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A death at sea

AN INTRODUCTION TO MARITIME LAW AND THE DEATH ON THE HIGH SEAS ACT

The field of maritime torts and, particularly, death claims, can be confounding for a general practitioner. At times, even seasoned maritime practitioners can find themselves lost navigating the labyrinth of maritime statutes, rules, regulations, and centuries-old case law. Unlike the generally straightforward application of state wrongful-death and survival statutes, the availability of maritime-death claims and recoverable damages depends on various factors including the status of the decedent, status of defendant, the location of the death, location of the wrongful acts leading to decedent's death and whether the claim is based on negligence or unseaworthiness of the vessel.

Overview

The Death on the High Seas Act, 46 U.S.C., § 30301, et seq., formerly 46 U.S.C., § 761, et seq. (DOHSA) is a federal statute that establishes a cause of action for one category of maritime deaths – wrongful deaths occurring on the high seas beyond three nautical miles from United States shores. Considering the complexity of the applicable law that differs based on these variables, this article will be limited to addressing the claims and remedies available to nonseafarers. The article also does not address commercial-aviation accidents governed by the Act which are given more favorable treatment.

Before discussing the statute in more detail, it is important to briefly address admiralty jurisdiction and the historical evolution of maritime-death claims. Article III, section 2, of the United States Constitution establishes federal jurisdiction over "all cases of admiralty and maritime jurisdiction." Congress granted admiralty jurisdiction to federal courts in the Judiciary Act of 1789.

In a series of cases, the Supreme Court of the United States established the "location and connection" test to determine whether federal admiralty jurisdiction is invoked. The location test requires the court to, "determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water." (*Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.* (1995) 513 U.S. 527, 534.) The "connection test raises two issues. A court, first, must 'assess the general features of the type of incident involved,'. . . to determine whether the incident has 'a potentially disruptive impact on maritime commerce,' second, a court must determine whether 'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.'" (*Ibid.* (internal citations omitted).)

When admiralty jurisdiction is established

If admiralty jurisdiction is established over a tort claim, the substantive general maritime law will apply. (*E. River S.S. Corp. v. Transamerica Delaval Inc.* (1986) 476 U.S. 858, 864.) "Absent a relevant statute, the general maritime law, as developed by the judiciary, applies. . . Drawn from state and federal sources, the general maritime law is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules." (*Id.* at pp. 864-65.)

While federal courts have original jurisdiction over admiralty claims, in the Savings to Suitors Clause, Congress also preserved plaintiffs' right to sue defendants, in personam, for maritime torts (as opposed to "in rem," as when one sues the vessel) in state court. (28 U.S.C. § 1333.) Thus, a plaintiff bringing in personam admiralty claims can choose to proceed in state or federal court. State-court judges have concurrent jurisdiction to decide these claims, and they cannot be removed to federal court (except on diversity of citizenship grounds, or when the plaintiff contractually agreed to a federal forum). (See, *Romero v. International Terminal Operating Co.* (1959) 358 US. 354, 371.) However, when state courts are deciding admiralty cases, they are constrained by the so-called "reverse-*Erie*" doctrine, which requires that the substantive remedies afforded by the states

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conform to governing federal maritime standards. (*Offshore Logistics, Inc. v. Tallentire* (1986) 477 U.S. 207, 222-223.)

Turning to the historical background of maritime claims, one might be surprised to learn that until DOHSA was enacted in 1920, deaths occurring on the high seas could not be redressed in civil court. In *The Harrisbur*g (1886) 119 U.S. 199, the Supreme Court declared that there was no remedy available for survivors of those killed on the high seas under the general maritime law. However, individual states had been and were enacting wrongful-death and survival statutes. Some extended remedies to deaths occurring in their territorial waters, but generally not to deaths on the high seas.

The birth of DOHSA wrongful-death actions

Given the void in legal remedies for deaths at sea, Congress remedied the situation by enacting a law that applied uniformly across the nation. Thus, DOHSA was born, offering limited economic damages with the intent of providing something where no remedy previously existed. The same year, Congress also enacted the Jones Act (46 U.S.C. App. § 688) providing seamen with a negligence cause of action for injuries and deaths caused by their employer's negligence. (See generally, *McDermott Int'l, Inc. v. Wilander* (1991) 498 U.S. 337 342-343.)

In 1970 the Supreme Court reversed itself and declared there was a general maritime law cause of action for wrongful death. (*Moragne v. States Marine Lines, Inc.* (1970) 398 U.S. 375.) *Moragne* created a general maritime law cause of action for wrongful death based on negligence when neither the DOHSA nor the Jones Act apply, such as the deaths of nonseafarers within state territorial waters and provides for nonpecuniary damages. Survival causes of action have also been recognized in deaths occurring in state territorial waters. (See e.g., *Sutton v. Earles* (9th Cir. 1994) 26 F.3d 903 and *Evich v. Morris* (9th Cir. 1987) 819 F.2d 256.)

Moreover, in 1996, the Supreme Court specifically declared that state wrongful-death and survival laws could supplement the general maritime law for deaths of nonseafarers in state territorial waters when neither DOHSA nor the Jones Act apply. (*Yamaha Motor Corp., U.S.A. v. Calhoun* (1996) 516 U.S. 199, 215-216.) The Court specifically found that DOHSA was not intended to affect the application of state statutes to deaths within territorial waters. (*Id.* citing Section 7, 46 U.S.C. App. § 767, presently, 46 U.S.C. § 30308.)

The culmination of these cases has made available general damages for deaths occurring in state territorial waters for the pecuniary value of lost support, companionship and society of the decedent. Significantly, it also authorizes a survival action for the decedent's pre-death pain and suffering. (See, e.g., *Azzopardi v. Ocean Drilling & Exploration Co.* (5th Cir. 1984) 742 F.2d 890, 893 and cases cited.)

While remedies for deaths occasioned onshore and within state territorial waters evolved and expanded over time, DOHSA remained the same. In fact, the Supreme Court in several decisions beginning in 1978 ensured DOHSA's limited remedies were left undisturbed and could not be supplemented by state or general maritime law wrongful-death or survival actions.

DOHSA precludes general damages for wrongful death

Consequently, a century later, DOHSA continues to exist with its harsh consequences, precluding recovery of general damages for loss of society, love and affection, thereby failing to recognize the immense loss that death of a loved one causes their surviving family members. The DOHSA could be criticized for being anachronistic and treating aviation accident victims more favorably by permitting general damages for loss of care, comfort and companionship. (See, e.g., *Rowan Cos. v. Houston Helicopters, Inc.* (E.D. La. 2007) 2007 U.S. Dist. LEXIS 76824, *7-8, 2007 WL 3046207 [distinguishing recoveries].)

More recently, the DOHSA has been held to place severe limits on cruise-line passengers' cases involving COVID-19 related deaths. (See, e.g., *Maa v. Carnival Corp. & PLC* (C.D. Cal. Sept. 21, 2020), No. CV 20-6341 DSF (SKX), 2020 WL 5633425 (*Maa*).)

The DOHSA has survived in its present form despite repeated legislative efforts to amend it. Special interests have kept the status quo, limiting exposure for deaths on the seas. Unfortunately, the likelihood of recovering minimal damages in DOHSA wrongful-death cases has resulted in practitioners declining to represent victims. This is particularly true when one considers that in certain circumstances, the maximum recovery is the cost of the deceased's burial.

DOHSA: What is it, and when does it apply?

The DOHSA is a federal statute that exclusively governs the claims relating to deaths arising on the highs seas as defined by the statute and case law.

Section 30302 of title 46 of the United States Code provides: "When the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond three nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. The action shall be for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative."

Section 30308 of title 46 of the United States Code provides the DOHSA does not apply to, "the Great Lakes or waters within the territorial limits of a state." The statute also provides that contributory negligence of the decedent is not a bar to recovery, but comparative negligence will reduce recovery accordingly. (46 U.S.C. § 30304.)

The statute's lack of clarity has resulted in much litigation over disputes arising from defining the timing and location of the wrongful act or death and how it may affect the applicability of the statute. By its express terms, the Act

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applies to deaths caused by wrongful acts occurring on the high seas beyond three nautical miles from shore. While it may seem simple enough to apply when an accident occurs at sea (negligent acts at sea, resulting in a death at sea), what happens when the death occurs at sea due to negligent acts that took place on land? How about an accident that occurred at sea and caused injuries that later resulted in a death on land? A number of decisions had to grapple with these issues and ultimately focused on the *place of injury* from the wrongful act, rather than the *place of death* to determine the applicability of DOHSA.

Courts have repeatedly held that wrongful-death actions resulting from injuries on the high seas fall under admiralty jurisdiction and are subject to DOHSA, even if the death did not occur until the injured person succumbed to their injuries on land. Thus, in *Bergen v. F/V St. Patrick* (9th Cir. 1987), 816 F.2d 1345, 1348, opn. mod., on reh'g, (9th Cir. 1989) 866 F.2d 318, plaintiffs alleged some crewmembers died in territorial waters but the vessel's unseaworthiness resulted from decisions made onshore. The Ninth Circuit held the DOHSA applies to "the site of an accident on the high seas, not to where death actually occurs or where the wrongful act causing the accident may have originated." (*Bergen v. F/V St. Patrick*, *supra*, 816 F.2d at p. 1348.)

In *Moyer v. Rederi* (S.D. Fla. 1986) 645 F. Supp. 620 (*Moyer*), the district court rejected the argument that DOHSA did not apply to a cruise passenger who experienced a heart attack while snorkeling during an expedition in the waters of Mexico and later died on shore, holding "[t]he right to recover for death depends upon the law of the place of the act or omission that caused it and not upon that of the place where death occurred." (*Id*., at p. 627.) The case is often cited for its additional holding that "a cause of action under DOHSA accrues at the time and place where an allegedly wrongful act or omission 'was consummated' in an actual injury, not at the point were [sic] previous or subsequent negligence allegedly occurred." (*Ibid.*) In finding the death claim was within the reach of DOHSA, the court stated, "'the foundation of the right to recover [under DOHSA] is a wrongful act or omission *taking effect* on the high seas.'" (*Id*. at p. 628, emp. orig., int. citations omitted.)

Following such authorities, recent decisions from the district court in the Central District of California involving the deaths of passengers on Princess Cruises due to contracting COVID-19 have held that the wrongful-death claims are governed by DOHSA. In *Maa*, *supra*, 2020 WL 5633425, the court rejected arguments that DOHSA did not apply because the decedent died onshore and numerous negligent acts by the cruise line were undertaken on land, holding, "the DOHSA applies where 'the site of an accident [is] on the high seas' regardless of where 'death actually occurs or where the wrongful act causing the accident may have originated.... It is ... irrelevant that decisions contributing to the [boat's] unseaworthiness may have occurred onshore or within territorial waters,'" (*Id*. at *8-9.) The court found that the site of the accident, the place where decedent contracted COVID-19, was clearly on the high seas. (See also, *Dorety v. Princess Cruise Lines Ltd*. (C.D. Cal. Sept. 17, 2020), No. 2:20-CV-03507-RGK-SK, 2020 WL 6748719, at *2.)

The same legal principles apply in the reverse when an accident leading to death occurs on land, even if some negligent acts occurred on the high seas. In *Fojtasek v. NCL (Bahamas) Ltd*. (S.D. Fla. 2009) 613 F. Supp. 2d 1351, decedent, a cruise passenger, participated in a zip-line excursion on land purchased during the cruise. The court found the spouse's wrongful-death claims arose under Florida law because the accident causing the death occurred on land. Citing *Moyer, supra*, the court held: "Here, the cause of action accrued on land at the time that the decedent fell from the zip-line. Thus, because that injury did not occur on the high seas, DOHSA does not apply." (*Id*. at p. 1354.)

"High seas"

Another issue often litigated is DOHSA's geographical reach. The term "high seas" has not been defined in the statute. An acceptable definition might be an area in open oceans outside the territorial jurisdiction of any country. However, the Ninth Circuit has held that the term "high seas" has "no apparent, independent geographical significance, other than perhaps to emphasize that the boundary beyond which DOHSA applies is the point where U.S. territorial waters ended *at the time of enactment*." (emp. supp.) (*Helman v. Alcoa Glob. Fasteners, Inc.* (9th Cir. 2011), 637 F.3d 986, 991.) The court thus concluded that for purposes of the statute, the geographic boundary is beyond three nautical miles from shore. (*Ibid*.)

Accordingly, courts have consistently held that the Act applies to any location on water beyond three nautical miles from U.S. shores. (See e.g., *Howard v. Crystal Cruises, Inc.* (9th Cir. 1994), 41 F.3d 527, 529 [applying the DOHSA to death resulting from injuries occasioned while disembarking cruise ship anchored in Mexican territorial waters, holding it "appears to be settled that the term 'High Seas' within the meaning of DOHSA is not limited to international waters, but includes the territorial waters of a foreign nation as long as they are more than a marine league away from any United States shore."]; *Moyer*, *supra*, 645 F.Supp. at p. 623 [applying DOHSA to death arising out of heart attack suffered while cruise ship passenger was on a snorkeling expedition in Mexican territorial waters, holding the prevailing view is that "maritime incidents occurring within the territorial waters of foreign states fall within the ambit of DOHSA."].)

Statute of limitations

Whether filed in state or federal court, the statute of limitations for maritime injury and death claims under the DOHSA is three years from the date of the injury or death. However, practitioners need to be cognizant that cruise lines include contractual limitations

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in their passage contract requiring suit within one year of the death. This limitation is enforceable under the general maritime law and permissible pursuant to federal law under section 30508 of title 46 of the United States Code. (See e.g., *Dempsey v. Norwegian Cruise Line* (9th Cir. 1992), 972 F.2d 998.)

DOHSA – an exclusive remedy

As noted above, while state laws have evolved over the years, and further rights and remedies were made available for deaths occurring in state territorial waters, DOHSA's exclusive application has been fiercely guarded. The Supreme Court had a number of opportunities to expand the rights of survivors seeking compensation for the deaths of their loved ones, but time and again, it ruled DOHSA cannot be supplemented by the general maritime law or state law.

In *Mobil Oil Corp. v. Higginbotham* (1978) 436 U.S. 618, the Court held the DOHSA precludes damages for loss of society under general maritime law. (*Id*., at pp. 624-625.) In *Offshore Logistics, Inc. v. Tallentire* (1986) 477 U.S. 207, 232, the Court held that DOHSA may not be supplemented by nonpecuniary damages under a state wrongful-death statute. (*Id*., at p. 232.) Finally, in *Dooley v. Korean Air Lines Co., Ltd*. (1998) 524 U.S. 116, the Court held the DOHSA preempts survival actions under the general maritime law. (*Id*., at p. 124.) Accordingly, beneficiaries under DOHSA cannot recover any damages beyond those allowed under DOHSA and those cannot be supplemented by state or general maritime law for either wrongful-death or survival claims.

Standing to bring a DOHSA action?

Section 30302 of title 46 of the United States Code provides, "the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. The action shall be for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative."

The statutory language requires the "personal representative" to bring the action, in admiralty, which can be brought either in federal court, or state court under the Saving to Suitors Clause. The personal representative is the only one with legal standing to bring the action and has to be actually appointed to act in that capacity. The court explained in *Santos v. Am. Cruise Ferries, Inc.* (D.P.R. 2015), 100 F.Supp.3d 96, 104, that a "personal representative" under the statute is by definition a duly appointed executor or administrator of an estate, not merely an heir or a beneficiary who has no standing to bring a DOHSA suit. When the appointment has not been obtained by the time the action is filed, the court has discretion to allow the plaintiff to obtain the appointment. (*Id.* at p. 106.)

Therefore, it is important for practitioners who often file lawsuits under state wrongful-death laws by a decedent's heir, beneficiary, or successor in interest, to understand that such would not be sufficient for purposes of DOHSA. While a court will likely allow reasonable time to obtain the necessary appointment of the personal representative, an undue delay in doing so could result in the court dismissing the case and precluding relation back for any subsequent filing. (See e.g., *Kennedy v. Carnival Corp.* (S.D. Fla. 2019), 385 F.Supp.3d 1302, 1313, report and recommendation adopted (S.D. Fla. Mar. 21, 2019) No. 18-20829-CIV, 2019 WL 2254962 [finding stay rather than dismissal is appropriate to allow plaintiff who is actively seeking appointment, with the likelihood of obtaining it, complete the process]; *Hassanati ex rel. Said v. Int'l Lease Fin. Corp.* (9th Cir. 2016), 643 F.Appx. 620, 622 [dismissing case and declining to allow relations back, holding "[T]wo-year delay in seeking appointment was unreasonable and not an understandable mistake."].)

Remedies

Once a personal representative has been properly appointed to comply with the requirement of section 30302 of title 46 of the United States Code, the party may proceed with prosecuting the action on behalf of decedent's spouse, parent, child, or dependent relative. Section 30303 provides that "[t]he recovery in an action under this chapter shall be a fair compensation for the pecuniary loss sustained by the individuals for whose benefit the action is brought. The court shall apportion the recovery among those individuals in proportion to the loss each has sustained."

While the statute does not define what constitutes "fair compensation for the pecuniary loss sustained" by the spouse, parent, child or dependent relative, case law has established the parameters of recoverable remedies. A pecuniary loss is a financial benefit that would have been received by the beneficiary from the decedent. It is a loss which can be monetarily measured and does not include intangible losses such as loss of society, loss of love and affection, loss of companionship, loss of consortium or for mental anguish. "Any damage award must be proved and be reasonably certain. . . Although damages need not be proved to a mathematical certainty, sufficient facts must be introduced so that a court can arrive at an intelligent estimate without speculation or conjecture." (*Bergen v. F/V St. Patrick* (9th Cir. 1987), 816 F.2d 1345, 1350, opinion modified on reh'g (9th Cir. 1989), 866 F.2d 318 (*Bergen*).) (Internal citations omitted).

Loss of nurturing to children

This remedy allows the recovery for the value of care, guidance and moral, intellectual and physical training children would have received but for the wrongful death of a parent even when damages may not be computed with any degree of mathematical certainty. (*Solomon v. Warren* (1976) 540 F.2d 777, 788.) The evidence must show the deceased parent was fit to furnish such training and that such has been rendered during the parent's lifetime to their children. (*Ibid.*) While primarily intended to benefit minor children, the damages may be recovered by adult children, but they must "be very specific to show that their parents' guidance had a pecuniary value beyond

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the irreplaceable values of companionship and affection." (*Id*. at 789.) The *Solomon* court also found there is no bright line rule as to a definite age when the parent's nurture ceases to have value and that the "facts and circumstances of each particular case control not only the legal basis for such damages but their quantum as well." (*Ibid*.)

Loss of support and contributions

This is the reasonable expectation of the financial contributions that the decedent would have made to his dependent had decedent lived. It is usually measured by loss of future income. (*Sea-Land Services v. Gaudet* (1974) 414 U.S. 573.) Recovery requires a showing of dependency on the deceased or an expectation of future support and services. (*Ibid.)* Additionally, the gross future income has to be reduced by decedent's own expected consumption. (*Matter of Adventure Bound Sports, Inc.* (S.D. Ga. 1994), 858 F.Supp. 1192, 1200.)

Loss of services

Spouses are entitled to recover the monetary value of any services, usually encompassing household services such as cooking, cleaning, or yardwork, the decedent would have provided but for the wrongful death. (*Bergen, supra*, 816 F.2d at p. 1350.) The loss is calculated using the number of anticipated hours of service the decedent would have provided multiplied by an hourly rate for those services.

Loss of inheritance

Damages for loss of inheritance require proof that the decedent, but for his death, would probably have accumulated property that the wrongful-death beneficiary would have inherited. (*Nygaard v. Peter Pan Seafoods* (9th Cir. 1983), 701 F.2d 77, 80.) The plaintiff must prove a reasonable expectation of pecuniary benefit. (*Snyder v. Whittaker Corp*. (5th Cir. 1988), 839 F.2d 1085, 1093.) The factfinder will determine the "likelihood the decedent would have accumulated substantial property; how much consumption and taxes would eat into any accumulations; the decedent's past propensity to save or invest; and similar factors." (*Ibid.*)

Funeral expenses

Funeral expenses are allowed as pecuniary loss only if paid by the decedent's dependents. (*Sea-Land Services, supra*, 414 U.S. at p. 591; *Higginbotham, supra*, 436 U.S. at p. 624; *Kennedy v. Carnival Corp.*, *supra*, 385 F. Supp. at p. 1318.)

Importantly, punitive damages are non-pecuniary damages and are unavailable under DOHSA. (*Bergen, supra*, 816 F.2d at p. 1347.)

Finally, while survival remedies are not available under DOHSA, 46 U.S.C. section 30305 allows for a limited survival remedy if decedent's personal-injury action was pending and decedent died as the result of the wrongful act, neglect or default of defendant, then the personal representative of the decedent may be substituted as a plaintiff and "the action may proceed under this chapter for the recovery authorized by this chapter."

With the preclusion of survival remedies and nonpecuniary damages, DOHSA is out of step with the general maritime law and the laws of most states. It makes no sense whatsoever to permit relatives of passengers who die because of an accident that occurs two nautical miles from shore to recover the loss of care, comfort, companionship, consortium, and for the decedent's pre-death pain and suffering, but disallow these remedies if the same incident by fortuity caused the death three nautical miles from shore. Unfortunately, the most vulnerable victims of this harsh and arbitrary law are elderly cruise ship passengers who are often retired with adult non-dependent children and whose lost lives under DOHSA would amount to the minimal value of their lost services and funeral costs.

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