

Unequal recovery for death on the high seas

(originally published in *TRIAL* magazine, September 2009)

by Ross Diamond III

Almost a decade ago, Congress expanded the limited pecuniary remedies available to victims of commercial air disasters on the water. It's time for lawmakers to act again.

The Congressional remedy for this was the adoption of the Death on the High Seas Act in 1920, which was originally codified at 46 U.S.C. §761, at seq. Title 46 was recently re-codified and the statute is now found at 46 U.S.C. §30301 through §30308. The operative sections of the statute, **for seafarers and vessel passengers**, provides as follows:

§ 30302. Cause of action

When the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 3 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.

§ 30303. Amount and apportionment of recovery

The 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.

In *Moragne v. United States Lines, Inc.*, 398 U.S. 375 (1970), the Supreme Court overruled *The Harrisburg*, holding that the General Maritime Law does include a common law wrongful death remedy; and in *Sea-Land Services, Inc., v. Gaudet*, 414 U.S. 573 (1974), held that the common law damages included not only loss of support, but also loss of the companionship and society of the decedent, and a survival action for the pain and suffering of the decedent.

However, the Supreme Court was quickly confined the common law wrongful death remedy to cases in which the measure of damages is not governed by a federal statute. In *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), the court held that since Congress had specified in DOHSA that the damages recoverable were “. . . a fair compensation for the pecuniary loss sustained by the individuals for whose benefit the action is brought . . .”, the courts were not free to supplement that measure of damages under a common law remedy. The court later extended the same logic to Jones Act death cases in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), holding that the parents of a deceased seaman could not recover damages for loss of society because the Jones Act, now 46 U.S.C. §§30104-30106, had been uniformly interpreted as allowing the recovery of only pecuniary losses for the death of a seaman.

Therefore, in cases governed by DOHSA involving the deaths of seaman, other marine employees, or vessel passengers, the wrongful death damages are now limited to the recovery of pecuniary losses sustained by surviving family members. The one exception to this is that under the Jones Act, a seaman's claim for personal injuries survives to his estate by virtue of F.E.L.A. §59, permitting the estate of the deceased seaman to recover damages for the decedent's conscious pre-death pain and suffering (along with any loss of earnings or medical expenses between injury and death) where those losses are proven by the evidence. *Deal v. A.P. Bell Fish Co.*, 728 F.2d 717 (5th Cir.1984); *Thompson v. Offshore Co.*, 440 F. Supp. 752 (S.D. Tex.1977). However, in *Miles*, the Supreme Court held that the survival remedy did not include recovery of the deceased seaman's loss of future earnings over work life expectancy.

Unfortunately, non-seamen do not have a survival remedy under DOHSA. The Supreme Court, in *Dooley v. Korean Airlines Co., Ltd.*, 524 U. S. 116 (1998), declined to extend general maritime law to permit recovery for pre-death pain and suffering under a general maritime law survival cause of action. In *Dooley*, the Court rejected the argument that DOHSA, which does not authorize recovery for pre-death pain and suffering, did not bar such damages under general maritime law because DOHSA is a wrongful-death statute rather than a survival statute. The Court noted that "Because Congress has already decided these issues, it has precluded the judiciary from enlarging either the class of beneficiaries or the recoverable damages."

Finally, state wrongful death statutes cannot be used to supplement damages in cases where DOHSA applies, under the decision in *Offshore Logistics, Inc. v. Tallentire*, 477 U. S. 207 (1986).

Pecuniary damages

For some families, particularly those consisting of a dependent spouse and minor children, the damages recoverable under DOHSA can include more than simple loss of support. The pecuniary damages available fall into several categories and attention to each can result in a more appropriate recovery for the victim's family.

Loss of Support

The Death on the High Seas Act specifically allows for the recovery of the financial support and contributions the deceased would have made to dependent family if he or she had lived. See, for a good example, the district court opinion on damages in *Higginbotham v. Mobil Oil Corp.*, 360 F.Supp. 1140 (W.D. La. 1973). For a comprehensive listing of cases on recovery of financial support, see *Death on the High Seas Act*, 16 A.L.R. Fed. 679. Recovery for loss of support requires some showing of dependence on the deceased or an expectation of support. *Bergen v. F/V St. Patrick*, 816 F.2d 1345 (9th Cir. 1987).

The claim for loss of support is not the same as a claim for the decedent's future earnings, since the earnings must be reduced by income taxes and also by the amounts that the deceased would have consumed himself in order to reach an amount (hereafter referred to for the purposes of this paper as "disposable Income") available for the support of family members. *Martinez v. Puerto Rico Marine Management, Inc.*, 755 F. Supp. 1001 (S.D. Ala. 1990); *Matter of Adventure Bound Sports, Inc.*, 858 F.Supp. 1192 (S.D.Ga. 1994); and *Rohan v. Exxon Corp.*, 896 F. Supp.

666 (S.D.Tex. 1996). As those cases illustrate, the awards should be adjusted for expected increases in the decedent's earnings, and then reduced to present value at the after-tax earnings rates on the safest available investments. This absolutely requires the testimony of an economics expert. See, for example, the loss calculation tables prepared by the plaintiffs' economist which were incorporated into the opinion in *Martinez*.

Spouses are normally entitled to claim loss of support from earnings over the work life expectancy of the deceased, and also from projected retirement pension or Social Security benefits unless those benefits are already being paid. *Adventure Bound Sports*, supra. Children are usually permitted to recover support until the age of majority, although under exceptional circumstances proven by the evidence, some cases have awarded support beyond that. In *Hamilton v. Canal Barge Co.*, 1977 A.M.C. 2276 (E.D. La. 1975), the court awarded loss of support until the child reached age 22 because it appeared likely that he would attend college.

In some cases, on an appropriate showing, the courts have awarded damages for the cost of a college education. *Solomon v. Warren*, 540 F.2d 777 (5th Cir. 1976). Compare the awards to the families of the two decedents in *Adventure Bound Sports*, supra. In that case, one decedent left a widow and two sons, who had all lived together. Since that family was being compensated for all of the decedent's after-tax earnings that he would not have consumed himself, and from which he would have paid the cost of college educations, no additional funds were awarded for that purpose. The other decedent was divorced and left two children who did not live with him. Those children were awarded loss of the child support he was required to pay under state law. Since those amounts would not consume his disposable earnings, and the court found that the children were likely to attend college, those additional costs were awarded to each child.

Loss of Inheritance

Spouses and children, whose life expectancies exceed the life expectancy of the deceased, have a reasonable expectation of benefitting from any prospective accumulation of the decedent's estate. Therefore, loss of inheritance can be a legitimate pecuniary loss in a DOHSA action. *Solomon v. Warren*, supra; *Cox v. Northwest Airlines, Inc.*, 379 F.2d 893 (7th Cir. 1967); *National Airlines, Inc. v. Stiles*, 268 F.2d 400 (5th Cir. 1959). Again, compare the awards to the two families in *Adventure Bound Sports*, supra, which make it clear that loss of inheritance can be a separate item of pecuniary loss only when the support awards do not consume all of the decedent's disposable income.

The pecuniary losses sustained by children do not necessarily end at the age of majority. If the evidence in a case indicates that the decedent would have continued to accumulate assets and enlarge his inheritable estate had he lived, that can constitute a separate pecuniary loss recoverable by the family. In the case of adult children surviving a decedent, that may be the only pecuniary loss they can claim. If the decedent was a young, high wage earner, this loss can be substantial. See *Rohan v. Exxon Corp.*, supra, where the plaintiff's economist projected that the inheritance of the decedent's daughter would exceed \$1,200,000.00.

Loss of Services of the Deceased

The loss of the household services performed by the decedent, such as lawn maintenance work, painting and repair of the family home, maintenance of the family vehicles, and providing

transportation to family members, constitutes pecuniary losses to the family. *Sea-Land Services, Inc., v. Gaudet*, 414 U.S. 573 (1974); and *Tallentire v. Offshore Logistics, Inc.*, 754 F.2d 1274, 1287 (1985), *reversed on other grounds* 477 U.S. 207 (1986) where the Fifth Circuit had remanded the case to the District Court to determine the value of the decedent's repair work on the home and family automobiles.

To recover for this pecuniary loss, a claimant must present testimony assigning a value to the services performed by the decedent. *Ivy v. Security Barge Lines*, 585 F.2d 732, 740 (5th Cir. 1978). One way of proving that value is to have the widow or other family members testify as to the number of hours per week the decedent spent performing household chores, and how much the family has paid for other persons to perform those services after the decedent's death. *Adventure Bound Sports*, *supra* at 1201. A vocational counselor can support that testimony. The plaintiff need not prove the value of such services with mathematical precision. In the District Court opinion in *Higginbotham*, *supra* at 1144, no specific evidence was cited, and the opinion simply states that "The Court is aware that services such as these have a value which the Court estimates at approximately \$50.00 per month."

Recovery of damages for loss of household services requires proof that such services were expected and likely to be provided, but for the wrongful death. *Bergen v. F/V St. Patrick*, *supra*; *Verdin v. C & B Boat Co., Inc.*, 860 F.2d (5th Cir. 1979). However, where some evidence of the value of the services performed by the decedent has not, or can not, be offered at trial, no damages can be awarded for loss of services. In *Martinez v. Puerto Rico Marine Management, Inc.*, *supra*, the decedents were Honduran fishing boat captains and it was not possible to produce any reliable evidence of the value of their services in the economy of that country.

Loss of Nurture, Guidance and Instruction

The loss to children of the nurture, instruction, guidance and the physical, intellectual and moral training that they would have received from their parent, but for the death, constitutes a pecuniary loss recoverable under DOHSA. This pecuniary value was illustrated by the District Court opinion in *Higginbotham*, *supra* at 1144, where the court found:

"Higginbotham provided the guidance, care and discipline of a good father to the minor child Donna, who was residing in his household. His moral qualities, sense of values, beliefs and experiences in life, when considered with the close relationship that existed between him and his child, leads this Court to conclude that the minor child has sustained, during her minority, and will continue to sustain, further loss from the lack of her father's care, guidance and discipline. This item of damages is assessed at \$2,000.00 a year for the child throughout her minority and school years."

See also *Nygaard v. Peter Pan Fisheries*, 701 F.2d 77 (9th Cir. 1983).

Solomon v. Warren, *supra*, contains a lengthy discussion of the loss of care, nurture and guidance with much favorable language. In that case, the three children of the decedent had all reached the age of eighteen at the time of his death and claimed damages for loss of

guidance. The Fifth Circuit found that there was no evidence in this case to support such an award. However, in reaching that decision, the court reviewed the law with respect to care, nurture and guidance for children under the age eighteen. In describing these losses, the court stated:

“Without serious dispute, children may suffer a pecuniary deprivation, apart from the loss of support and financial contribution, from the death of their parents in the loss of parental guidance and training, commonly identified as a loss of nurture... Although this item damages can not be computed with any degree of mathematical certainty, the courts in applying the strictured pecuniary loss test of DOHSA have held that the loss to children of the nurture, instruction, and physical, intellectual, and moral training that they would have received from their parents, but for the parent’s wrongful death, may constitute a pecuniary loss, and as such may be a recoverable element of damages under DOHSA.” [*Solomon*, 540 F. 2d at 788.]

In declining to award such damages to the children who were past the age of majority in that particular case, the *Solomon* court specifically noted that damages of this type were important for minors in their formative years.

Although the value of care, nurture and guidance may not be capable of computation with any mathematical certainty, the child of the decedent must nonetheless present evidence as to the monetary value of the services. *Martinez v. Port Rico Marine Management, Inc.*, *supra*. One way of producing that type of evidence would be through the testimony of a vocational counselor who can testify as to the rates of pay in various occupations in the community. In *Adventure Bound Sports*, *supra* at 1201, the court pointed out that the plaintiffs had offered evidence concerning the salaries of teachers, guidance counselors, and psychologists, professions that they analogize to the roles that the father would have filled in raising his sons.

Finally, attempts to maximize the decedent’s earning capacity in order to increase the loss of support claim may have the effect of limiting the damages recoverable for loss of nurture and guidance. In *Centeno v. Gulf Fleet Crews, Inc.*, 798 F.2d 138 (5th Cir. 1986) the plaintiff argued that the decedent would have worked at sea twelve months out of the year. The Fifth Circuit remanded the case for a new trial on damages because, among other things, the damage award for loss of nurture and guidance was too high, considering the limited amount of time he would have left to spend with his children.

Funeral Expenses

Funeral expenses are allowed as pecuniary loss only if paid by the decedent’s dependents. *Sea-Land Services v. Gaudet*, *supra* at 591; *Wilhelm Seafoods, Inc. v. Moore*, 328 F.2d 868 (5th Cir. 1964). At least one case has held that funeral expenses are not a pecuniary loss under DOHSA if paid by the decedent’s estate rather than by the decedent’s dependents. *Barbe v. Drummond*, 507 F.2d 794 (1st Cir. 1974).

Commercial Aviation Amendment

It is obvious that when the U.S. Congress was drafting the Death on the High Seas Act in 1920, the focus was on the men and women who went to sea on ships to work and support their families. The damages allowed by the statute would replace the support being provided by the family bread winner. However, in other contexts, the DOHSA limits on damages can be cruel. Where the decedent is an elderly retiree, no longer supporting anyone and consuming, rather than accumulating, and inheritable estate, or is a teenage boy who has no income and no dependents, but is the pride and joy of his family, the Death on the High Seas Act can leave surviving family members with a great loss, but no recoverable damages.

There was no such thing as commercial aviation when the Death on the High Seas Act was adopted in 1920. However, the deaths of commercial aircraft passengers at sea come within the maritime law and the coverage of the Death on the High Seas Act. See *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217 (1996), rejecting claims for loss of society damages based on DOHSA, and *Dooley v. Korean Air Lines Co., Ltd.*, 524 U.S. 116 (1998), denying recovery of damages for pre-death pain and suffering on the basis that the survival section of DOHSA, 46 U.S.C. §30305, permitted the personal representative of the decedent to pursue only the remedies provided by the Act.

It took a major disaster to motivate Congress to make a partial change in the Death on the High Seas Act. On July 17, 1996, TWA Flight 800 departed New York for Paris, France, and Rome, Italy. Shortly after takeoff, the plane exploded in mid air and crashed approximately eight nautical miles south of the shore of Long Island, New York. Everyone on board died, including a large number of high school students from Pennsylvania. Their families were shocked to learn that the Death on the High Seas Act would allow them no damages for their losses, and persuaded Republican Senator Arlen Specter to take the lead on an amendment to the Death on the High Seas Act to eliminate this draconian result under DOHSA. In 2000 both houses of Congress passed a bill to amend the Act, calling it to be retroactive to commercial aviation crashes occurring on or after July 16, 1996.

That amendment is now found in 46 U.S.C. §30307, which provides as follows:

- (a) Definition. In this section, the term "nonpecuniary damages" means damages for loss of care, comfort, and companionship.
- (b) Beyond 12 nautical miles. In an action under this chapter, if the death resulted from a commercial aviation accident occurring on the high seas beyond 12 nautical miles from the shore of the United States, additional compensation is recoverable for nonpecuniary damages, but punitive damages are not recoverable.
- (c) Within 12 nautical miles. This chapter does not apply if the death resulted from a commercial aviation accident occurring on the high seas 12 nautical miles or less from the shore of the United States.

Therefore, for commercial aviation accidents only, the amendment made three major changes. One was allowing the recovery of damages for loss of care, comforting and companionship, as nonpecuniary damages; another was extending the boundary line for DOHSA to apply to aviation accidents to twelve nautical miles offshore, and extend the operation of state wrongful death statutes out to twelve nautical miles for aviation accidents; leaving the demarcation line for vessel casualties at three nautical miles.

Does this change in DOHSA make a difference? Yes, and it can be substantial. One example can be found in *Makary v. EgyptAir (In Re Air Crash Near Nantucket Island, Massachusetts)*, 462 F.Supp.2d 360 (E.D.N.Y. 2006), where the damages awarded by the District Court, sitting non-jury, added reasonable damage awards to the nominal pecuniary damage awards to most of the eight plaintiffs in that case.

Future action

The 2000 amendment to DOHSA did the right thing for air crash victims, but its failure to extend the same rights to those killed on ships created such disparate remedies as to have equal protection implications. The statute is now grossly unfair, and Congress should act immediately to amend it to allow the recovery of nonpecuniary damages for loss of society to the victims of all marine casualties, whether by air or by sea.

Help may be on the way in the form of the Cruise Vessel Security and Safety Act of 2009, currently pending in the House and Senate.⁴⁴ These bills contain several provisions that would improve passenger safety on cruise ships—including by preventing rape and assault by crew members. The bills contain language that would make much-needed changes to DOHSA, allowing the same nonpecuniary damage remedy—including loss of society—to the families of victims killed at sea on vessels or aircraft.

Help may be on the way in the form of the Cruise Vessel Security and Safety Act of 2009, currently pending in the House and Senate.⁴⁴ These bills contain several provisions that would improve passenger safety on cruise ships—including by preventing rape and assault by crew members. The bills contain language that would make much-needed changes to DOHSA, allowing the same nonpecuniary damage remedy—including loss of society—to the families of victims killed at sea on vessels or aircraft.

Admiralty attorneys thought it would take a major disaster, such as the crash of an airliner into a cruise ship, for Congress to take action. However, the legal disaster that DOHSA can render has already occurred in *Rux v. Republic of Sudan*,⁴⁵ a case that flew under the radar because it was brought under the Foreign Sovereign Immunities Act (FSIA), rather than admiralty law.⁴⁶

We had thought it would take a major disaster, such as the crash of an airliner into a cruise ship, for Congress to take action. However, the legal disaster that DOHSA can render has already occurred in *Rux v. Republic of Sudan*, 495 F.Supp.2d 541(E.D. Va. 2007), a case which flew under our collective radar because it was a suit under the Foreign Sovereign Immunities Act, 28 U.S.C. 1605.

The case involved the deaths of 17 U.S. Navy sailors in the terrorist bombing of the U.S.S. Cole while it was at dock in Yemen in 2000. The plaintiffs were more than 50 family members of the deceased sailors. In a lengthy opinion, after wading through numerous issues relating to the Foreign Sovereign Immunities Act, the district court turned to the issue of damages recoverable in the case. The court concluded that DOHSA controlled the damages recoverable by the families of the decedents, although it did so with displeasure as to the harsh results to the family of the deceased sailors:

The Court sympathizes greatly with Plaintiffs, who continue to suffer terribly years after their loved ones died. But the Court is bound to follow the legal precedent before it. Congress makes the laws; courts merely interpret them. Whether to amend DOHSA to allow more liberal recovery in cases of death caused by terrorism on the high seas, as Congress did in 2000 for cases of commercial aviation accidents on the high seas, is a question for Congress alone. Accordingly, Plaintiffs' intentional infliction of emotional distress and maritime wrongful death claims are **DISMISSED** for failure to state a claim upon which relief can be granted. [Id. At 555]

Although it gives the Court no pleasure to do so, it refuses Plaintiffs' request for damages for loss of consortium, loss of solatium, loss of society, mental anguish and emotional distress, because, as emphasized earlier, each of these is non-pecuniary in nature and consequently cannot be recovered under DOHSA. [Id. At 567]

The court then set out the damages awarded to individual family members of the decedents, and awarded no damages to 23 of the plaintiffs, all of whom were siblings of the sailors lost in the disaster. The court concluded by clearly expressing its irony that the laws of this country could fail so greatly for those who have lost much:

We have heard testimony from, and about, those family members who have suffered from the loss of these young men and women. The psychological effects on the survivors can never be erased, especially given that they were caused by a senseless act deliberately enabled by a rogue government. It is depressing to realize that a country organized on a religious basis with religious rule of law could and would execute its power for purposes which most countries would find intolerable and loathsome. **It is a further tragedy that the laws of the United States, in this instance, provide no remedy for the psychological and emotional losses suffered by the survivors.** [Id. at 569; Emphasis added.]

The words of Judge Doumar in this case ring out for Congress to act quickly to amend the Death on the High Seas Act allow the families of victims of vessel and aircraft accidents at sea the same recovery for the very real personal losses they all sustain. The law as it stands now is

grossly unfair. Currently, the families of an elderly person or teenager killed in a cruise ship or pleasure boat accident can be left with only a claim for funeral expenses, while the same families of the same victims in a commercial aviation accident are permitted to recover damages for their loss of society and companionship. It is a state of law that should not be permitted in this country.

Ross M. Diamond III practices law with Diamond Fuquay in Mobile, Alabama.
His e-mail address is ross@diamondfuquay.com.