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# Survival Remedies for Deaths on the High Seas

Edward J. Balzarini, Jr.\*

## I. INTRODUCTION

The Death on the High Seas Act (DOHSA)<sup>1</sup> provides a federal cause of action for deaths resulting from "[a] wrongful act, neglect, or default"<sup>2</sup> which occurs beyond a marine league (three nautical miles) from the shore of any state, territory or dependency of the United States.<sup>3</sup> The decedent's personal representative is authorized to bring the action in admiralty, in a United States District Court, on behalf of a defined class of beneficiaries.<sup>4</sup> The measure of damages in a DOHSA action is defined as the amount of the pecuniary loss sustained by the beneficiaries.<sup>5</sup> In *Mobil Oil Corp. v. Higginbotham*,<sup>6</sup> the Supreme Court held that nonpecuniary remedies for wrongful death, such as compensation for loss of society, cannot be recovered in a DOHSA action.

Since the *Higginbotham* decision, a recurring issue in actions for maritime death is whether the recovery under DOHSA can be supplemented with a claim for survival damages. A survival claim, which is brought on behalf of the decedent's estate, typically seeks damages for a decedent's conscious pain and suffering and lost earnings.<sup>7</sup> This article discusses the question of whether, in the af-

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1. 46 U.S.C. §§ 761-768 (1926).

2. *Id.* § 761.

3. In addition to deaths occurring on the seas, DOHSA has been applied in actions arising out of aircraft presumably lost at sea. *See, e.g., Dugas v. National Aircraft Corp.*, 438 F.2d 1386 (3d Cir. 1971); *Solomon v. Warren*, 540 F.2d 777 (5th Cir. 1976), *rehearing denied*, 545 F.2d 1298 (1976), *cert. denied*, 434 U.S. 801 (1977).

4. 46 U.S.C. § 761 (1976). The beneficiaries are defined as including the decedent's wife, husband, parent, child or dependent relative.

5. *Id.* § 762.

6. 436 U.S. 618 (1978).

7. *See* S. SPEISER, 2D RECOVERY FOR WRONGFUL DEATH §§ 14:6-14:8. Of those jurisdictions which include the decedent's lost earnings as an element of damages in a survival action, some provide for recovery of the decedent's probable lifetime earnings, while others include only those earnings lost from the date of injury to the date of death.

termath of *Higginbotham*, a claim for survival damages can properly be joined with a DOHSA claim, and considers the possible sources of a survival remedy for deaths occurring on the high seas.

## II. *Higginbotham*, DOHSA, AND SURVIVAL REMEDIES

*Mobil Oil Corp. v. Higginbotham* is the third of a recent trilogy of Supreme Court decisions which decided issues involving federal remedies for tortious maritime death. The first of these decisions, *Moragne v. States Marine Lines, Inc.*,<sup>8</sup> created a federal nonstatutory remedy under the general maritime law for deaths occurring within state territorial waters. *Moragne* thus repudiates the rule of *The Harrisburg*,<sup>9</sup> which in 1886 held that federal maritime law did not recognize a cause of action for wrongful death. The enactment in 1920<sup>10</sup> of DOHSA, which provides a cause of action for wrongful deaths occurring outside of a state's territorial waters, was a congressional response to the rule of *The Harrisburg*.<sup>11</sup> DOHSA, however, provides no cause of action for wrongful deaths occurring within territorial waters, and prior to *Moragne* the availability of such an action in cases involving non-seamen was therefore dependent on the existence of a relevant state wrongful death statute.<sup>12</sup>

While *Moragne* judicially created a federal cause of action for certain maritime wrongful deaths, it left for later decision the determination of the elements of damage recoverable in a *Moragne* death action. Shortly thereafter, in *Sea-Land Services, Inc. v. Gaudet*,<sup>13</sup> the Court defined the *Moragne* remedy as including recovery of damages for loss of the decedent's support, services and society, but not for the survivors' mental anguish or grief.<sup>14</sup> The Court based its inclusion of loss of society<sup>15</sup> as an element of dam-

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8. 398 U.S. 375 (1970).

9. 119 U.S. 199 (1886).

10. Also enacted in 1920 was the Jones Act, 46 U.S.C. § 688 (1976), which includes a remedy for the wrongful death of a seaman in the course of employment as the result of the employer's negligence. Its applicability is not limited to the high seas, and it includes a survival remedy.

11. See 59 CONG. REC. 4482 (1920) (56th Congress, remarks of Rep. Volstead).

12. Prior to *Moragne* federal courts routinely permitted recovery under a state wrongful death statute for deaths occurring within the state's territorial waters. See, e.g., *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921); *Just v. Chambers*, 312 U.S. 383 (1941).

13. 414 U.S. 573 (1974).

14. *Id.* at 586 n.17. The Court noted that "the great majority of jurisdictions" do not provide for recovery of damages for the mental anguish or grief of the survivors of the decedent in a wrongful death action.

15. The Court defined the term "society" as embracing "a broad range of mutual benefits each family member receives from the others' continued existence, including love, af-

ages on the fact that a majority of state wrongful-death statutes permit such a recovery, and its recognition of "the humanitarian policy of the maritime law to show special solicitude for those who are injured within its jurisdiction."<sup>16</sup>

In *Mobil Oil Corp. v. Higginbotham*,<sup>17</sup> the Court was presented with the question of whether in an action for wrongful death occurring on the high seas, recovery under DOHSA could be supplemented by recovery of the non-pecuniary damages for "loss of society" available under the *Moragne* remedy. *Higginbotham* arose out of a helicopter crash which occurred in the Gulf of Mexico outside of Louisiana's territorial waters. The trial court awarded damages under DOHSA for the beneficiaries' pecuniary loss, but refused to award compensation for loss of society on grounds that DOHSA does not provide for such a recovery.<sup>18</sup> The Court of Appeals for the Fifth Circuit reversed,<sup>19</sup> holding that a claim under the general maritime wrongful death law created in *Moragne* could be brought along with a DOHSA action, and the beneficiaries could thereby recover non-pecuniary damages for "loss of society" in addition to compensation for their pecuniary losses.

Although its decision resulted in a disparity in the damages recoverable for deaths occurring in territorial waters and on the high seas, the Supreme Court reversed<sup>20</sup> the court of appeals' decision in *Higginbotham*. The Court held that there can be no recovery for non-pecuniary damages for a death which occurs on the high seas because DOHSA expressly limits the amount of the recovery to the beneficiaries' pecuniary loss. The opinion states that a desire for uniformity in the measure of damages for maritime wrongful deaths must yield to the express language of the statute.<sup>21</sup> The argument that admiralty courts have traditionally supplemented maritime statutes was rejected as follows:

We realize that, because Congress has never enacted a comprehensive maritime code, admiralty courts have often been called upon to supplement maritime statutes. The Death on the High Seas Act, however, announces

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fection, care, attention, companionship, comfort and protection." *Id.* at 586.

16. *Id.* at 589.

17. 436 U.S. 618 (1978).

18. *See id.* at 619.

19. 545 F.2d 422 (5th Cir. 1977).

20. 436 U.S. 618, 626.

21. *Id.* at 625. The Court also stated that other than in the measure of damages, disparities between DOHSA and the *Moragne* remedy were not likely to develop. This suggests that DOHSA's statute of limitations and schedule of beneficiaries are to be applied to the *Moragne* remedy. *Id.* at n.19.

Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, *survival*, and damages . . . . The Act does not address every issue of the wrongful-death law, . . . but when it does speak directly to a question, the courts are not free to "supplement" Congress' answer so thoroughly that the Act becomes meaningless. . . . Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of nonpecuniary supplements . . . . There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.<sup>22</sup>

The Court's inclusion of "survival" as an issue of maritime death law governed by DOHSA called into question the widespread practice of supplementing the recovery under DOHSA with survival damages. Prior to *Higginbotham*, there were numerous federal decisions holding that DOHSA is a wrongful death statute which does not preclude a separate survival claim for a decedent's pain and suffering and lost earnings.<sup>23</sup> These decisions fall into two categories. The first permits a claim under the survival statute of the state of the decedent's residence to be joined with a DOHSA action.<sup>24</sup> The second group of decisions interpret *Moragne* as creating a federal maritime survival remedy, in addition to a wrongful death remedy, and permit this survival remedy to supplement the recovery under DOHSA.<sup>25</sup>

*Chute v. United States*<sup>26</sup> is the first post-*Higginbotham* decision in which the practice of joining a survival claim with a DOHSA action was challenged. *Chute* involved the deaths of two passengers on a pleasure yacht which sank just outside of Massachusetts' territorial waters. The defendant contended that the Supreme Court had held in *Higginbotham* that DOHSA is the exclusive

22. *Id.* at 625 (emphasis added) (citations omitted).

23. See cases cited in notes 24 & 25, *infra*.

24. *Canillas v. Joseph H. Carter, Inc.*, 280 F. Supp. 48 (S.D.N.Y. 1968); *Petition of Gulf Oil Corp.*, 172 F. Supp. 911 (S.D.N.Y. 1959); *United States v. The S/S Washington*, 172 F. Supp. 905 (E.D. Va.), *aff'd sub. nom. United States v. Texas Co.*, 272 F.2d 711 (4th Cir. 1959); *Montgomery v. Goodyear Tire and Rubber Co.*, 231 F. Supp. 447 (1964); *Dennis v. Central Gulf Steamship Corp.*, 453 F.2d 137 (5th Cir. 1972), *cert. denied*, 409 U.S. 948 (1972); *Egan v. Pan American World Airways, Inc.*, 62 F.R.D. 710 (S.D. Fla. 1974); *Dugas v. National Aircraft Corp.*, 438 F.2d 1386 (3d Cir. 1971); *Solomon v. Warren*, 540 F.2d 777 (5th Cir. 1976), *rehearing denied*, 545 F.2d 1298 (5th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977).

25. *Spiller v. Thomas M. Lowe, Jr. & Assoc., Inc.*, 466 F.2d 903 (8th Cir. 1972); *Greene v. Vantage Steamship Corp.*, 466 F.2d 159 (4th Cir. 1972); *Barbe v. Drummond*, 507 F.2d 794 (1st Cir. 1974); *Muirhead v. Pacific Inland Navigation, Inc.*, 378 F. Supp. 361 (W.D. Wash. 1974); *Law v. Sea Drilling Corp.*, 523 F.2d 793 (5th Cir. 1975).

26. 466 F. Supp. 61 (D. Mass. 1978), *rev'd on other grounds*, 610 F.2d 16 (1st Cir. 1979).

remedy for deaths occurring on the high seas, and the plaintiffs could not therefore recover damages for the decedent's pain and suffering. The court, however, rejected this expansive interpretation and held that *Higginbotham* "does not preclude the judicial recognition of a federal survival action for antemortum pain and suffering."<sup>27</sup> It predicated its decision on Justice Stevens' observation in *Higginbotham* that "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted."<sup>28</sup> The court reasoned that since DOHSA is a wrongful death and not a survival statute, there is a legislative void in the available remedies for maritime deaths which the courts may fill by recognizing a federal survival action for deaths on the high seas.

A similar result was reached in *Kuntz v. Windjammer "Barefoot" Cruises, Ltd.*<sup>29</sup> As in *Chute*, the defendant argued that the effect of the Supreme Court's holding in *Higginbotham* was to discredit the practice of supplementing a recovery under DOHSA with survival damages. Here again, however, the court distinguished a wrongful death action from a survival action, and held that DOHSA is a wrongful death statute which does not preclude the separate and distinct remedy available in a survival claim.<sup>30</sup> After a review of the legislative history of DOHSA, the court concluded that "it is clear that Congress understood the distinction between the two types of actions,"<sup>31</sup> and was concerned only with enacting a wrongful death statute.<sup>32</sup> The court noted that judicial recognition of the right to seek survival damages for deaths on the high seas would serve not only to fill the gap left by Congress, but also to promote the policy expressed in *Moragne* that, "certainly, it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy when not required to withhold it by established and inflexible rules."<sup>33</sup>

The question of whether *Higginbotham* precludes the recovery

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27. 466 F. Supp. at 69.

28. *Id.* (citing *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)).

29. 573 F. Supp. 1277 (W.D. Pa. 1983), *aff'd*, 738 F.2d 423 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 188 (1984).

30. 573 F. Supp. at 1285.

31. *Id.*

32. The Supreme Court has expressly acknowledged that DOHSA is a wrongful death statute which does not include a survival remedy. See *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 575 n.2 (1974).

33. 573 F. Supp. at 1286 (quoting *The Sea Gull*, 2 Fed. Cas. 909 (No. 12,578) (C.C. Md. 1865)).

of survival damages for deaths on the high sea was considered by the Court of Appeals for the Fifth Circuit in *Azzopardi v. Ocean Drilling and Exploration Co.*<sup>34</sup> The court concluded that *Higginbotham*, like DOHSA, was concerned only with wrongful death remedies and did not address the issue of survival damages for maritime deaths. As in *Chute* and *Kuntz*, the court in *Azzopardi* rejected arguments for an expansive application of *Higginbotham* and held that the decision does not preclude a claim for survival damages in cases involving a death on the high seas. Thus, each of the courts which to date have considered the issue have declined to interpret *Higginbotham* as holding that DOHSA is the exclusive remedy for deaths occurring within its domain.

Once it is determined that there exists a right to assert a survival claim for a death on the high seas, a question arises as to the appropriate source of the remedy. Prior to *Moragne*, the survival statute of a decedent's state of residence was commonly applied in conjunction with DOHSA.<sup>35</sup> In the aftermath of *Moragne* there has been a definite trend towards recognition of a non-statutory survival action under the general maritime law.<sup>36</sup> Indeed, all of the post-*Higginbotham* decisions discussed above hold that there now exists a federal maritime survival action which may be joined with a DOHSA claim.<sup>37</sup> While recognition of a federal survival action guarantees a uniformity which is not possible if the varying state survival statutes are the source of the remedy, it also raises many issues as to the nature and extent of the damages recoverable in the action.<sup>38</sup> Given the maritime law's tradition of showing special solicitude for those who are injured or die within its jurisdiction, these issues should be resolved in favor of the victims and their survivors.

### III. CONCLUSION

A majority of federal courts now recognize a survival remedy under general maritime law. Since DOHSA is a wrongful death statute it does not preclude recovery of survival damages for a

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34. 742 F.2d 890 (5th Cir. 1984).

35. See cases cited *supra* note 24.

36. See cases cited *supra* note 25.

37. See *Chute*, 466 F. Supp. 61; *Kuntz*, 573 F. Supp. 1277; *Azzopardi*, 742 F.2d 890.

38. For example, is the economic loss to the decedent's estate an item of damages in the action, and if so, how is the loss to be calculated? See *Muirhead v. Pacific Inland Navigation, Inc.*, 378 F. Supp. 361, 363 (W.D. Wash. 1974); *Kuntz v. Windjammer "Barefoot" Cruises, Ltd.*, 573 F. Supp. 1277, 1286 (1983).

death on the high seas. *Higginbotham* has not been interpreted as discrediting the practice of supplementing a DOHSA recovery with survival damages. Definition of the damages recoverable in a federal maritime survival action awaits future decision.

