

WRONGFUL DEATH AT SEA—THE DEATH ON THE HIGH SEAS ACT

Expanding international trade and travel have resulted in an increase in the number of aircraft and ships engaged in international transportation. The number of accidents on the high seas has grown accordingly, and significant interest has arisen in recovery for deaths resulting from such tragedies. The Federal Death on the High Seas Act (hereinafter DHSA)¹ is the most common source of recovery for wrongful death at sea, and the purpose of this comment is to explore its ramifications in some detail. It is hoped that some of the act's shortcomings will be made apparent; in addition, some constructive suggestions are set forth which may serve as a basis for legislative inquiry and possible statutory revision.

I

BACKGROUND

The history of wrongful death actions in high seas cases dates back to at least 1825 when in *Plummer v. Webb*² a right of action for wrongful death was recognized as a part of the general maritime law. A few other courts in this early period similarly adhered to this viewpoint.³ In 1886, however, the decision in *The Harrisburg*⁴ permanently laid such humanitarian notions to rest when the United States Supreme Court held that the general maritime law did not include a right of action for wrongful death. Thus it became clear that a cause of action for wrongful death in admiralty had to be created by statute.⁵

From 1886 until 1920 no action in admiralty was available to the dependents of the person injured at sea who died. A few states, however, had enacted wrongful death statutes which were given application in both state and federal courts in cases arising within state territorial waters.⁶ A few courts applied such statutes to deaths arising on the high seas.⁷ Because the constitutionality of the application of a state wrongful death statute to occurrences on the high seas was doubtful, the cases had to rest on farfetched theories. For example, a vessel registered in a state was considered by some courts to be "state territory";⁸ in another instance the offending vessel was deemed to be a "citizen" of the state if registered there even though traveling on the high seas.⁹ These extreme theories resulted in

¹ 41 Stat. 537-38 (1920), 46 U.S.C. §§ 761-67 (1958).

² 19 Fed. Cas. 894 (No. 11234) (D.Me. 1825).

³ *The Columbia*, 27 Fed. 704 (S.D.N.Y. 1886); *The Manhasset*, 18 Fed. 918 (E.D. Va. 1884); *Hollyday v. The David Reeves*, 12 Fed. Cas. 386 (No. 6625) (D.Md. 1879).

⁴ 119 U.S. 199 (1886).

⁵ See *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921); *First Nat'l Bank v. National Airlines, Inc.*, 288 F.2d 621 (2d Cir. 1961).

⁶ The cases are too numerous for extensive citation. See, e.g., *The City of Norwalk*, 55 Fed. 98 (S.D.N.Y. 1893), *aff'd sub nom. The Transfer No. 4 & The Car Float No. 16*, 61 Fed. 364 (2d Cir. 1894); *Opsahl v. Judd*, 30 Minn. 126, 14 N.W. 575 (1883).

⁷ The United States Supreme Court authorized this procedure in *The Hamilton*, 207 U.S. 398 (1907).

⁸ See, e.g., *Lindstrom v. International Nav. Co.*, 117 Fed. 170, 173 (C.C.E.D.N.Y. 1902).

⁹ See *The Saganore*, 247 Fed. 743, 757 (1st Cir. 1917).

strange decisions. In one case the laws of three different states had possible application, but since they were "in conflict" recovery was denied completely.¹⁰

Although the need for remedial federal legislation was recognized as early as 1899,¹¹ the question of to what extent state statutes were to be superseded prevented any final action.¹² It took the tragic Titanic disaster to demonstrate the urgent need for legislation.¹³ Thus in 1920 the DHSA was enacted to provide the wrongful death cause of action missing in admiralty, and to create uniformity in death actions arising beyond the boundaries of state territorial waters.¹⁴

II

SITUATIONS IN WHICH THE ACT APPLIES

Because the DHSA was hastily considered and was passed as a compromise to supply the remedy that was immediately needed, there was a lack of understanding of the potential problems in this area of legislation.¹⁵ These problems become particularly apparent in considering the scope of the act's applicability.

Section 1 of the DHSA provides in part:

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore . . . the personal representative of the decedent may maintain a suit for damages¹⁶

Section 4 provides:

Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring on the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.¹⁷

Although these provisions appear straightforward, the courts have had considerable difficulty determining their interrelation for particular fact situations. This problem will be approached by analyzing the applicability of these two sections in terms of the nationality of the decedent and the party at fault.

¹⁰ *The Middlesex*, 253 Fed. 142 (D. Mass. 1916). For an extended discussion of the problems of conflict between state statutes as applied in maritime wrongful death situations see Magruder & Grout, *Wrongful Death Within the Admiralty Jurisdiction*, 35 YALE L.J. 395, 396-418 (1926); Robinson, *Wrongful Death in Admiralty and the Conflict of Laws*, 36 COLUM. L. REV. 406 (1936).

¹¹ See Hughes, *Death Actions in Admiralty*, 31 YALE L.J. 115, 117 (1921).

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ These purposes seem clear from both the legislative history and the interpretation of cases construing the act. See 59 CONG. REC. 4482-83 (1920) (remarks of Representative Volstead); Hughes, *supra* note 11, at 118; *Wilson v. Transocean Airlines*, 121 F. Supp. 85, 90 & n.22 (N.D. Cal. 1954).

¹⁵ See 59 CONG. REC. 4482-86 (1920). It is abundantly clear from the debates in the House of Representatives that few of the speakers were familiar with either the act or admiralty. The legislation had been drafted by a group of New York admiralty attorneys, and even Representative Volstead, who introduced the bill in the House, was unclear as to the DHSA's ramifications.

¹⁶ 41 Stat. 537 (1920), 46 U.S.C. § 761 (1958).

¹⁷ 41 Stat. 537 (1920), 46 U.S.C. § 764 (1958).

A. Situations Involving an American Wrongdoer

It is relatively clear that the beneficiaries of an American decedent, whatever their nationality,¹⁸ may recover under section 1 of the act against an American vessel, person, or corporation wrongfully causing his death at sea.¹⁹ The same result follows when recovery is sought under the DHSA against an American wrongdoer and the decedent is foreign.²⁰

B. Situations Involving a Foreign Wrongdoer

1. American Decedent

Difficult problems arise in the cases dealing with the death of an American citizen caused by a foreign vessel, person, or corporation. It is clear that section 4 applies,²¹ but some decisions have indicated it is not exclusive and that in certain cases the cause of action provided by section 1 may be available. The problem of the availability of section 1 has practical significance because the substance of the foreign laws involved may be more restrictive than the DHSA in the amount of recovery, permissible beneficiaries, period of limitations, and theories of recovery.²² Thus it is important for a claimant to know when the cause of action under section 1 is available.

For purpose of clarity the discussion of this question is divided into two subparts; the first deals with the applicability of section 1 when there is no wrongful death remedy provided by the foreign law, and the second with the situation where the foreign law does provide such a remedy. However, before considering the cases it is useful to discuss briefly the pertinent legislative history pertaining to the applicability of these two sections.

At the time the DHSA was enacted it appears that Congress viewed existing principles of international maritime law as precluding assertion of an American wrongful death action against a ship of a foreign flag in the belief that this would infringe the foreign nation's sovereignty.²³ Thus the addition of section 4 seems to reflect the idea that the law of the flag should govern.²⁴ This result, however, had already been reached by the courts,²⁵ which led an early commentator to state, "the addition [of section 4] was superfluous, for it is an elementary doctrine of marine law that an admiralty claim against a ship can be enforced against her wherever she may be found."²⁶ To the extent that section 4 reaffirms the rule of

¹⁸ See, e.g., *The Vulcania*, 32 F. Supp. 815, 817 (S.D.N.Y. 1940).

¹⁹ See, e.g., *United States v. De Vane*, 306 F.2d 182 (5th Cir. 1962); *The Black Gull*, 82 F.2d 758 (2d Cir. 1936); *Hooker v. Raytheon Co.*, 212 F. Supp. 687 (S.D. Cal. 1962); *Lavello v. Danko*, 175 F. Supp. 92 (S.D.N.Y. 1959).

²⁰ See *Lawson v. United States*, 192 F.2d 479 (2d Cir. 1951); *Middleton v. Luckenbach S.S. Co.*, 70 F.2d 326 (2d Cir. 1934). Since the American law as embodied in § 1 is among the most liberal, see note 22 *infra* and accompanying text, the question of a foreigner wishing to apply a foreign law in an American forum does not appear to have arisen.

²¹ There have been no cases that questioned the possible applicability of § 4 in cases involving a foreign wrongdoer. When recovery under the section has been desired and a cause of action under the foreign law has been stated, recovery has always been granted. See, e.g., *Lawson v. United States*, *supra* note 20.

²² See generally Note, 67 *YALE L.J.* 1445, 1450-59 (1958).

²³ S. REP. NO. 216, 66th Cong., 1st Sess. (1920); H.R. REP. NO. 674, 66th Cong., 2d Sess. (1920); see Hughes, *Death Actions in Admiralty*, 31 *YALE L.J.* 115 (1921); cf. *Davidsson v. Hill*, [1901] 2 K.B. 606.

²⁴ See Hughes, *supra* note 23, at 121.

²⁵ The leading case is *La Bourgogne*, 210 U.S. 95 (1908).

²⁶ Hughes, *supra* note 23, at 118.

the law of the flag this statement appears correct. However, the section contains another important provision. In cases enforcing foreign created causes of action for wrongful death the courts prior to the DHSA had been allowing foreign ship-owners to limit their liability under the American statute.²⁷ Congress expressly avoided this practice by precluding limitation in the latter part of section 4.²⁸ Since limitation was allowed in actions against American wrongdoers under section 1, it appears that section 4 was intended to give American shipping an advantage by this discrimination, and was not intended to change the rule of the law of the flag as then applied by the courts. As will be seen, however, the courts have seen fit to expand this initially intended coverage of the act through interpretation of sections 1 and 4. Today, the law of the flag still is applied in some cases, but for reasons much different than those existing at the time the DHSA was enacted.²⁹

a. No Remedy Provided by Foreign Law

The clearest case of applicability of section 1 of the DHSA against a foreign wrongdoer is where there indisputably is no foreign wrongful death action available.³⁰ This situation does not invoke the literal provisions of section 4 and thus in that sense presents no obstacle to the application of section 1. Of course providing a remedy here under section 1 still involves a conscious preference of the DHSA to the law of the flag, but this would appear proper under conflict of laws principles that are now recognized in admiralty.³¹

When the foreign law does provide some remedy, it becomes more difficult to invoke section 1 and still retain consistency within the act. Nevertheless, some courts have applied section 1 where the remedy under section 4 appeared inadequate, and have treated the problem as if no remedy existed in the foreign law. It was on this theory that the first case arising under the DHSA carved an exception into the law of the flag. In *The Windrush*,³² the facts involved a death on the high seas caused by the fault of a foreign vessel; although there was a cause of action given by the foreign state, it provided only a remedy in personam. Section 1 of the DHSA, in comparison, also provides a remedy in rem.³³ The court held that since no remedy in rem was available under the foreign law there was not a foreign

²⁷ See *The Titanic*, 233 U.S. 718 (1914); *La Bourgogne*, 210 U.S. 95 (1908).

²⁸ See text accompanying note 17 *supra*. S. REP. NO. 216, 66th Cong., 1st Sess. 5 (1920), contains the statement, "But as the Supreme Court has held that the limited liability statute . . . applies to foreign vessels . . . the Committee recommends [that the present § 4 be inserted]."

²⁹ See, e.g., *Lauritzen v. Larsen*, 345 U.S. 571 (1953). However, the applicability of the law of the flag rule may have been strengthened in cases not involving flags of convenience by the adoption of the "genuine link" principle in the 1958 Geneva Convention, which dealt with safety on the high seas. U.N. Doc. No. A/CONF. 13/L.53 & corr. 1 (1958); see Note, 35 N.Y.U.L. REV. 1049 (1960). *But cf.* *Marine Cooks & Stewards, AFL v. Panama S.S. Co.*, 362 U.S. 365, 371-72 (1960); *Afran Transp. Co. v. National Maritime Union*, 169 F. Supp. 416 (S.D.N.Y. 1958).

³⁰ See, e.g., *Noel v. Airponents, Inc.*, 169 F. Supp. 348 (D.N.J. 1958). The court assumed no foreign wrongful death law existed.

³¹ The court in *Noel v. Airponents, Inc.*, *supra* note 30, applied the "connecting factors" rule. See note 37 *infra*.

³² 286 Fed. 251 (S.D.N.Y. 1922), *aff'd sub nom.* *The Buenos Aires*, 5 F.2d 425 (2d Cir. 1924).

³³ Section 1 expressly allows an action against "the vessel." See text accompanying note 16 *supra*.

"right of action" to satisfy the language of section 4, and suit was allowed under section 1.³⁴

A more recent case has allowed suit to be brought under section 1 when the foreign law gave a cause of action for wrongful death but recovery under that law was "doubtful."³⁵ This court, however, used different reasoning to apply American law. It felt it was not bound to adhere to a law of the flag that might not allow recovery when there were sufficient "connecting factors" to justify application of American law.³⁶ The connecting factors doctrine was first set forth in *Lauritzen v. Larsen*,³⁷ although that case denied application of American law.

The rule existing today thus seems to be that section 1 will apply when either no foreign wrongful death right of action is available, the foreign law has doubtful application, or the remedy under the foreign law is not substantially similar to that of section 1. It appears that the reason the courts have departed from the law of the flag in these cases is to insure in a proper case that the decedent's beneficiaries do not go without compensation, since this was the initial purpose of the act. To what extent today the courts will override the law of the flag will depend on the sufficiency of the connecting factors pointing to American law.³⁸ Exactly where the line in this regard will be drawn is subject only to speculation, since the courts seem to be taking a case by case approach to the problem.

b. Remedy Provided by Foreign Law

It is in the area where the foreign law provides a "sufficient remedy" that the interaction between sections 1 and 4 has most perplexed the courts. The question is whether suit may be brought under section 1 as well as under section 4. Although no case distinctly holds the two remedies to be concurrent, three cases are generally cited for this proposition.³⁹

³⁴ The rationale used by the court was that the nature and extent of libellant's rights must be determined according to general maritime law; that since actions for maritime wrongful death had been adopted by the leading seagoing nations the concept had become a part of the general maritime law; that the law was to be applied as the forum understood it; and, that the DHSA was that law in an American court. 5 F.2d at 436-37. The decision has been criticized. See Magruder & Grout, *Wrongful Death Within the Admiralty Jurisdiction*, 35 *YALE L.J.* 395, 425-26 (1926).

³⁵ *Noel v. United Aircraft Corp.*, 191 F. Supp. 557 (D. Del. 1961), *subsequent opinion*, 202 F. Supp. 556 (D. Del. 1962).

³⁶ The case found there was a Venezuelan wrongful death statute, but it apparently referred to the place of negligence rather than the place of the crash. Since the negligence allegedly occurred in the United States, the court felt that recovery under Venezuelan law was doubtful. Both parties were American; thus the court found the action to be exclusively triable under § 1 of DHSA. 202 F. Supp. at 557-58.

³⁷ 345 U.S. 571 (1953). The case arose on a Jones Act claim, see note 47 *infra*, and involved injury to a Danish seaman on a Danish ship and an applicable Danish statute providing recovery. The Court considered various theories for accepting the case and applying American law. The test used was one of weighing "connecting factors," including nationality of the parties and ship, where the event took place, laws of contractual relationships, and interest of the United States in affording a remedy. The Court declined to take the case and/or apply American law because the connecting factors pointed overwhelmingly to the law and forum of Denmark.

³⁸ Query if the "connecting factors" test would be satisfied in the case when the decedent was an American passenger and defendant "does business" in American foreign commerce. The case has not arisen but it would seem that § 1 would apply if no foreign remedy was available.

³⁹ *Fernandez v. Linea Aeropostal Venezolana*, 156 F. Supp. 94 (S.D.N.Y. 1957); *Iafrate v. Compagnie Generale Transatlantique*, 106 F. Supp. 619 (S.D.N.Y. 1952); *The Presidente Wilson*, 30 F.2d 466 (D. Mass. 1929).

In *The Presidente Wilson*,⁴⁰ a case concerning deaths of American citizens on an American ship with which the Italian *Presidente Wilson* had collided, the court said that the allegation of a cause of action under Italian law brought the cases within the provisions of both sections 1 and 4 of the DHSA. The court felt that the case was controlled by the decision in *The Buenos Aires*.⁴¹ Otherwise, there was little consideration of why both sections should apply.

In *Iafrate v. Compagnie Generale Transatlantique*,⁴² the court sustained a libel under section 1 of the DHSA although the death occurred aboard a French vessel. The court dismissed the claim based on the French wrongful death law because it had been insufficiently pleaded. Here, once again, the court did not come to grips with the problem whether concurrent actions were possible. All that appeared was that a cause of action under section 1 was present, and if libellant so wished, he also could plead the foreign law with more particularity to state an additional valid cause of action under section 4.

Although the two above cases may be dismissed as decisions failing to analyze carefully the problem of concurrent rights, *Fernandez v. Linea Aeropostal Venezolana*⁴³ must be given more serious consideration. This case involved an American citizen who met her death on a Venezuelan plane which crashed on the high seas. Defendants argued that libellant's remedy, if any, must be under the law of the flag as provided by section 4. Thus if there was no applicable Venezuelan wrongful death statute,⁴⁴ libellant would be unable to recover. The court argued that such a result was more harsh than was intended by the legislature. The court said, "the act as passed preserved not merely rights under foreign law, but also, by section 1 of the act, gave an additional right to the personal representative. . . ."⁴⁵ The court then distinguished *Lauritzen v. Larsen*⁴⁶ on the basis that it was a case dealing with the Jones Act⁴⁷ which was, "in practical effect, a labor law regulating the rights of seamen"⁴⁸ and was not intended to regulate the rights of foreign seamen on foreign ships. Since the DHSA clearly is not limited to American decedents, *Lauritzen* was deemed inapplicable. The court maintained that the law of the forum should be applied because it had removed the previously existing "disability" of not being able to recover for wrongful death. Thus the court felt that it was dealing with a procedural question of the power to bring suit rather than the right to do so,⁴⁹ and sustained the contested libel under section 1. Although another libel based on section 4 was dismissed because the foreign law was insufficiently pleaded, leave was given to amend, thus indicating that both

⁴⁰ *Supra* note 39.

⁴¹ 5 F.2d 425 (2d Cir. 1924).

⁴² *Supra* note 39.

⁴³ *Supra* note 39. It should be noted that this case is another in the group of cases arising from the crash of the Venezuelan airliner. The other cases may be found in notes 30 and 35 *supra*. See also *Noel v. Linea Aeropostal Venezolana, Ltd.*, 247 F.2d 677 (2d Cir. 1957).

⁴⁴ The argument of the defendants was that § 4 was totally exclusive in any case involving a foreign wrongdoer. The court here was hypothetically assuming that there was no Venezuelan wrongful death statute in order to point out the fallaciousness of the argument. The court did not assume the inexistence of a foreign cause of action for the remainder of the opinion but, to the contrary, assumed the Venezuelan claim could be proved.

⁴⁵ 156 F. Supp. at 96.

⁴⁶ 345 U.S. 571 (1953).

⁴⁷ 38 Stat. 1185, 46 U.S.C. § 688 (1958). The Jones Act deals with recovery for injury to or death of seamen.

⁴⁸ 156 F. Supp. at 96.

⁴⁹ For criticism and a full exposition on the conflict of laws aspects of this theory see Note, 67 *YALE L.J.* 1445, 1452-53 (1958).

causes of action were concurrently maintainable. Nevertheless, since the case disregards the conflicts test of *Lauritzen* which is generally accepted today, the reasoning of the court and its result can be termed doubtful.

Contrary to the above cases, the most recent decision dealing with the interaction of sections 1 and 4 clearly holds that there is no concurrent cause of action available under section 1 when there is an applicable basis for recovery under the foreign law. In *Bergeron v. Koninklijke Luchtvaart Maatschappij, N.V.*,⁵⁰ previous cases were considered and dismissed either as not squarely facing the problem⁵¹ or as dealing with a case in which it appeared uncertain that a cause of action under the foreign law existed.⁵² The court, however, did not take the position that the rule of the law of the flag governed, but instead chose to decide the case upon the connecting factors test of *Lauritzen*. Thus the case can be distinguished from several older cases which applied the law of the flag to hold a cause of action unavailable under section 1.⁵³ It was recognized in *Bergeron* that it would be desirable to have some flexibility to avoid leaving the libellant without any remedy, and the decision approves the rule of previous cases such as *Noel v. Airponents, Inc.*,⁵⁴ which allowed a cause of action under section 1 when no foreign right of action existed. *Bergeron* squarely holds that a remedy should be available under *either* section 1 *or* section 4; but not under section 1 if recovery under section 4 is available.⁵⁵

Although this position is broader than that contemplated by the Congress that passed the DHSA, the rule is practical and should not expose foreign defendants to undue hardship. The rule would favor application of a foreign remedy if one exists. Only if there are strong considerations, such as the nationality of the parties, availability of recovery, and the like, would the foreign wrongdoer be subjected to a law other than that of his flag. Finally, when the DHSA is applied, even though the recovery is without dollar limitation,⁵⁶ awards are generally not large because they are limited by the amount decedent would have earned and contributed to a limited class of beneficiaries;⁵⁷ moreover, no recovery is allowed for pain and suffering.⁵⁸ Therefore, under modern notions of conflict of laws in admiralty, the position reached by the *Bergeron* court seems proper.⁵⁹

⁵⁰ 188 F. Supp. 594 (S.D.N.Y. 1960).

⁵¹ The court distinguished *Iafate v. Compagnie Generale Transatlantique*, 106 F. Supp. 619 (S.D.N.Y. 1952), on this ground. *The Presidente Wilson*, 30 F.2d 466 (D. Mass. 1929), was not mentioned.

⁵² *Fernandez v. Linea Aeropostal Venezolana*, 156 F. Supp. 94 (S.D.N.Y. 1957), was distinguished in this way. That decision, although vulnerable for the reason that the foreign law was not sufficiently pleaded, seems broader than indicated by this court.

⁵³ See *The Silverpalm*, 79 F.2d 598 (9th Cir. 1935); *Egan v. Donaldson Atl. Line, Ltd.*, 37 F. Supp. 909 (S.D.N.Y. 1941); *The Vulcania*, 41 F. Supp. 849 (S.D.N.Y. 1941), *previous opinion*, 32 F. Supp. 815 (S.D.N.Y. 1940); *The Vestris*, 53 F.2d 847 (S.D.N.Y. 1931); *Powers v. Cunard S.S. Co.*, 32 F.2d 720 (S.D.N.Y. 1925).

⁵⁴ *Supra* note 30.

⁵⁵ When the foreign law provides [no wrongful death action] . . . or an examination of the relevant contact points indicate . . . a closer relation to American law, Section 1 will be available so as not to preclude recovery. But there is no warrant in the statutory language or policy for the maintenance of concurrent causes of action under both American law (Section 1) and foreign law (Section 4).

188 F. Supp. at 597.

⁵⁶ Section 2, 41 Stat. 537 (1920), 46 U.S.C. § 762 (1958), provides no limit other than the recovery shall be a fair and just compensation for the pecuniary loss suffered by the beneficiaries.

⁵⁷ See discussion in part IV, following note 106 *infra*.

⁵⁸ See discussion in part IV, following note 106 *infra*.

⁵⁹ See generally Note, 47 VA. L. REV. 1400 (1961); Comment, 67 YALE L.J. 1445 (1958).

2. Situations Involving a Foreign Decedent and a Foreign Wrongdoer

The situation involving one foreigner attempting to claim under the DHSA against another foreigner has rarely arisen before American courts. In most cases the claimant would sue in a more convenient forum. The wording of the DHSA, however, is broad enough to encompass such a suit.⁶⁰ Apparently, if the flag law of the wrongdoer does not provide a cause of action that brings the case within the scope of DHSA section 4, recovery may be available under section 1. As has been shown previously, a foreign libellant may recover against an American wrongdoer under section 1; and section 1 will also be applied when no foreign law exists to bring section 4 into play in the case of an American libellant.⁶¹ Thus, other than the notions of forum non conveniens, there is no express bar to the DHSA providing a foreigner with an American forum to gain recovery for wrongful death in a high seas case.

Although the court can take the case, the real question is when will it take a case involving only foreign litigants. Where there is some interest of the courts in allowing recovery, such as domicile in the United States, either of the decedent or his representatives, there should be little question but that a suit will be allowed.⁶² In addition, the courts have indicated that they will take the case when it is doubtful whether the decedent's representatives could be heard in the more "convenient" forum. Thus in *Tsangarakis v. Panama S.S. Co.*,⁶³ the court declined to dismiss on the ground of forum non conveniens, reasoning that it could not be sure a Greek court would take jurisdiction over a case involving a Liberian ship.⁶⁴ The decedent and his representative were Greek, the ship at fault was Liberian but British owned, and the witnesses were Greeks. On forum non conveniens principles the decision is quite liberal.

Furthermore, it appears that if suit is brought against a foreign ship in American courts for some reason other than death, and the owner files limitation proceedings, the court will adjudicate death claims arising from the incident involved between foreign litigants without questioning nationality.⁶⁵ This is because one of the purposes of limitation proceedings is the consolidation of claims.

Thus, the few cases that have arisen indicate that the American courts are relatively open as a forum for wrongful death claims between foreign litigants, at least in cases involving ships. No case has been decided involving foreign litigants in an airplane accident. Doubtless such a case would be decided under forum non conveniens considerations similar to those set forth in *Tsangarakis*. The danger

⁶⁰ Section 1, 41 Stat. 537 (1920), 46 U.S.C. § 761 (1958), allows recovery for the wrongful death of "a person." Section 4, 41 Stat. 537 (1920), 46 U.S.C. § 764 (1958), contains no reference to who may bring the action or for whom.

⁶¹ See notes 20 & 55 *supra* and accompanying text.

⁶² See *O'Neill v. Cunard White Star, Ltd.*, 160 F.2d 446 (2d Cir. 1947). Although recovery under DHSA § 4 was not available because the period of limitation had run, the court indicated that it would be an abuse of discretion to dismiss on the ground of forum non conveniens where the decedent alien was domiciled in the United States for twenty years. His representative (wife) also was a U.S. domiciliary, and their children were U.S. citizens.

⁶³ 197 F. Supp. 704 (E.D. Pa. 1961).

⁶⁴ For a similar case see *Kontos v. The S.S. Sophie C.*, 184 F. Supp. 835 (E.D. Pa. 1960).

⁶⁵ See *Petition of Skibs A/S Jolund*, 250 F.2d 777 (2d Cir. 1957), *subsequent opinion sub nom. Verbeeck v. Black Diamond S.S. Corp.*, 269 F.2d 68, 71 (2d Cir. 1959). Recovery was granted for the death of a Belgian mess boy on a Norwegian ship under Norwegian law as allowed by DHSA § 4. The claim was heard in limitation proceedings, although the wrongful death recovery could not be limited. See note 177 *infra* and accompanying text.

of forum shopping is not particularly acute because of the operation of section 4 of the DHSA. Most countries today having shipping or air transportation industries have wrongful death statutes; even if suit were brought in an American court section 4 in most cases would require the foreign law to govern. Therefore, with the limit of forum non conveniens to assure that suits between foreign litigants do not overly crowd our courts, it would seem proper for American admiralty courts to hear such cases when both parties are properly before them.⁶⁶

C. Considerations Other Than Nationality

1. Geographical Limits

Having discussed the application of the DHSA with regard to the nationality of the litigants, there are still other conditions precedent to the application of the act. The DHSA clearly does not apply within the one league (three mile) limit;⁶⁷ similarly, attempts by states to extend the application of their wrongful death statutes beyond this boundary have met with little success.⁶⁸ If it does not appear certain whether the accident occurred inside or beyond this boundary, the best procedure seems to be to assert claims under both the DHSA and the appropriate state wrongful death statute, and then proceed under both until the finding of fact locating the accident is made.⁶⁹ It is not clear from the cases, but the burden of proving that the accident occurred on the high seas would presumably rest on the claimant seeking recovery under the DHSA.

In addition, it is not clear whether the DHSA would have application when the accident occurs on territorial waters of a foreign country. Nevertheless, the scope of the general admiralty jurisdiction clearly extends to such cases,⁷⁰ and presumably the scope of the DHSA would be the same except in the areas where it is expressly not applicable.⁷¹

2. Period of Limitations

Another condition precedent to recovery under the DHSA is the limitation period of two years contained in section 3.⁷² Filing the libel, however, will always toll the limitation period, whether or not jurisdiction is obtained by service of the summons.⁷³ In addition, the limitation requirement is excused when there is no

⁶⁶ See generally Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 CORNELL L.Q. 12 (1949).

⁶⁷ Section 1 of DHSA is applicable "whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore. . . ." 41 Stat. 537 (1920), 46 U.S.C. § 761 (1958). See *The Tungus v. Skovgaard*, 358 U.S. 588 (1959). Section 7, 41 Stat. 538 (1920), 46 U.S.C. § 767 (1958), prevents the act's operation in the Great Lakes and the Panama Canal Zone. See *Niepert v. Cleveland Elec. Illuminating Co.*, 241 F.2d 916 (6th Cir. 1956).

⁶⁸ See, e.g., *Krause v. Republic Aviation Corp.*, 196 F. Supp. 856 (E.D.N.Y. 1961). A recent case indicates that if a state has offshore islands, there is a three mile zone of territorial water around each zone. *Hooker v. Raytheon Co.*, 212 F. Supp. 687 (S.D. Cal. 1962).

⁶⁹ This procedure was used and approved in *First Nat'l Bank v. National Airlines, Inc.*, 288 F.2d 621 (2d Cir. 1961). The trial court used an "advisory" jury to decide where the crash had occurred.

⁷⁰ For cases allowing recovery in such situations see, e.g., *United States v. Flores*, 289 U.S. 137 (1933); *Randall v. Bisso*, 207 F. Supp. 89 (E.D.La. 1962).

⁷¹ See note 67 *supra*.

⁷² 41 Stat. 537 (1920), 46 U.S.C. § 763 (1958).

⁷³ See, e.g., *Hagerup v. Whitin Mach. Works*, 65 F. Supp. 82 (D. Mass. 1946); *Batkiewicz v. Seas Shipping Co.*, 54 F. Supp. 789 (S.D.N.Y. 1944). It does not matter if the libel is filed by the wrong party (*i.e.*, the beneficiary rather than the personal representative). *Fornaris v. American Sur. Co.*, 183 F. Supp. 339 (D.P.R. 1960). However, mere sending of notice of the claim to the defendant will not suffice. *In re Agwi Nav. Co.*, 89 F.2d 11 (2d Cir. 1937).

reasonable opportunity for securing jurisdiction over the vessel, person, or corporation sought to be charged by service of summons.⁷⁴

A literal reading of section 3 might suggest that the period of limitations runs from the date of neglect or default.⁷⁵ This would, however, lead to an absurd result. If the act or omission occurred two years prior to the injury, the wrongdoer would go free. This result was clearly not the contemplation of Congress and the courts have so held.⁷⁶ There has been some argument that the period of limitations starts running from the date of injury rather than the date of death. But this reasoning also would lead to an unduly harsh result. If the injured party lingered for two years before expiring, his beneficiaries would be barred from suit. The courts have recognized this possibility and, although some loose language appears in the decisions, most cases make it clear that the date of death is the beginning of the period of limitations.⁷⁷

Section 3 of the DHSA applies only to suits brought under section 1. When recovery is sought under a foreign created cause of action as permitted by section 4, the period of limitations is that provided by the foreign law.⁷⁸ The decisions uniformly rest on the rationale that since the cause of action is statutory, the period is not a limitation on the remedy, but a condition on the very right to bring the suit.⁷⁹

3. Location of the Wrongful Conduct

The final question to be considered as to the scope of applicability of the DHSA is whether the negligent conduct, the injury, the death, or all of these factors must occur on the high seas in order to bring the act into play.⁸⁰ The early view of this problem was that the cause of action did not arise until death, and thus death in addition to injury had to occur on the high seas for the DHSA to be applicable.⁸¹ Where injury occurred at sea and death did not result until the victim was on shore, the cause of action was said to arise on shore and the admiralty court was without jurisdiction.⁸² Happily, the rule did not find favor

⁷⁴ DHSA § 3, 41 Stat. 537 (1920), 46 U.S.C. § 763 (1958); see *Dunn v. Wheeler Shipbuilding Co.*, 86 F. Supp. 659 (E.D.N.Y. 1949).

⁷⁵ "Suit shall be begun within two years from the date of such wrongful act, neglect, or default. . . ." 41 Stat. 537 (1920), 46 U.S.C. § 763 (1958).

⁷⁶ *E.g.*, *Abbott v. United States*, 207 F. Supp. 468 (S.D.N.Y. 1962); *Brown v. Anderson-Nichols & Co.*, 203 F. Supp. 489 (D. Mass. 1962).

⁷⁷ See cases cited note 76 *supra*. See also *Williams v. Moran, Mueser & Rutledge*, 205 F. Supp. 208 (S.D.N.Y. 1962); *Petition of United States*, 92 F. Supp. 495 (S.D.N.Y. 1950); *Dunn v. Wheeler Shipbuilding Co.*, *supra* note 74; *Batkiewicz v. Seas Shipping Co.*, *supra* note 73; *The Vuleania*, 32 F. Supp. 815 (S.D.N.Y. 1941). *Contra*, *Sloand v. United States*, 93 F. Supp. 83 (W.D.N.Y. 1950).

⁷⁸ *E.g.*, *O'Neill v. Cunard White Star, Ltd.*, 69 F. Supp. 943 (S.D.N.Y. 1946), *aff'd*, 160 F.2d 446 (2d Cir. 1947); *The Vulcania*, 32 F. Supp. 815 (S.D.N.Y. 1940); *The Vestris*, 53 F.2d 847 (S.D.N.Y. 1931).

⁷⁹ For critical comment on this "substance-procedure" type of analysis see EHRENZWEIG, *CONFLICT OF LAWS* 131-33, 428-36 (1962).

⁸⁰ Section 1 of DHSA is applicable "whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore. . . ." 41 Stat. 537 (1920), 46 U.S.C. § 761 (1958). (Emphasis added.)

⁸¹ *Pickles v. F. Leyland & Co.*, 10 F.2d 371 (D. Mass. 1925); *Hughes, Death Actions in Admiralty*, 31 *YALE L.J.* 115, 120 (1921); *cf.* *The Kaian Maru*, 2 F.2d 121 (D. Ore. 1924); *Ryley v. Philadelphia & R. Ry.*, 173 Fed. 839 (S.D.N.Y. 1909). *But cf.* *The Anglo-Patagonian*, 235 Fed. 92 (4th Cir. 1916); *The Chiswick*, 231 Fed. 452 (5th Cir. 1916).

⁸² *Pickles v. F. Leyland & Co.*, *supra* note 81.

among the courts, and was discarded.⁸³ The rule that followed was that "the 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."⁸⁴

This rule sufficed to allow admiralty jurisdiction to be asserted for such accidents taking place aboard ship. However, with the advent of air travel the problems became even more complex. Here a very real possibility exists of the wrongful act or omission occurring ashore while the injury and death take place at sea. The question whether the DHSA applied was again in doubt. In 1951, in *Lacey v. L.W. Wiggins Airways, Inc.*,⁸⁵ the existing rule was modified to allow the act to operate if the *accident* took place on the high seas.⁸⁶ This interpretation of the statute is supported by the legislative history.⁸⁷ In addition, the court reasoned that the DHSA should be applicable to any maritime tort occurring beyond the three mile limit in order to carry out the uniformity desired by Congress in enacting the statute.⁸⁸ The rule as stated by the courts today is: "the tort is deemed to occur, not where the wrongful act or omission has its inception, but where the impact of the act or omission produces such injury as to give rise to a cause of action."⁸⁹

In the corollary situation when the act or omission occurs over the sea and death results on land, the DHSA has no application and the Extension of Admiralty Act⁹⁰ does not affect this rule.⁹¹

A final discussion might be made here as to what facts constitute a wrongful death to bring the DHSA into operation, but this will be deferred until part VI which takes up the theories of liability of the DHSA.

III

JURISDICTION OF THE CAUSE OF ACTION

One of the most hotly debated issues concerning the DHSA is whether along with admiralty jurisdiction there exists concurrent jurisdiction on the part of state courts and the law side of federal courts. The specific issues are: (1) whether state wrongful death statutes apply to high seas cases, creating a right enforceable by a nonadmiralty court; (2) whether a "common law" wrongful death cause of action exists independently of the DHSA, creating a right enforceable outside

⁸³ *The City of Vancouver*, 60 F.2d 793 (9th Cir. 1932), *aff'd sub nom. Vancouver S.S. Co. v. Rice*, 288 U.S. 445 (1933); see ROBINSON, ADMIRALTY LAW 156-61 (1939); 1 BENEDECT, ADMIRALTY § 142 n.9 (6th ed. Knauth 1940).

⁸⁴ *Vancouver S.S. Co. v. Rice*, 288 U.S. 445, 447 (1933). The court also said, "The foundation of the right to recover is a wrongful act or omission taking effect aboard the ship and resulting in death upon the land." *Id.* at 448.

⁸⁵ 95 F. Supp. 916 (D. Mass. 1951).

⁸⁶ The court found this to be a maritime tort because the effect of the act or omission was not spent until the plane fell into the sea. Thus the importance was in the consummation of the act, not in its origin. *Id.* at 918.

⁸⁷ See 59 CONG. REC. 4483 (1920) (remarks of Representatives Volstead and Moore).

⁸⁸ See text accompanying note 14 *supra*.

⁸⁹ *Wilson v. Transocean Airlines*, 121 F. Supp. 85, 92 (N.D. Cal. 1954). See also *Middleton v. United Aircraft Corp.*, 204 F. Supp. 856 (S.D.N.Y. 1960); *Lavello v. Danko*, 175 F. Supp. 92 (S.D.N.Y. 1959); *Noel v. Airponents, Inc.*, 169 F. Supp. 348 (D.N.J. 1958). Cf. *Blumenthal v. United States*, 306 F.2d 16 (3d Cir. 1962), where the Federal Tort Claims Act was involved with the DHSA.

⁹⁰ 62 Stat. 496 (1948), 46 U.S.C. § 740 (1958).

⁹¹ *Pearson v. Northeast Airlines, Inc.*, 199 F. Supp. 538 (S.D.N.Y. 1961).

admiralty jurisdiction; and (3) whether a nonadmiralty court can hear a suit brought under the DHSA and utilize federal civil or state procedure in enforcing the cause of action. The question of exclusive admiralty jurisdiction has been considered important because jury trial is not available in admiralty; and federal civil and state procedures have been considered more advantageous to claimants in some cases. These problems have undergone extensive commentary,⁹² and therefore the subject here will be only briefly discussed.

One argument for allowing suit in a state court or on the law side of a federal court was that a right of action given by state statutes is applicable to high seas cases. The contention was based primarily on the wording of section 7 of the DHSA,⁹³ and its legislative history.⁹⁴ As previously pointed out, however, the rule today is that state statutes may not be applied beyond the three mile limit.⁹⁵

Another argument has been that a "common law" cause of action existed prior to the DHSA's enactment, and that the right to sue under this cause of action was "saved" from pre-emption by the DHSA by the "savings to suitors" clause of the Judiciary Act.⁹⁶ Thus the contention is that the common law right is triable outside the admiralty jurisdiction. The usual answer to this contention is that *The Harrisburg*⁹⁷ decided that no common law right of action for wrongful death

⁹² See Junkerman, *Admiralty and the Ocean Air Lanes*, 26 INS. COUNSEL J. 548 (1959); Thompson, *Jurisdiction of Death in the Air*, 1944 INS. L.J. 654; Comments, 55 COLUM. L. REV. 907 (1955), 41 CORNELL L.Q. 243 (1956), 25 J. AIR L. & COM. 102 (1958); Notes, 11 BUFFALO L. REV. 405 (1962), 47 CORNELL L.Q. 632 (1962), 27 CORNELL L.Q. 94 (1941), 28 FORDHAM L. REV. 141 (1959), 23 GEO. WASH. L. REV. 217 (1954), 30 N.Y.U.L. REV. 494 (1955), 28 So. CAL. L. REV. 78 (1954), 16 U. MIAMI L. REV. 128 (1961).

⁹³ Section 7 states in part: "The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this Act . . ." 41 Stat. 538 (1920), 46 U.S.C. § 767 (1958).

⁹⁴ See generally 59 CONG. REC. 4482-86 (1920). A last minute amendment to § 7 deleting the concluding clause of the first sentence, "as to causes of action accruing within the territorial limits of any state," created some doubt whether admiralty jurisdiction was to be exclusive. It is clear that the amendment was hastily considered and designed to exclude words in § 7 thought to be surplusage. The meaning of the statute, however, was not intended to be changed. The intent behind § 7 as evidenced by the committee reports, S. REP. NO. 216, 66th Cong., 1st Sess. (1920); H.R. REP. NO. 674, 66th Cong., 2d Sess. (1920), was clearly that admiralty jurisdiction was to be exclusive beyond the three mile limit. Thus the deletion was unfortunate. As observed by Representative Goodykoontz, the effect of the deletion was to leave the remaining language "not unlike Mahomet's coffin, suspended between heaven and earth, having no application to anything in particular." 59 CONG. REC. 4486 (1920). For a lucid discussion of this amendment see *Wilson v. Trans-Ocean Airlines*, 121 F. Supp. 85, 89-90 (N.D. Cal. 1954).

⁹⁵ The uniformity desired by Congress would be defeated if this were not so. Most cases concede the proposition, see cases cited note 104 *infra*, even those allowing concurrent jurisdiction, see cases cited note 105 *infra*. See also note 68 *supra* and accompanying text.

The Supreme Court has recently reaffirmed the desirability of maintaining uniform remedies in admiralty. See *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962).

⁹⁶ Judiciary Act of 1789, 28 U.S.C. § 1333 (1958). The original wording of the act was: "The district courts shall have original jurisdiction . . . of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common-law is competent to give it. . . ." 36 Stat. 1091 (1911). The savings clause now reads: ". . . saving to suitors in all cases all other remedies to which they are otherwise entitled." The argument does not appear to have as much weight under the language of the amended version of the savings clause. It now seems clear that no one is "entitled" to recover for wrongful death under the common law, although some argument might remain that the common law is "competent" to give such a remedy. See historical note accompanying 28 FED. CODE ANN. § 1333 (1961).

⁹⁷ 119 U.S. 199 (1886).

existed for high seas cases and consequently there was no pre-existing right available to be "saved."⁹⁸

Finally, it has been argued that the cause of action created by the DHSA can be enforced in state courts or federal courts sitting at law as well as by admiralty courts. This argument has been based again primarily on the wording of section 7 and its legislative history.⁹⁹ Section 1, however, states that suit may be maintained in "the district courts of the United States, in admiralty . . ."¹⁰⁰ In addition, sections 4 and 5 also indicate that admiralty is the exclusive forum.¹⁰¹ Relying on this statutory language and the legislative intent, the courts have rejected attempts to have DHSA actions heard by state or federal law courts.¹⁰²

The foregoing arguments generally appear simultaneously in the cases, but a majority of the courts strike them down holding that an action for wrongful death on the high seas, other than seamen's actions under the Jones Act,¹⁰³ must be brought exclusively in admiralty and under the DHSA.¹⁰⁴ The dissenting cases are few in number and appear to be primarily limited to New York courts.¹⁰⁵ Resolution of the question by the United States Supreme Court is unlikely because there is no conflict between the courts of appeals.

⁹⁸ *E.g.*, *Noel v. Linea Aeropostal Venezolana, Ltd.*, 247 F.2d 677 (2d Cir. 1957). In light of the decision in *The Harrisburg*, the argument has been made that subsequent to that decision a common law had developed by virtue of the general recognition of wrongful death actions. However, this argument has likewise met with little success. See, *e.g.*, *First Nat'l Bank v. National Airlines, Inc.*, 288 F.2d 621 (2d Cir. 1961).

⁹⁹ See notes 93 and 94 *supra*.

¹⁰⁰ 41 Stat. 537 (1920), 46 U.S.C. § 761 (1958).

¹⁰¹ See text accompanying note 17 *supra*. Section 5, 41 Stat. 537 (1920), 46 U.S.C. § 765 (1958), speaks of "The pendency in a court of admiralty of the United States of a suit [under the DHSA] . . ."

¹⁰² *E.g.*, *Blumenthal v. United States*, 306 F.2d 16 (3d Cir. 1962).

¹⁰³ See note 107 *infra*. Although workmen's compensation recovery may be available for high seas deaths, see text following note 131 *infra*, it is technically not a wrongful death recovery.

¹⁰⁴ *Blumenthal v. United States*, 306 F.2d 16 (3d Cir. 1962); *First Nat'l Bank v. National Airlines, Inc.*, 288 F.2d 621 (2d Cir. 1961); *National Airlines, Inc. v. Stiles*, 268 F.2d 400 (5th Cir. 1959); *D'Aleman v. Pan Am. World Airways, Inc.*, 259 F.2d 493 (2d Cir. 1958); *Trihey v. Transocean Air Lines, Inc.*, 255 F.2d 824 (9th Cir. 1958); *Noel v. Linea Aeropostal Venezolana, Ltd.*, 247 F.2d 677 (2d Cir. 1957); *Turner v. Wilson Line*, 242 F.2d 414 (1st Cir. 1957); *Higa v. Transocean Airlines*, 230 F.2d 780 (9th Cir. 1955); *The Silverpalm*, 79 F.2d 598 (9th Cir. 1935) (§ 4); *The Vestris*, 53 F.2d 847 (S.D.N.Y. 1931) (§ 4); *Kunkel v. United States*, 140 F. Supp. 591 (S.D. Cal. 1956); *Wilson v. Transocean Airlines*, 121 F. Supp. 85 (N.D. Cal. 1954); *Iafate v. Compagnie Generale Transatlantique*, 106 F. Supp. 619 (S.D.N.Y. 1952); *Decker v. Moore-McCormack Lines, Inc.*, 91 F. Supp. 560 (D. Mass. 1950); *Egan v. Donaldson Atl. Line, Ltd.*, 37 F. Supp. 909 (S.D.N.Y. 1941) (§ 4); *Birk v. United Fruit Co.*, 48 F.2d 656 (S.D.N.Y. 1930); *Dall v. Cosulich Line*, 1936 Am. Mar. Cas. 359 (S.D.N.Y. 1936); *In re Rademaker's Estate*, 166 Misc. 201, 2 N.Y.S.2d 309 (Surr. Ct. 1938).

¹⁰⁵ *Sierra v. Pan Am. World Airways*, 107 F. Supp. 519 (D.P.R. 1952); *Batkiewicz v. Seas Shipping Co.*, 53 F. Supp. 802 (S.D.N.Y. 1943); *Choy v. Pan Am. Airways*, 1941 Am. Mar. Cas. 483 (S.D.N.Y. 1941); *Powers v. Cunard S.S. Co.*, 32 F.2d 720 (S.D.N.Y. 1925) (§ 4); *Bugden v. Trawler Cambridge, Inc.*, 319 Mass. 315, 65 N.E.2d 533 (1946); *Ledet v. United Aircraft Corp.*, 10 N.Y.2d 258, 219 N.Y.S.2d 245 (1961); *Wyman v. Pan Am. Airways*, 1941 Am. Mar. Cas. 912 (N.Y. Sup. Ct. 1941), *aff'd*, 262 App. Div. 995, 30 N.Y.S.2d 816 (1941); *Kristanson v. Steinfeldt*, 256 App. Div. 824, 9 N.Y.S.2d 790 (1939) (memorandum decision); *Colbert v. Steinfeldt*, 255 App. Div. 790, 7 N.Y.S.2d 373 (1938) (memorandum decision); *Murphy v. Steinfeldt*, 254 App. Div. 790, 4 N.Y.S.2d 10 (1938) (memorandum decision); *Elliott v. Steinfeldt*, 254 App. Div. 739, 4 N.Y.S.2d 9 (1938).

Ledet v. United Aircraft Corp., *supra*, indicates that the issue is still alive.

This majority rule is sound because it is strongly dictated by the express wording of the act and its legislative history. Although some of the arguments made by the proponents of concurrent jurisdiction doubtless are valid,¹⁰⁶ any change should be made by Congress and not read into the existing statute by a court. The problems involved in this area are of practical significance and suggest that Congress should review this portion of the DHSA with a view to its clarification.

IV

INTERACTION OF THE DHSA WITH OTHER STATUTES

A. *The Jones Act*

The DHSA is not the only remedy for death on the high seas. A death action for seamen is available under the Jones Act.¹⁰⁷ The Supreme Court has not directly decided the point,¹⁰⁸ but it seems apparent that the Jones Act and the DHSA, insofar as the wrongful death of seamen is concerned, exist side by side, and where both would be applicable concurrent remedies for wrongful death exist.¹⁰⁹ This does not mean that there may be double recovery,¹¹⁰ however, but the applicability of both statutes raises a problem because they have different classes of beneficiaries eligible for recovery.

The Jones Act provides recovery in terms of priority of a series of classes of beneficiaries.¹¹¹ Thus if there is a spouse or child living, dependent parents or relatives cannot recover. On the other hand, under the DHSA all of the listed beneficiaries may severally recover¹¹² with the award being apportioned between

¹⁰⁶ The arguments have primarily centered around application of the DHSA to airline crashes. Reasons advanced for allowing concurrent jurisdiction include jury trial, less delay, more extensive discovery, no need for a specialized admiralty court for air crashes, inapplicability of limited liability to aircraft, and disparity of treatment of land and air crashes. See generally authorities cited note 92 *supra*.

¹⁰⁷ 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958).

¹⁰⁸ *Cf. Van Beecq v. Sabine Towing Co.*, 300 U.S. 342, 346 (1936). The Court indicated that the two statutes apply concurrently without deciding the point. In the earlier case of *Lindgren v. United States*, 281 U.S. 38 (1930), the Court specifically refused to answer the question.

¹⁰⁹ See *Moore-McCormack Lines v. McMahon*, 235 F.2d 142 (2d Cir. 1956); *Petition of Wood*, 230 F.2d 197 (2d Cir. 1956); *Syville v. Waterman S.S. Co.*, 84 F. Supp. 718 (S.D. N.Y. 1949), *aff'd sub nom. Civil v. Waterman S.S. Co.*, 217 F.2d 94 (2d Cir. 1954); *Dobson v. United States*, 27 F.2d 807 (2d Cir. 1928); *Whitaker v. Blidberg-Rothchild Co.*, 195 F. Supp. 420 (E.D. Va. 1961); *McLaughlin v. Blidberg-Rothchild Co.*, 156 F. Supp. 379 (S.D.N.Y. 1957); *Petition of Southern S.S. Co.*, 135 F. Supp. 358 (D. Del. 1955); *The Four Sisters*, 75 F. Supp. 399 (D. Mass. 1947); *Batkiewicz v. Seas Shipping Co.*, 53 F. Supp. 802 (S.D.N.Y. 1943); *Campbell v. Luckenbach S.S. Co.*, 5 F.2d 674 (D. Ore. 1925); *In re Rademaker's Estate*, 166 Misc. 201, 2 N.Y.S.2d 309 (1938); GILMORE & BLACK, ADMIRALTY 304 (1957); Comment, 57 YALE L.J. 243, 271 (1947); *cf. Ridgedell v. Olympic Towing Corp.*, 205 F. Supp. 952 (E.D. La. 1962).

¹¹⁰ *E.g., Randall v. Bisso*, 207 F. Supp. 892 (E.D. La. 1962).

¹¹¹ The Jones Act refers to the Federal Employers' Liability Act (F.E.L.A.) for the extent of recovery, F.E.L.A. § 51, 53 Stat. 1404 (1939), 45 U.S.C. § 51 (1958), which provides that the action is for the benefit "of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee"

¹¹² Although a larger number of beneficiaries may recover, the recovery is several and not in the alternative. See quotation accompanying note 138 *infra*; *Fornaris v. American Sur. Co.*, 183 F. Supp. 339 (D.P.R. 1960); *The City of Rome*, 48 F.2d 333 (S.D.N.Y. 1930).

them by the court.¹¹³ There is no indication in the legislative history of these two acts why their permissible beneficiaries differ. One possible reason the Jones Act has a more limited group of beneficiaries is that it allows survival of the decedent's cause of action for pain and suffering in addition to recovery for wrongful death.¹¹⁴ It may be that in the Jones Act Congress intended to restrict recovery for pain and suffering to the nearest of kin to avoid having such recovery spread among a large class of beneficiaries. No reason appears, however, to justify the difference in the permissible beneficiaries under the two acts insofar as who may recover for wrongful death is concerned. Thus, to avoid discrimination against beneficiaries of seamen, some courts have held that beneficiaries precluded from recovery under the Jones Act may recover under the DHSA.¹¹⁵

Allowing recovery under both statutes has been criticized¹¹⁶ because the defendant is required to defend two actions, one of which may be before a jury while the other is not. The criticism seems warranted in this regard. Nevertheless, the principle of the cases seems sound because, aside from the recovery for pain and suffering allowable in Jones Act cases, the total allowable recovery under either act will be the same for each beneficiary. Under both statutes recovery is limited by the extent the decedent could have earned and contributed to his beneficiaries during his lifetime.¹¹⁷ Nonetheless, in order to prevent multiplicity of actions it would be advisable for Congress to reconcile the problem by enacting new legislation. This may easily be accomplished by amending the Jones Act to do away with the priority of classes of beneficiaries as to recovery for wrongful death. The priority could, if desired, be retained for the recovery for pain and suffering. Such an amendment would make it unnecessary for seamen's beneficiaries to resort to the DHSA at all.

B. Actions Against the United States

In high seas wrongful death cases in which the U.S. Government is the defendant, recovery is possible under the cause of action given by the DHSA in conjunction with the waiver of sovereign immunity provided by other statutes. For example, the Public Vessels Act¹¹⁸ has been construed to allow recovery from the Government by the beneficiaries of passengers on a public vessel,¹¹⁹ or passengers or seamen on other ships¹²⁰ if the Government is found to be at fault. In addition, the Federal Tort Claims Act¹²¹ has been construed to adopt the cause of action created by the DHSA to allow recovery in similar situations.¹²²

¹¹³ See quotation accompanying note 138 *infra*; *Fornaris v. American Sur. Co.*, *supra* note 112; *United States v. The S.S. Washington*, 172 F. Supp. 905 (E.D. Va. 1959); *Petition of Southern S.S. Co.*, 135 F. Supp. 358 (D. Del. 1955).

¹¹⁴ See note 166 *infra* and accompanying text.

¹¹⁵ *Tetterton v. Arctic Tankers, Inc.*, 116 F. Supp. 429 (E.D. Pa. 1953); *The Four Sisters*, 75 F. Supp. 399 (D. Mass. 1947); *cf. Doleman v. Levine*, 295 U.S. 221 (1935); *In re Panama Transp. Co.*, 98 F. Supp. 114 (S.D.N.Y. 1951).

Recovery for pain and suffering by one of the beneficiaries under the Jones Act does not change the result. *The Four Sisters*, *supra*.

¹¹⁶ See GILMORE & BLACK, ADMIRALTY 304-06 (1957).

¹¹⁷ See discussion in part V, B, following note 148 *infra*.

¹¹⁸ 43 Stat. 1112-13 (1925), 46 U.S.C. §§ 781-90 (1958) (libels in personam are allowed for damages caused by public vessels).

¹¹⁹ *Dobson v. United States*, 27 F.2d 807 (2d Cir. 1928) (dictum).

¹²⁰ *New England Maritime Co. v. United States*, 55 F.2d 674 (D. Mass. 1932).

¹²¹ 28 U.S.C. §§ 1346(b), 2674 (1958).

¹²² *Blumenthal v. United States*, 189 F. Supp. 439 (E.D. Penn. 1960), *aff'd*, 306 F.2d 16 (3d Cir. 1962) (airplane); *United States v. Gavagan*, 280 F.2d 319 (5th Cir. 1960); *Kunkel v. United States*, 140 F. Supp. 591 (S.D. Cal. 1956); *Walker v. United States*, 102 F. Supp. 618 (S.D.N.Y. 1951); *Moran v. United States*, 102 F. Supp. 275 (D. Conn. 1951).

On the other hand, recovery against the Government in this manner has been denied to sailors,¹²³ soldiers,¹²⁴ and Government employees¹²⁵ when injured in the scope of their employment. The reason given is that existing death benefits provided by the Government are sufficient and exclusive. However, if there is also fault on the part of another ship or entity, the DHSA operates to allow recovery by Government personnel. In this situation the death benefits received from the Government do not act as a bar.¹²⁶ If both the Government ship and the other vessel are at fault, a court may require contribution by the Government.¹²⁷

C. State Statutes

There is also some interaction of the DHSA with state statutes. As was pointed out previously, the DHSA supersedes state wrongful death statutes in the area of its operation.¹²⁸ The DHSA also supersedes other state statutes or decisional law that would otherwise affect the method or amount of recovery prescribed.¹²⁹ For example, a state statute providing for a direct action against an insurer will not be applied even if by the state law it would apply in the particular case.¹³⁰ There are, however, two major exceptions to this rule: one is the area of state survival statutes, which will be subsequently discussed,¹³¹ and the other is in the application of state workmen's compensation legislation.

A very interesting case, *King v. Pan Am. Airways, Inc.*,¹³² has held that the California workmen's compensation law provides the *exclusive* recovery for wrongful death by the beneficiaries of an airlines employee against the California employer, even though the employee's death resulted from a crash on the high seas. The desired libel under the DHSA was dismissed. The reasoning of the court was: (1) the only maritime connection with the facts was the fortuitous locality of the accident; (2) there is no constitutional barrier because state workmen's compensation statutes are allowed to operate to protect employees beyond the boundaries of their states of employment; (3) the DHSA cannot be said to exclude the application of workmen's compensation laws because the latter is based upon absolute liability whereas the former requires proof of fault; thus the two statutes provide different remedies; and (4) the workmen's compensation law allows an adequate remedy and it is the law in relation to which the parties contracted.

It would seem to be a sound result to allow workmen's compensation recovery in a case such as *King*, on the basis of the state's interest in protecting employees

¹²³ *Dobson v. United States*, *supra* note 119.

¹²⁴ *United States v. The S.S. Washington*, 172 F. Supp. 905 (E.D. Va. 1959).

¹²⁵ *Mandel v. United States*, 191 F.2d 164 (3d Cir. 1951), held that the Federal Employees' Compensation Act, 39 Stat. 745-50 (1916), as amended, 5 U.S.C. §§ 751-93 (1958), is exclusive and thus no remedy under the DHSA was possible.

¹²⁶ *United States v. The S.S. Washington*, *supra* note 124; *The City of Rome*, 48 F.2d 333 (S.D.N.Y. 1930).

¹²⁷ See, e.g., *United States v. The S.S. Washington*, *supra* note 124.

¹²⁸ See note 95 *supra* and accompanying text.

¹²⁹ See, e.g., *Lawson v. United States*, 192 F.2d 479 (2d Cir. 1951); *Middleton v. Luckenback S.S. Co.*, 70 F.2d 326 (2d Cir. 1934); *Iafrate v. Compagnie Generale Transatlantique*, 106 F. Supp. 619 (S.D.N.Y. 1952).

¹³⁰ *Guess v. Read*, 290 F.2d 622 (5th Cir. 1961); *Fornaris v. American Sur. Co.*, 183 F. Supp. 339 (D.P.R. 1960).

¹³¹ See notes 165-68 *infra* and accompanying text.

¹³² 166 F. Supp. 136 (N.D. Cal. 1958), *aff'd*, 270 F.2d 355 (9th Cir. 1959), *cert. denied*, 362 U.S. 928 (1960). A similar case was subsequently affirmed, *per curiam*. *Hudson v. Transocean Air Lines*, 272 F.2d 397 (9th Cir. 1959).

and their families from the consequences of on-the-job injuries. It would not seem logical to withhold workmen's compensation from those employees required by the nature of their job to work outside the boundaries of their state of domicile. Thus, insofar as *King* supports the applicability of state workmen's compensation laws in high seas cases it appears to be well reasoned.¹³³ The decision, however, went much further than this, and in effect held that the state law pre-empted the federal right created by the DHSA. Although double recovery certainly could not be tolerated, it would seem that under the facts of *King* the plaintiff should be able to choose between the two remedies.¹³⁴ This seems particularly true in view of the desirability of uniformity in high seas cases. A choice of remedies would satisfy the intent behind both pieces of legislation,¹³⁵ and it seems reasonable to suggest that the rule of the *King* case be modified to allow such a procedure.

An alternative remedy to the *King* result would be a federal law providing a uniform recovery in the nature of workmen's compensation for airline and maritime employees, such as are now applicable to railroad workers, seamen, long-shoremen, and others. Either solution would allow the uniform recovery¹³⁶ that Congress has found to be a desirable goal in high seas death cases.

V

BENEFICIARIES AND THE MEASURE OF RECOVERY

Section 1 of the DHSA provides in part:

The personal representative of the decedent may maintain a suit . . . for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative . . .¹³⁷

Section 2 of the DHSA states:

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.¹³⁸

Although the meaning of the above provisions seems clear, resort to the cases must be made to determine how the rules are applied.

¹³³ See, e.g., *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532 (1935).

¹³⁴ It does not seem proper that a state by legislation should in effect be able to change the beneficiaries, for example, who could recover under the DHSA. It is entirely possible that the list of permissible beneficiaries under a compensation statute would be less inclusive than that of the DHSA. See *Doleman v. Levine*, 295 U.S. 221 (1935), which allowed different beneficiaries to recover under a workmen's compensation statute and a wrongful death act to prevent such a conflict. See generally Note, 57 *MICH. L. REV.* 756 (1959). It would seem that similar arguments could be made with regard to periods of limitation, forum, and the like.

¹³⁵ Presumably, the intent of workmen's compensation is to remove the burden of proving fault to obtain recovery from industrial accidents, and to make recovery easier and more speedy. On the other hand, the purpose behind the DHSA was to create a uniform remedy for wrongful death on the high seas to ensure the decedent's beneficiaries did not go without recovery.

¹³⁶ The *King* case seems to say that if there is an applicable workmen's compensation statute it will be exclusive. State workmen's compensation laws vary in their standards and benefits. Thus there is no assurance of uniformity unless federal legislation is forthcoming or a choice of the DHSA remedy is allowed.

¹³⁷ 41 Stat. 537 (1920), 46 U.S.C. § 761 (1958).

¹³⁸ 41 Stat. 537 (1920), 46 U.S.C. § 762 (1958).

A. Who May Recover

The DHSA in terms requires the suit to be brought by the personal representative of the decedent. This has been interpreted to preclude suit being brought directly by the beneficiaries.¹³⁹ Although the list of beneficiaries in the statute seems explicit, much judicial time has been devoted to deciding who can recover. For example, "wife" has been construed to include a separated spouse,¹⁴⁰ a deserted spouse,¹⁴¹ and a remarried widow.¹⁴² However, a putative spouse, whether or not meretricious, has been denied recovery.¹⁴³ Both natural¹⁴⁴ and illegitimate¹⁴⁵ children have been allowed recovery. "Parents," in addition to including both mothers and fathers,¹⁴⁶ in one case has included a stepmother.¹⁴⁷ "Dependent relatives," the broadest of the terms, has been held to include brothers, sisters, nieces, nephews, uncles, and aunts.¹⁴⁸ Thus the DHSA provides recovery for a broad range of beneficiaries.

B. Measure of Recovery

The theory of damages set forth in section 2 of the DHSA is "pecuniary loss." This has been interpreted to mean that "the damages should be equivalent to compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased."¹⁴⁹ However, "reasonable" does not mean a mere possibility of benefit.¹⁵⁰ The courts have required a showing of actual support or contributions to establish pecuniary loss,¹⁵¹ although recovery has not been limited to actual contributions.¹⁵² Compensation is not allowed for advice, society, and companionship,¹⁵³ or for recovery that

¹³⁹ *Moore-McCormack Lines, Inc. v. McMahon*, 235 F.2d 142 (2d Cir. 1956); *Fornaris v. American Sur. Co.*, 183 F. Supp. 339 (D.P.R. 1960). If the administrator is disqualified or dies, a successor must be appointed to prosecute the action. *Syville v. Waterman S.S. Corp.*, 84 F. Supp. 718 (S.D.N.Y. 1949).

¹⁴⁰ *Peterson v. United N.Y. Sandy Hook Pilots Ass'n*, 17 F. Supp. 676 (E.D.N.Y. 1936).

¹⁴¹ *Civil v. Waterman S.S. Corp.*, 217 F.2d 94 (2d Cir. 1954).

¹⁴² *Blumenthal v. United States*, 189 F. Supp. 439 (E.D. Penn. 1960); *United States v. The S.S. Washington*, 172 F. Supp. 905 (E.D. Va. 1959). The widow's rights are fixed at the moment of death; her subsequent remarriage is not to be considered.

¹⁴³ *Syville v. Waterman S.S. Corp.*, *supra* note 139; *Lawson v. United States*, 192 F.2d 479 (2d Cir. 1951). A valid common law marriage would probably be recognized. *Cf. Tetterson v. Arctic Tankers, Inc.*, 116 F. Supp. 429 (E.D. Penn. 1953).

¹⁴⁴ *E.g.*, *Peterson v. United N.Y. Sandy Hook Pilots Ass'n*, *supra* note 140.

¹⁴⁵ *Middleton v. Luckenbach S.S. Co.*, 70 F.2d 326 (2d Cir. 1934); *Syville v. Waterman S.S. Corp.*, *supra* note 139; *In re Wenkhous' Estate*, 158 Misc. 663, 286 N.Y.S. 518 (Surr. Ct. 1936).

¹⁴⁶ *E.g.*, *Petition of Gulf Oil Corp.*, 172 F. Supp. 911 (S.D.N.Y. 1959).

¹⁴⁷ *Lawson v. United States*, *supra* note 143.

¹⁴⁸ *See, e.g.*, *Petition of Gulf Oil Corp.*, *supra* note 146.

¹⁴⁹ *Middleton v. Luckenbach S.S. Co.*, 70 F.2d 326, 330 (2d Cir. 1934). *See also National Airlines, Inc. v. Stiles*, 268 F.2d 400 (5th Cir. 1959); *The S.S. Black Gull*, 90 F.2d 619 (2d Cir. 1937); *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. 1959); *Walker v. United States*, 102 F. Supp. 618 (S.D.N.Y. 1951).

¹⁵⁰ *In re Panama Transp. Co.*, 98 F. Supp. 114 (S.D.N.Y. 1951).

¹⁵¹ *See, e.g.*, *First Nat'l Bank v. National Airlines, Inc.*, 288 F.2d 621 (2d Cir. 1961); *Whitaker v. Blidberg-Rothchild Co.*, 195 F. Supp. 420 (E.D. Va. 1961).

¹⁵² *National Airlines, Inc. v. Stiles*, 268 F.2d 400 (5th Cir. 1959).

¹⁵³ *Middleton v. Luckenbach S.S. Co.*, 70 F.2d 326 (2d Cir. 1934); *First Nat'l Bank v. National Airlines, Inc.*, 171 F. Supp. 528 (S.D.N.Y. 1958); *Peterson v. United N.Y. Sandy Hook Pilots Ass'n*, 17 F. Supp. 676 (E.D.N.Y. 1936).

would more properly be a part of decedent's estate.¹⁵⁴ The factors taken into account to determine pecuniary loss have included contributions, actual losses such as wages of the beneficiary, life expectancies of both the beneficiaries and the decedent, infirmities of the decedent that would have affected his earning power, possibilities of inheritance from the decedent, expectation of future support, possibility of the decedent's future marriage, earning capacity of decedent, and his prospects of advancement.¹⁵⁵ If a beneficiary has died prior to judgment, recovery is allowed but limited to the actual life span between the dates of the decedent's and beneficiary's deaths.¹⁵⁶ It is not required that the beneficiary be completely dependent upon the decedent.¹⁵⁷

With regard to the judgment itself, it seems that the court is not required to make a mathematical computation to arrive at the amount of the award.¹⁵⁸ There is a conflict between various courts whether interest should be allowed on the award between the time of death and the date of judgment.¹⁵⁹ The more recent and seemingly better reasoned cases allow it.¹⁶⁰ Finally, the value of the award must be discounted to arrive at the present value.¹⁶¹

The courts that go through some form of computation usually do so by applying mortality tables to the amount of yearly support found to have been furnished any particular beneficiary.¹⁶² Other courts have made the award depend upon the present cost of an annuity furnishing the same amount of monthly support as the beneficiary had been receiving.¹⁶³ Other death benefits received by the beneficiary have not been made to reduce the recovery.¹⁶⁴

Under the DHSA, the award has uniformly been held not to include recovery for pain and suffering.¹⁶⁵ Moreover, the DHSA has no provision allowing for the survival of the decedent's cause of action as is the case with the Jones Act.¹⁶⁶

¹⁵⁴ E.g., *Funeral expenses, fare paid, or lost baggage. Trihey v. Transocean Air Lines, Inc.*, 255 F.2d 824 (9th Cir. 1958); *The Culberson*, 61 F.2d 194 (3d Cir. 1932); *First Nat'l Bank v. National Airlines, Inc.*, *supra* note 153. *But see Chermesino v. Vessel Judith Lee Rose, Inc.*, 211 F. Supp. 36 (D. Mass. 1962) (funeral expenses allowed without comment).

¹⁵⁵ See, e.g., *Whitaker v. Blidberg-Rothchild Co.*, 195 F. Supp. 420 (E.D. Va. 1961); *Blumenthal v. United States*, 189 F. Supp. 439 (E.D. Pa. 1960); *Petition of Gulf Oil Corp.*, 172 F. Supp. 911 (S.D.N.Y. 1959); *Walker v. United States*, 102 F. Supp. 618 (S.D.N.Y. 1951); *Peterson v. United N.Y. Sandy Hook Pilots Ass'n*, 17 F. Supp. 676 (E.D.N.Y. 1936).

¹⁵⁶ *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342 (1936); *Petition of Gulf Oil Corp.*, *supra* note 155.

¹⁵⁷ *Petition of Gulf Oil Corp.*, *supra* note 155.

¹⁵⁸ *National Airlines, Inc. v. Stiles*, 268 F.2d 400 (5th Cir. 1959). The court need not set up an equation involving the use of mortality tables and the like. If desired, the factors determining recovery may be weighed and the amount of recovery may be stated as merely a single figure.

¹⁵⁹ E.g., compare *Petition of Gulf Oil Corp.*, *supra* note 155, with *National Airlines, Inc. v. Stiles*, *supra* note 158.

¹⁶⁰ *National Airlines, Inc. v. Stiles*, *supra* note 158. *But cf.* Note, 9 DE PAUL L. REV. 255 (1960).

¹⁶¹ See, e.g., *The City of Rome*, 48 F.2d 333 (S.D.N.Y. 1930).

¹⁶² See, e.g., *First Nat'l Bank v. National Airlines, Inc.*, 171 F. Supp. 528 (S.D.N.Y. 1958), *aff'd*, 238 F.2d 621 (2d Cir. 1961).

¹⁶³ E.g., *Walker v. United States*, 102 F. Supp. 618 (S.D.N.Y. 1951).

¹⁶⁴ See, e.g., *In re Panama Transp. Co.*, 98 F. Supp. 114 (S.D.N.Y. 1951).

¹⁶⁵ See, e.g., *Abbott v. United States*, 207 F. Supp. 468 (S.D.N.Y. 1962); *Petition of Gulf Oil Corp.*, 172 F. Supp. 911 (S.D.N.Y. 1959). *But see Tetterton v. Arctic Tankers, Inc.*, 116 F. Supp. 429 (E.D. Pa. 1953) (allowing award for pain and suffering without comment).

¹⁶⁶ See Federal Employers' Liability Act § 59, 36 Stat. 291 (1910), 45 U.S.C. § 59 (1958). Section 5 of the DHSA, 41 Stat. 537 (1920), 46 U.S.C. § 765 (1958), does not provide for survival of a decedent's cause of action for personal injury. It merely allows decedent's per-

Where, however, a state survival statute is by its terms applicable, the admiralty courts have seen fit to allow its application to give recovery for pain and suffering in nonseamen cases.¹⁶⁷ As a practical matter, survival will be allowed in most cases today by the operation of either the Jones Act or state survival statutes. Thus it would not be surprising to find the courts willing to read survival into the DHSA recovery. As one writer said, "It has been consistently true in this branch of the law that whatever a seaman¹⁶⁸ can get under one theory he can sooner or later get under all the others."¹⁶⁹

C. *Limitations on Recovery*

The DHSA contains no dollar limitation on recovery. However, two external limitations may be present in high seas death cases which can restrict the claimant's recovery—the Limitation of Liability Act¹⁷⁰ and the Warsaw Convention.¹⁷¹ Limitation proceedings are possible only in cases involving ships¹⁷² whereas the convention applies only to aircraft on international flights.¹⁷³ The convention at present places an \$8500 maximum¹⁷⁴ on the individual recovery, while the Limitation of Liability Act limits all claims arising out of the incident to the value of the ship involved.¹⁷⁵ The convention applies to all signatories and can affect recoveries under both sections 1 and 4 of the DHSA.¹⁷⁶ On the other hand, the operation of the Limitation of Liability Act is expressly excluded from section 4 actions¹⁷⁷ and thus only applies to suits brought under section 1.¹⁷⁸

sonal injury suit to be continued by his representative as a DHSA action for wrongful death without the inconvenience of refileing, etc., when decedent dies during the personal injury trial. See *United States v. The S.S. Washington*, 172 F. Supp. 905 (E.D. Va. 1959), *aff'd*, 272 F.2d 711 (4th Cir. 1959); *Abbott v. United States*, *supra* note 165; *Decker v. Moore-McCormack Lines, Inc.*, 91 F. Supp. 560 (D. Mass. 1950); *Pickles v. F. Leyland & Co.*, 10 F.2d 371 (D. Mass. 1925).

¹⁶⁷ *E.g.*, see cases cited note 165 *supra*.

¹⁶⁸ (Footnote added.) Or anyone else for that matter.

¹⁶⁹ GILMORE & BLACK, ADMIRALTY 308 (1957).

¹⁷⁰ 9 Stat. 635 (1851), as amended, 46 U.S.C. §§ 181-89 (1958).

¹⁷¹ Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention), 49 Stat. 3000 (1929). The convention does not create a cause of action but limits the amount of recovery available under local law. See *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir. 1957), *cert. denied*, 355 U.S. 907 (1957).

¹⁷² Aircraft owners may not limit their liability under the act. *Noakes v. Imperial Airways, Ltd.*, 29 F. Supp. 412 (S.D.N.Y. 1939); *Dollins v. Pan-Am. Grace Airways, Inc.*, 27 F. Supp. 487 (S.D.N.Y. 1939); see 26 CORNELL L.Q. 124 (1940). For discussion of limitation procedure, see generally GILMORE & BLACK, ADMIRALTY 663-748 (1957).

¹⁷³ Warsaw Convention, *supra* note 171. See generally DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW (1954).

¹⁷⁴ The future of the convention is decidedly uncertain. An amendment has been proposed to increase the amount of recovery, but as yet, the amendment has not been ratified by a sufficient number of countries. In addition, the United States seems to be considering withdrawing from the convention. See, *e.g.*, Lissitzyn, *International Aviation Policy: The Warsaw Convention, The Hague Protocol and International Limitation of Liability, The Warsaw Convention Today*, 56 AM. SOC'Y INT'L L. PROC. 115 (1962); N.Y.C. Bar Ass'n, *Report on the Warsaw Convention as Amended by the Hague Protocol*, 26 J. AIR L. & COM. 255 (1959).

¹⁷⁵ 9 Stat. 635 (1851), as amended, 46 U.S.C. § 183 (1958).

¹⁷⁶ The convention would apply to limit recovery under the foreign right of action allowed by § 4 to be brought in American courts since use of the foreign law would entail applying that law as limited in the foreign country. Thus the limitation would not be a "statute of the United States" precluded by the language of § 4. See note 171 *supra* and accompanying text.

¹⁷⁷ See, *e.g.*, *Skibs A/S Joland v. Black Diamond S.S. Corp.*, 250 F.2d 777 (2d Cir. 1957); *Egan v. Donaldson Atl. Line, Ltd.*, 37 F. Supp. 909 (S.D.N.Y. 1941); *The Vestris*, 53 F.2d 847 (S.D.N.Y. 1931).

¹⁷⁸ See, *e.g.*, *Petition of Wood*, 230 F.2d 197 (2d Cir. 1956); *Petition of Southern S.S.*

VI

THEORIES OF LIABILITY UNDER THE DHSA

In order for liability to be created by the DHSA, the death involved must be caused by "wrongful act, neglect, or default . . ." ¹⁷⁹ The relation of these words to existing theories of tort liability is somewhat uncertain.

The legislative history of the meaning of these words is inconclusive because the subject was not discussed directly. ¹⁸⁰ It would seem that if recovery was to be restricted solely to negligence, that word would have been exclusively used in the statute. This was done in the Federal Employers' Liability Act ¹⁸¹ and in the Jones Act. ¹⁸²

Other language in section 1 indicates that the intent of the DHSA was to allow recovery on the same theories that would have been available to the decedent had he survived the injury. Section 1 states that suit may be maintained against the person, ship, or company that would have been liable if death had not ensued. Since recovery under the DHSA is allowed against the same defendants as in nondeath cases, it would seem also that the same theories of recovery should be available in either case.

The decisions on the theories of recovery under the DHSA indicate that negligence is not to be the sole theory of recovery. For example, in the case of seamen, recovery under the DHSA may be based on the doctrine of unseaworthiness, a form of strict liability. ¹⁸³ The courts allowing recovery on this theory have generally relied on the same analysis of section 1 as was presented above. In addition, they have partially rested their decisions on two Supreme Court cases ¹⁸⁴ affirming the interpretation of state wrongful death statutes as encompassing the doctrine of unseaworthiness, where the language of these statutes was similar to the DHSA. Also, the doctrine of *res ipsa loquitur*, which is a departure from rigid concepts of negligence based on fault, has been accepted as applicable to air crash cases under the DHSA. ¹⁸⁵

Finally, and most important, it appears that the basis for recovery under the DHSA may also include strict liability based upon implied warranty theories. *Middleton v. United Aircraft Corp.* ¹⁸⁶ recently allowed recovery against a man-

Co., 135 F. Supp. 358 (D. Del. 1955); *Petition of United States*, 92 F. Supp. 495 (S.D.N.Y. 1950).

¹⁷⁹ DHSA § 1, 41 Stat. 537 (1920), 46 U.S.C. § 761 (1958).

¹⁸⁰ See 59 Cong. Rec. 4482-86 (1920) (negligence was referred to only tangentially).

It is clear, however, that negligence is a basis for liability under the act since this is expressly stated in § 1. See, e.g., *The Black Gull*, 82 F.2d 758 (2d Cir. 1936); *Nietes v. American President Lines, Ltd.*, 188 F. Supp. 219 (N.D. Cal. 1959); *Lavello v. Danko*, 175 F. Supp. 92 (S.D.N.Y. 1959). Contributory negligence is not a bar but is to be considered only in mitigation of damages. 41 Stat. 537-38 (1920), 46 U.S.C. § 766 (1958).

¹⁸¹ 35 Stat. 65 (1908), 45 U.S.C. § 51 (1958).

¹⁸² 38 Stat. 1185 (1915), as amended, 46 U.S.C. § 688 (1958).

¹⁸³ *Chermesino v. Vessel Judith Lee Rose, Inc.*, 211 F. Supp. 36 (D. Mass. 1962); *McLaughlin v. Bldberg Rothchild Co.*, 167 F. Supp. 714 (S.D.N.Y. 1958); cf. *Kernan v. American Dredging Co.*, 355 U.S. 426, 430 (1958). *McLaughlin* characterized unseaworthiness as a breach of a duty rather than absolute liability. Practically speaking, there would seem to be little difference.

¹⁸⁴ *The Tungus v. Skovgaard*, 358 U.S. 588 (1959); *United N.Y. & N.J. Sandy Hook Pilots Ass'n, v. Halecki*, 358 U.S. 613 (1959).

¹⁸⁵ See *Trihey v. Transocean Air Lines, Inc.*, 255 F.2d 824 (9th Cir. 1958); *Blumenthal v. United States*, 189 F. Supp. 439 (E.D. Pa. 1960), *aff'd*, 306 F.2d 16 (3d Cir. 1962).

¹⁸⁶ 204 F. Supp. 856 (S.D.N.Y. 1960) (crash of helicopter on high seas).

ufacturer under the DHSA on this basis. The court relied on the idea of strict liability in tort rather than a contractual warranty theory, and thus any problem with the concept of privity of contract was avoided. The term "wrongful act, neglect or default" in the DHSA was interpreted to include the theory of implied warranty as a tort recovery. In reaching this result the *Middleton* court relied on the same analysis as the courts allowing recovery for unseaworthiness in seamen cases.¹⁸⁷ The wrong was conceptualized as the breach of a duty to supply a safe product. In addition, the aircraft involved was considered to be a "dangerous instrumentality" to allow the application of the rule analogously supported by the *MacPherson* doctrine¹⁸⁸ already embodied in admiralty.¹⁸⁹

In *Noel v. United Aircraft Corp.*,¹⁹⁰ Judge Layton was not convinced that recovery upon a warranty theory should yet be granted in admiralty. He held that the DHSA did not provide a cause of action based upon implied warranty against the propeller manufacturer of an airplane that had crashed on the high seas. Interestingly enough, Judge Layton did not say that the DHSA could not encompass such a theory. He stated instead that admiralty tort theory had not yet developed to a point where recovery for a passenger on a common carrier was to be given on the basis of an implied warranty against the manufacturer. He felt that to allow the libel to stand he would be expanding the admiralty law, and that such an expansion should be made by Congress or the Supreme Court.

Although one must respect the sophisticated analysis of the cases and theories cited in *Noel*, it would seem that interpreting the DHSA to include recovery on the basis of implied warranty is not a great expansion of existing admiralty tort theory, if it is an expansion at all. The history of tort recovery on warranty theory has been one of development by the courts rather than by legislation, and it would not seem improper for an admiralty court likewise to consider application of the doctrine. The court did suggest that if admiralty tort theory encompassed the doctrine of implied warranty, the DHSA would also include it.

It is beyond the scope of this comment to discuss the merits and demerits of recovery for personal injury on the basis of warranty or product liability ideas. Suffice it to say that the doctrine of implied warranty in one form or another is no stranger to admiralty.¹⁹¹ Although Judge Layton is correct that the doctrine of implied warranty is not yet firmly implanted in the law allowing passengers to recover against manufacturers in airplane accidents, there is ample indication that such is the trend.¹⁹² Furthermore, on principle there seems to be no reason why recovery should be denied to a passenger on an airplane that crashes because of a product defect, when recovery is allowed in other third party product liability

¹⁸⁷ See cases cited note 183 *supra* and accompanying text.

¹⁸⁸ *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

¹⁸⁹ See *Sieracki v. Seas Shipping Co.*, 149 F.2d 98 (3d Cir. 1945), *aff'd*, 328 U.S. 85 (1946); *Dunn v. Wheeler Shipbuilding Corp.*, 86 F. Supp. 659 (E.D.N.Y. 1949).

¹⁹⁰ 204 F. Supp. 929 (D. Del. 1962).

¹⁹¹ The doctrine of unseaworthiness is in effect a type of warranty theory, although restricted to seamen. Implied warranty is clearly the basis for recovery over by the shipowner in injuries to stevedores. See, e.g., *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), and the line of cases it spawned. See also cases cited notes 183 & 189 *supra*.

¹⁹² See, e.g., *Ewing v. Lockheed Aircraft Corp.*, 202 F. Supp. 216 (D. Minn. 1962); *Siegel v. Braniff Airways, Inc.*, 204 F. Supp. 861 (S.D.N.Y. 1960); *Conlon v. Republic Aviation Corp.*, 204 F. Supp. 865 (S.D.N.Y. 1960); *Middleton v. United Aircraft Corp.*, *supra* note 186; *Hinton v. Republic Aviation Corp.*, 180 F. Supp. 31 (S.D.N.Y. 1959); *cf.* *Thompson v. Reedman*, 199 F. Supp. 120 (E.D. Pa. 1961).

situations.¹⁹³ For these reasons it seems regrettable that the libel in *Noel* was not allowed to stand on the implied warranty theory asserted. The decision appears to be out of step with the general development of tort law today, both within and without the admiralty jurisdiction.¹⁹⁴

In any event, so far as theories of recovery under the DHSA are concerned, one clear premise can be extracted from the decisions: the scope of the permissible theories of recovery will include the same theories available to the decedent under admiralty law in general had he not died from his injuries. How many theories of recovery are available, however, is not precisely ascertainable at the moment. The most important question concerns the clarification of whether recovery on the basis of implied warranty is to be recognized, although the trend of the decisions both in admiralty and elsewhere seems to be to allow recovery on that basis.

CONCLUSION

The DHSA is a necessary piece of legislation providing recovery in an area where humanitarian notions of justice strongly dictate that recovery should be available. Nevertheless, bringing suit under the DHSA today is fraught with a number of traps for the unwary. Although some problems, such as the interaction of sections 1 and 4, have been substantially resolved by the courts, it would seem that the time is ripe for Congress to take a fresh look at the other problems concerning the DHSA. There is no reason for the inconsistency in the allowable beneficiaries between the Jones Act and the DHSA in cases involving the death of seamen. In addition, the questions of concurrent jurisdiction and the interaction of the DHSA with state workmen's compensation laws should be settled. Revision of the DHSA in this fashion would hopefully prevent the judicial legislation that has been deemed necessary by the courts to keep the act properly applicable to the changing times.

John Edginton Ball

¹⁹³ *E.g.*, *Peterson v. Lamb Rubber Co.*, 54 Cal.2d 339, 353 P.2d 575, 5 Cal. Rptr. 863 (1960) (recovery by an employee against a manufacturer because of a defect in a product purchased by the employer); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) (recovery by driver of a car purchased by another). That warranty is not restricted to sales transactions see, *e.g.*, *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, *supra* note 191; *Aced v. Hobbs-Sesack Plumbing Co.*, 55 Cal.2d 573, 360 P.2d 897, 12 Cal. Rptr. 257 (1961).

It may be noted that admiralty has accepted other ideas through a process of judicial evolution. Equity powers were not always known to the admiralty courts, but presently are in wide use. "The Chancellor is no longer fixed to the woosack. He may stride the quarter-deck of maritime jurisprudence and, in the role of admiralty judge, dispense, as would his land-locked brother, that which equity and good conscience impels." *Compania Anonima Venezolana de Navegacion v. A. J. Perez Export Co.*, 303 F.2d 692, 699 (5th Cir. 1962).

¹⁹⁴ The decision has been criticized elsewhere. See 37 *TUL. L. REV.* 141 (1962); 48 *VA. L. REV.* 1467 (1962). The court characterized the libel as an attempt to avoid limited recovery against the carrier under the Warsaw Convention. However, this would not seem to be an important consideration since, as mentioned previously, the recovery is limited by the decedent's earning capacity. Also, the status of the Warsaw Convention today is uncertain; the limit is apparently going to be raised, and there is some possibility the United States may withdraw. See note 174 *supra*. Query whether a manufacturer actually relies on the Warsaw Convention limitation to determine prices when supplying equipment for aircraft. The crash which may cause the manufacturer's liability may or may not be subject to the convention's limitation depending upon the use of the aircraft at the time it goes down. See note 173 *supra* and accompanying text.