggested that the existence of an immunity would not trigger a *McDermott* apportionment. The court there noted that the adoption of a modified version of the doctrine of joint and several liability would result in a reduced verdict for the plaintiff in cases where one defendant is statutorily immune (*id.* at p. 1123), and, after a detailed discussion of the doctrine in connection with maritime cases, refused to reject the traditional doctrine in favor of the modified version. (*Id.* at p. 1139.)

[12] Donaldson has submitted the declaration of the attorney that represented the *Trevino* plaintiffs that the judgment against the private company was not reduced by an amount proportionate to the Navy's share of fault. We find it unnecessary to consider this declaration. It is enough that the opinion in that case does not suggest that judgment was entered against the private employer for less than 100 percent of the plaintiff's damages.

defendant's liability. Justice requires that the plaintiff be bound by that decision, and not shift the risk of poor prognostication to a non-settling defendant. Donaldson did not settle with the tobacco companies, and did not choose to file suit in California out of some understanding or belief that the tobacco companies were not liable for Mr. Pavolini's death. To the contrary, Mr. Pavolini brought suit against the tobacco companies, and Donaldson, after he was substituted into that case, argued, strenuously, that the tobacco companies were liable for Mr. Pavolini's death. Donaldson's inability to collect from the tobacco companies, therefore, was not the result of a choice made by him. It resulted from our finding that the tobacco companies were immune from suit, i.e., from the kind of "outside forces" discussed in *McDermott.* This case, consequently, does not fall within the exception or modification established by the court in *McDermott.*

National Marine argues that, under *McDermott*, the trial court at least should have reduced the award of damages against National Marine by any amount obtained by Donaldson in settlements with the dismissed defendants. It is true that, under *McDermott*, National Marine should not be required to pay the amount of damages attributable to the settling defendants for their proportionate fault in Mr. Pavolini's death. National Marine, however, did not identify any settling defendants, nor did it ask the jury to assess their proportionate fault. Under the circumstances, the court had no basis for reducing the award against National Marine.

National Marine also argues that the Navy and the tobacco companies were not truly immune from liability for Mr. Pavolini's death. This argument may be useful to National Marine in some later action for contribution from those entities, but as National Marine is jointly and severally liable for Mr. Pavolini's death irrespective of the immunities enjoyed by either the Navy or the tobacco companies, the argument is of little import here.

III.

The Jury's Finding that National Marine was 30 percent at Fault for Mr. Pavolini's Injuries and Death

Finally, National Marine contends that the evidence does not support the jury's finding that it was 30 percent at fault for Mr. Pavolini's injuries and death, arguing that the evidence required a finding that the Navy and the tobacco companies were more at fault for Mr. Pavolini's lung cancer than was National Marine.[13]

Contrary to National Marine's arguments, there was evidence from which the jury could have concluded that National Marine's fault for Mr. Pavolini's death and injuries was roughly comparable to the fault of the Navy and of the tobacco companies. As National Marine emphasizes, the expert witnesses agreed that the risk of contracting lung cancer is ten times greater for smokers than it is for non-smokers, but only five times greater for persons exposed to asbestos than for persons who have not been exposed to asbestos. The experts, however, also agreed that the combination of smoking and exposure to asbestos acts as a multiplier, such that the risk of contracting cancer for persons who both smoke and have been exposed to asbestos is 50 times greater than for persons who neither smoke nor have been exposed to asbestos. There also was evidence that every exposure to asbestos increases the risk that an individual will contract cancer. No expert could identify a single cause of Mr. Pavolini's cancer, and the evidence was that it would be impossible to rule out any exposure as playing a role in the development of cancer. In addition, except for some testimony that Mr. Pavolini did not suffer from an asbestos-related disease at all, no expert could apportion risk or fault between the Navy and National Marine, or between the tobacco companies and Mr. Pavolini's employers.

National Marine argues that although the experts could not apporportion fault, the jury was required to apportion fault in accordance to the risk that Mr. Pavolini's exposure

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[13] Because National Marine is jointly and severally liable for 90 percent of Mr. Pavolini's damages irrespective of its proportional share of fault, this argument is of no practical significance unless National Marine seeks contribution from either the Navy or the tobacco companies.

to tobacco, or exposure to asbestos, would cause lung cancer. That Mr. Pavolini, as a smoker, was ten times more likely than a non-smoker to contract lung cancer, however, does not mean that his exposure to tobacco was in fact a cause of his lung cancer. That the risk of cancer is ten times greater for smokers than for non-smokers, and only five times greater for persons exposed to asbestos than for persons who were not exposed to asbestos, does not mean that the tobacco companies were twice as responsible as Mr. Pavolini's employers for Mr. Pavolini's cancer. Similarly, that Mr. Pavolini may have been exposed to a greater amount of asbestos during his Naval career than during his work for Cardinal Carriers, does require a finding that Mr. Pavolini's cancer was caused by his exposure during his Naval career, or that the Navy was more responsible for Mr. Pavolini's death than was National Marine. "Risk" and "Cause" are different concepts, and there is no requirement that the jury apportion cause or fault along the lines of risk.

Moreover, even if each tortfeasor's contribution to the risk of an occurrence determined its proportionate fault should the occurrence take place, there was evidence from which the jury reasonably could have concluded that the tobacco companies, the Navy, and National Marine contributed equally to the risk that Mr. Pavolini would contract lung cancer.

Although the risk of cancer from use of tobacco exceeds the risk of lung cancer from exposure to asbestos, Mr. Pavolini stopped smoking in 1984, 13 years before he was diagnosed with lung cancer, and there was evidence that this fact significantly decreased the risk that Mr. Pavolini's use of tobacco would cause him to contract lung cancer. In addition, the evidence of Mr. Pavolini's exposure to asbestos during his Naval career, and during his work with Cardinal Carriers, was hotly contested. National Marine introduced evidence that as Mr. Pavolini's career with Cardinal Carriers progressed, he spent more time on shore, and more time in a supervisory capacity, with the result that his exposure to asbestos was reduced. Donaldson introduced evidence that even after being promoted to supervisory positions, Mr. Pavolini continued to do hands-on work on Cardinal Carrier's vessels, and he continued to be exposed to asbestos even when he wasn't handling it himself. Donaldson also introduced evidence that Mr. Pavolini's naval career

did not constantly expose him to asbestos. For example, Mr. Pavolini was not exposed to asbestos during periods when he was in school, or taught, or when he was on shore leave, or when he traveled as a passenger or during a three-year period when he worked on shore.

The doctrine of comparative fault is a flexible, commonsense concept, under which a jury properly may consider and evaluate the relative responsibility of various entities for an injury. (*Knight v. Jewett* (1992) 3 Cal.4th 296, 314; *Rosh v. Cave Imaging Systems, Inc.* (1994) 26 Cal.App.4th 1225, 1233.) The doctrine does not lend itself to " 'the exact measurements of a micrometer-caliper.' [Citations.] . . . . [¶] [And] 'the appellate court may not substitute its judgment for that of the jury or set aside the jury's finding if there is any evidence which under any reasonable view supports the jury's apportionment. [Citation.]' [Citation.]" (*Rosh v. Cave Imaging Systems, Inc., supra,* 26 Cal.App.4th at pp. 1233-1234.) In light of the evidence, including the opinions of the expert witnesses and their inability to identify any particular exposure or time of exposure to either asbestos or tobacco as being the sole or major cause of Mr. Pavolini's cancer, we can find no error in the jury's determination that National Marine, the Navy and the tobacco companies were equally at fault in Mr. Pavolini's death.

Conclusion

The judgment is affirmed.

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Stein, Acting P.J.

We concur:

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Swager, J.

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Margulies, J.

Trial Court:	Superior Court City and County of San Francisco
Trial Judge:	Honorable James McBride
Attorneys for Appellant:	Phillip R. Bonotto Brian M. Taylor Rushford & Bonoto
Attorneys for Respondent:	Harry F. Wartnick Martha A. H. Berman Wartnick, Chaber, Harowitz & Tigerman Daniel U. Smith Law Offices of Daniel U. Smith

(Donaldson v. National Marine, Inc. - A092876/A093705)