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SEAMEN'S DEATH ACTIONS UNDER THE JONES ACT, DOHSA, AND THE GENERAL MARITIME LAW: A COMPARISON

Seamen occupy a unique position under maritime law. Admiralty courts[1] accord great deference to seamen who bring suit for employment-related injuries since seamen are engaged in a hazardous profession.[2] Assurance of protection against the high risk of disabling injury encourages seamen to undertake the hazardous work.[3] If a seaman dies in the course of employment, provision should be made for his dependents.[4] Seamen, therefore, are "wards of admiralty,"[5] and admiralty courts will liberally grant a seamen or his personal representative a remedy for work-related injury or death.[6]

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[1] Rules or laws relating to ships, shipping and maritime matters are traditionally within admiralty jurisdiction. Originally the admiral, a naval officer, had authority over matters within admiralty and maritime jurisdiction. Presently, only courts have jurisdiction of cases arising in admiralty. *See* 1 BENEDICT ON ADMIRALTY §102, at 7-4 to 7-5 (Rev. 7th Ed. 1974) A case arises in admiralty when the dispute involves waters publicly navigable which successfully aid interstate or foreign commerce. *See* The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 233 (1851); Dardar v. State of Louisiana, 322 F. Supp. 1115, 1120 (E.D. La.), *aff'd sub nom.* Dardar v. Louisiana State Dept. of Hwys, 447 F.2d 952 (5th Cir. 1971). When a case is within admiralty jurisdiction, federal maritime law, as opposed to state common law or statutory law, applies. *See* Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409-10 (1953); 1 M. NORRIS, THE LAW OF SEAMEN, § 1, at 1 (3d ed. 1970) [hereinafter cited as M. NORRIS] (admiralty law derived from ancient customs and rules of shipping, not from common law).

[2] *See* Vella v. Ford Motor Co., 421 U.S. 1, 4 (1975). Seamen face the perils of the ocean. Thus, their employers must be solicitous of their welfare. Farrell v. United States, 336 U.S. 511, 524 (1949) (Douglas, J., dissenting).

[3] 421 U.S. at 4; *see* Harden v. Gordon, 11 F. Cas. 480, 483 (C.C.D. Me. 1823) (No. 6,047). *See also* Reed v. Canfield, 20 F. Cas. 426 (C.C.D. Mass 1842)(No. 11,641).

[4] *See* Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 577 (1974)(courts grant "special solicitude" for deceased seamen's dependents). *See also* 46 U.S.C. §§ 688, 761-767 (1976).

[5] *See* Garrett v. Moore-McCormack Co., 317 U.S. 239, 248 (1942). The master-seaman relationship differs from the ordinary employer-employee relationship defined in agency law. The seaman must obey the command of his master without hesitation or argument. *See* Southern S.S. Co. v. NLRB, 316 U.S. 31, 38 (1942); Robertson v. Baldwin, 165 U.S. 275, 288 (1897). Thus, the relationship places the master *in loco parentis* to the seaman, making the employer the legal guardian of the seaman. *See* The Iroquois, 194 U.S. 240, 247 (1904); Robertson v. Baldwin, 165 U.S. at 287; Murphy v. American Barge Line Co., 169 F.2d 61, 64 (3d Cir. 1948). *See generally* Petition of Den Norske Amerikalisje A/S, 276 F. Supp. 163, 171-72 (N.D. Ohio 1967); Norris, *The Seaman as Ward of the Admiralty*, 52 MICH. L. REV. 479 (1954).

[6] *See, e.g.*, Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 583 (1974); Moragne v. States Marine Lines, 398 U.S. 375, 387 (1970); The Sea Gull, 21 F. Cas. 909, 910 (C.C.D. Md. 1865) (No. 12,578)(unless otherwise required by established, prophylactic rules, courts should grant remedy consistent with humane and liberal nature of admiralty proceedings).

Maritime law has always shown a special solicitude for seamen who undertake hazardous and unpredictable sea voyages. Whether a seaman dies in United States waters or on the

To implement the humanitarian objectives of admiralty law, admiralty courts and Congress strive to provide uniformity in seamen's actions.[7] In 1920, Congress supplemented the general maritime law[8] through the enactment of the Merchant Marine Act (Jones Act)[9] and the Death on the High Seas Act (DOHSA),[10] thus expanding and unifying seamen's actions. Under general maritime law, which applies in the absence of a specific controlling statute,[11] injured seamen may bring an action against a vessel owner for maintenance, cure, and lost wages.[12] The right to a living allowance, medical expenses, and continuation of salary during a seaman's period of convalescence exists regardless of the fault of the shipowner or the place of the injury.[13] Until 1970, however, the general maritime law

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high seas has no rational relation to the reasons for allowing the seaman's family to recover damages for his death. *See* Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 626-27 (1978) (Marshall, J., dissenting); Moragne v. States Marine Lines, Inc., 398 U.S. 375, 395-96, 405 (1970).

[7] *See, e.g.*, Moragne v. States Marine Lines, 398 U.S. 375, 401-02 (1978); S. REP. No. 216, 66th Cong., 1st Sess. 3, 4 (1919) (DOHSA enacted to make federal admiralty law uniform). Congress determines the maritime law which will prevail throughout the United States. Southern Pac. Co. v. Jensen, 244 U.S. 205, 215 (1917). The Supreme Court has declared that admiralty legislation, when unrelated to matters of a more restricted field, shall operate uniformly throughout the country. *See* Panama R.R. Co. v. Johnson, 264 U.S. 375, 386-87 (1924). *See also* The Lottawana, 88 U.S. (21 Wall.) 558, 574-75 (1875) (framers aware of international nature of admiralty law and intended admiralty law to be uniform when granting federal courts power to adjudicate admiralty cases under Article 3, § 2 of the Constitution). Courts, however, may modify admiralty law in keeping with changing circumstances. *See* Cain v. Alpha S.S. Corp., 35 F.2d 717, 722 (2d Cir. 1929), *aff'd*, 281 U.S. 642 (1930). *See generally* Swain, *Requiem for* Moragne: *The New Uniformity*, 25 LOY. L. REV. 1, 3 (1979) [hereinafter cited as Swain].

[8] General maritime law is the international law of the sea. *See* The Lottawana, 88 U.S. (21 Wall.) 558, 573 (1875).

[9] 46 U.S.C. § 688 (1976). The Jones Act grants a seaman the right to recover damages for injury due to his employer's negligence. If the seaman dies, his personal representative may maintain a survival action for the seaman's death. In either case, the plaintiff has the right to trial by jury. *See* text accompanying notes 56-74 *infra*. *See generally* 1B BENEDICT ON ADMIRALTY § 2, at 1-12 (Rev. 7th ed. 1976) [hereinafter cited as 1B BENEDICT]; 2 M. NORRIS, *supra* note 1, § 657-704.

[10] 46 U.S.C. § 761-767 (1976). DOHSA grants a cause of action in admiralty for the death of a person or seaman due to a shipowner's negligence or for a seaman's death due to a vessel's unseaworthiness occurring outside of United States waters. *See* text accompanying notes 40-52 *infra*. *See generally* 2 M. NORRIS, *supra* note 1, §§ 650-656.

[11] M. NORRIS, *supra* note 1, § 3, at 5.

[12] *See* Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 543 (1960); The Osceola, 189 U.S. 158, 175 (1903). "Maintenance" is sustenance, including food and lodging, which the ship otherwise would be obliged to supply the seaman. *See* The Bouker No. 2, 241 F. 831, 835 (2d Cir.), *cert. denied*, 245 U.S. 647 (1917). "Cure" is charge or care of the seaman, including medical expenses, to the extent that cure is possible. *See* The Atlantic, 2 F. Cas. 121, 131 (C.C.S.D.N.Y. 1849) (No. 620). "Wages" are the salary of the seaman for the duration of the voyage. *See* Farrell v. United States, 336 U.S. 511, 520 (1949). The traditional right to maintenance, cure, and wages still exists today. *E.g.*, Robinson v. Pocahontas, Inc., 477 F.2d 1048, 1050-51 (1st Cir. 1973).

[13] *See* Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 527 (1938); H. BAER, ADMIRALTY LAW OF THE SUPREME COURT § 1-2, at 6, § 1-4, at 20 (3d ed. 1979) [hereinafter cited as H. BAER].

granted no wrongful death cause of action.[14] If a seaman died, his personal representative's right to bring a wrongful death action existed only under the Jones Act if the death was caused by the shipowner's negligence; DOHSA if the death was caused by the shipowner's negligence or the ship's unseaworthiness[15] outside of territorial waters;[16] or state wrongful death acts if the death was caused by negligence or unseaworthiness inside territorial waters.[17]

The absence of a general maritime law cause of action for wrongful death resulted in three anomalies.[18] First, identical wrongful conduct on the part of a shipowner produced liability if the conduct caused injury, but frequently not if the conduct caused death.[19] Second, DOHSA granted a wrongful death cause of action for deaths occurring outside of territorial waters as a result of unseaworthiness, while no such cause of action existed for deaths occurring within territorial waters if the applicable state statute did not recognize unseaworthiness as an actionable claim.[20] Third, the personal representative of a seaman covered by the Jones Act could not recover for the seaman's death due to unseaworthiness in territorial waters, while a harborworker's personal representative did have such a right to recovery when allowed by a state statute.[21]

See generally 2 M. NORRIS, *supra* note 1, §§ 538-611.

[14] *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 379-80, 380 n.3 (1970); The Harrisburg, 119 U.S. 199, 213 (1886). The Supreme Court formerly refused to grant an action for wrongful death under general maritime law because the Court reasoned that a personal cause of action died with the person in the absence of statute. *See* 119 U.S. at 213-14.

[15] The condition of unseaworthiness exists when a shipowner fails to supply a reasonably fit vessel and appurtenances. *Id.* at 550. Although the ship need not be accident-free, the owner absolutely warrants the seaworthiness of the ship to seamen under general maritime law, independent of the owner's common law duty to exercise reasonable care. *Id.* at 549.

Unseaworthiness encompasses more than a dangerous ship or defective equipment. *See generally* 1B BENEDICT, *supra* note 9, § 23, at 3-45 to 3-46. The quality or quantity of the ship's personnel may render the ship unseaworthy. *See, e.g.*, Waldron v. Moore-McCormack Lines, 386 U.S. 724, 728 (1967); Walter v. Moore-McCormack Lines, Inc., 309 F.2d 191, 193-94 (2d Cir. 1962); Boudoin v. Lykes Bros. S. S. Co., 348 U.S. 336, 339-40 (1955). Operational negligence, or "instantaneous unseaworthiness," however, does not render the owner liable for unseaworthiness. Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 500 (1971); 1B BENEDICT, *supra* note 9, § 21, at 3-4; *see* Puddu v. Royal Netherlands S.S. Co., 303 F.2d 752, 757 (2d Cir.), *cert. denied*, 371 U.S. 840 (1962) (ship seaworthy as to seamen injured by falling glass broken by negligent seaman, but unseaworthy as to seaman who steps on glass). Also, the mere occurrence of an accident does not alone prove unseaworthiness. *E.g.*, Brown v. Dravo Corp., 258 F.2d 704, 706 (3d Cir. 1958), *cert. denied*, 359 U.S. 960 (1959); Tanzi v. Deutsche Dampfschiffahrts-Gecellschaft Havsa, 355 F. Supp. 432, 434 (S.D.N.Y. 1973).

[16] A distance of more than three miles from the shore of the United States is "outside of territorial limits". *See* Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 620 (1978).

[17] *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 377, 393 (1970); 46 U.S.C. §§ 688, 761-767 (1976).

[18] *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 395-96 (1970).

[19] *Id.* at 395.

[20] *Id.*

[21] *Id.* at 395-96.

The Supreme Court condemned the inequities and lack of uniformity in wrongful death claims caused by the absence of a general maritime law death remedy, and ruled in *Moragne v. States Marine Lines, Inc.*,[22] that a cause of action for wrongful death now exists under general maritime law.[23] Consequently, a seaman's personal representative has three federal bases of recovery for the death of the seaman.

A seaman's personal representative suing under the general maritime law cause of action created in *Moragne* for wrongful death occurring in or out of territorial waters must prove that the unseaworthiness of the ship caused the decedent's death.[24] The representative may choose to proceed *in rem* against the vessel in federal court[25] or *in personam* against the owner in a federal or state court.[26] If the representative chooses a federal forum, the action must be brought in admiralty,[27] and admiralty courts

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[22] 398 U.S. 375 (1970), *overruling* The Harrisburg, 119 U.S. 199 (1886). In *Moragne*, the widow and administratrix of a longshoreman killed in the course of employment aboard a ship in territorial waters brought a wrongful death action for negligence and unseaworthiness. *Id.* at 376. Under the applicable state statute, the unseaworthiness allegation did not present an actionable claim. *Id.* at 377. The widow could not sue under the Jones Act because the decedent had been a longshoreman. *See id.* at 376; *e.g.*, Swanson v. Marra Bros., 328 U.S. 1, 7 (1946) (longshoremen or their survivors cannot sue under Jones Act even if longshoreman's employer also vessel owner). The widow also could not sue under DOHSA because death occurred in territorial waters. *See* 398 U.S. at 376.

[23] 398 U.S. at 409. The *Moragne* Court examined the history of the common law rule which denied a decedent's personal representative a cause of action for the decedent's death. The Court concluded that the common law rule has no applicability to maritime law. *Id.* at 381-88. The Court also observed that because all states have wrongful death statutes, no public policy exists against allowing wrongful death recovery. *Id.* at 390. Further, the Court reasoned that because the Jones Act and DOHSA both allow recovery for maritime deaths, Congress did not oppose the judicial creation of a wrongful death cause of action for those who would otherwise be without remedy. *Id.* at 393-95.

[24] *See id.* at 376-409. A personal representative alleging negligence as a cause of a seaman's death must bring the negligence claim under either the Jones Act or DOHSA. *See* text accompanying notes 45 & 55 *infra*.

[25] *See* Romero v. International Term. Oper. Co., 358 U.S. 354, 369 (1959). A claimant possessing a maritime lien may bring an *in rem* action. A maritime lien is a privileged claim upon maritime property for service done to the property or for injury caused by the property. The Ponzan, 9 F.2d 838, 842 (2d Cir. 1925); *see e.g.*, Savas v. The S.S. Capt. John C., 182 F. Supp. 641, 643-44 (E.D. Va. 1960), *aff'd sub nom.* Savas v. Maria Trading Corp., 285 F.2d 336 (4th Cir. 1961). The claimant's lien is against the ship, not the owner, and the claimant has the right to have the ship sold in a direct proceeding to satisfy the claim. *See* The Rupert City, 213 F. 263, 267 (W.D. Wash. 1914).

Only the federal admiralty courts have jurisdiction to adjudicate *in rem* admiralty claims. *See, e.g.*, Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 124 (1924); The Moses Taylor, 71 U.S. (4 Wall.) 411, 430-31 (1866). *But see* C.J. Hendry Co. v. Moore, 318 U.S. 133, 134, 153 (1943) (state court had jurisdiction of forefeiture action *in rem* for improper use of fishing net in state navigable coastal waters).

[26] *See* Romero v. International Term. Oper. Co., 358 U.S. 354, 369, 370 (1959); *cf.* Madruga v. Superior Ct., 346 U.S. 556, 560-61 (1954) (state court may adjudicate *in personam* maritime actions). *See also* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 409 (1970); note 46 *infra*. If the representative chooses a state forum, he cannot bring an *in rem* action. *See* notes 25-26 *supra*.

[27] *See* Romero v. International Term. Oper. Co., 358 U.S. 354, 370 (1959).

traditionally sit without a jury.[28] The general maritime law provides no specific time period in which the claimant must file a libel.[29] Rather, the flexible doctrine of laches determines the limitations period.[30]

A successful general maritime law libellant[31] may be entitled to generous recovery. The court may award pecuniary damages[32] for loss of the seaman's support and services,[33] and funeral expenses,[34] as well as non-pecuniary damages[35] for loss of society.[36] Contributory negligence[37] does

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[28] *See* Fitzgerald v. United States Lines Co., 374 U.S. 16, 17 (1963); Green v. Ross, 481 F.2d 102, 103 (5th Cir.), *cert. denied,* 414 U.S. 1068 (1973); H. BAER, *supra* note 13, § 1-11, at 72. Although admiralty courts traditionally sit without a jury, Congress has previously provided for jury trials in admiralty courts. *See* 5 Stat. 726 (1845). *See also* The Propeller Genesse Chief v. Fitzhugh, 53 U.S. (12 How.) 233, 242-44 (1851) (constitutional for Congress to provide for jury trials in admiralty courts). The Constitution does not forbid jury trials in admiralty cases, *see* Fitzgerald v. United States Lines, 374 U.S. 16, 20 (1963), although the seventh amendment does not require jury trials of admiralty cases. *See* Waring v. Clarke, 46 U.S. (5 How.) 456, 465 (1847). States may provide the jury trial right. *See* Garrett v. Moore-McCormack Co., 317 U.S. 239, 241 (1942); Norton v. Switzer, 93 U.S. 355, 356 (1876).

[29] H. BAER, *supra* note 13, § 1-10, at 69. A "libel" is a complaint in admiralty.

[30] Under the doctrine of laches, a plaintiff is barred from bringing an action if his delay is inexcusable and if the defendant has been prejudiced by the delay. *See* Gardner v. Panama R.R. Co., 342 U.S. 29, 31 (1951); Giddens v. Isbrandtsen Co., 355 F.2d 125, 128 (4th Cir. 1966).

[31] In admiralty, a "libellant" is a plaintiff.

[32] "Pecuniary damages" are the damages incurred by the beneficiaries that are proportionate to the decedent's injury. 1 S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 3:1, at 103-04 (2d ed. 1975) [hereinafter cited as S. SPEISER]. Pecuniary damages exclude "everything but the loss of money and support." *Id.* § 3:49, at 308.

[33] *See, e.g.,* Dennis v. Central Gulf S.S. Corp., 323 F. Supp. 943, 948-49 (E.D. La.), *aff'd,* 453 F.2d 137 (5th Cir. 1972).

[34] Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 584 (1974); *see* Greene v. Vantage S.S. Corp., 466 F.2d 159, 167 (4th Cir. 1972); Dennis v. Central Gulf S.S. Corp., 453 F.2d 137, 141 (5th Cir.), *cert. denied,* 409 U.S. 948 (1972).

[35] "Non-pecuniary damages" may most simply be termed "sentimental damages." *See* Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 595 (1974) (Powell, J., dissenting).

[36] Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 584 (1974); Petition of M/V Elaine Jones, 513 F.2d 911, 912-13 (5th Cir.), *cert. denied,* 423 U.S. 840 (1975). Loss of society encompasses the loss that family members endure from the death of another member, including love, affection, care, attention, companionship, comfort, and protection. 414 U.S. at 585; *see* Landry v. Two R. Drilling Co., 511 F.2d 138, 142 (5th Cir. 1975); Palmer v. Ribax, Inc., 407 F. Supp. 974, 979 (M.D. Fla. 1976). In the case of a spouse, loss of society includes loss of consortium. Thompson v. Offshore Co., 440 F. Supp. 752, 765 (S.D. Tex. 1977). A general maritime law libellant may not, however, recover damages for his mental anguish or grief on account of the decedent's death. Sea-Land Servs., Inc. v. Gaudet, 414 U.S. at 585 n.17; *In re* S/S Helena, 529 F.2d 744, 747 (5th Cir. 1976). *See generally* 1 S. SPEISER, *supra* note 32, at § 3:49; Comment, *Loss of Consortium in Admiralty: A Yet Unsettled Question,* 1977 B.Y.U.L. REV. 133. *See also* American Export Lines, Inc. v. Alvez, 100 S. Ct. 1673 (1980).

[37] Under the doctrine of contributory negligence, a plaintiff is absolutely barred from recovery if the plaintiff's own conduct proximately caused his injury, even though the defendant may have breached a duty of care owed to the plaintiff which proximately caused the same injury. 1 J. DOOLEY, MODERN TORT LAW: LIABILITY & LITIGATION § 4.02, at 78 (1977) [hereinafter cited as J. DOOLEY].

not bar recovery under general maritime law.[38] Rather, the principle of comparative negligence applies, allowing the court to reduce the amount of recovery by the amount of the decedent's own negligence.[39]

In contrast to the liberal provisions of general maritime law, DOHSA[40] provisions are markedly limited. DOHSA applies only to persons who die[41] outside of the territorial limits of the United States, or on the "high seas".[42] Under DOHSA, the decedent's personal representative can only

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[38] Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 430-32 (1939). The assumption of risk doctrine is also inapplicable in seamen's actions. *Id.* There are cogent reasons for denial of the defenses of contributory negligence and assumption of risk. A seaman risks loss of pay and desertion penalties if he abandons ship because working conditions are unsafe. If the seaman complains about working conditions, his superiors are likely to take a dim view of his complaints. Moreover, a seaman often has little opportunity or capacity to weigh the consequences of his actions in the course of employment. *Id.* at 430-31. *See also* note 5 *supra.*

[39] Socony-Vacuum Oil Co. v. Smith, 305 U.S. at 431. Under the comparative negligence doctrine, a court compares the fault of the plaintiff with that of the defendant, permitting recovery despite the plaintiff's negligence, reduced by the proportion that the plaintiff's negligence contributed to the injury. *See* 1 S. SPEISER, *supra* note 32, § 5:10, at 605; Prosser, *Comparative Negligence,* 51 MICH. L. REV. 465, 465 n.2 (1953). *See generally* Mole & Wilson, *A Study of Comparative Negligence,* 17 CORNELL L.Q. 333, 339-50 (1932); 1B BENEDICT, *supra* note 9, § 25, at 3-104 to 3-117. State law provisions cannot modify the comparative negligence rule since maritime torts are controlled by federal maritime law. *See* Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409-10 (1953).

[40] 46 U.S.C. §§ 761-767 (1976); *see* note 10 *supra.*

[41] DOHSA is not limited to seamen. *See* 46 U.S.C. § 761 (personal representative may sue for *person's* wrongfully caused death); Moragne v. States Marine Lines, Inc., 398 U.S. 375, 407-08 (1970); *e.g.,* Solomon v. Warren, 540 F.2d 777, 780 (5th Cir. 1976), *cert. dismissed,* 434 U.S. 801 (1977) (DOHSA action for death of passengers). DOHSA deals specifically and exclusively with wrongful death actions. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 407 (1970).

[42] 46 U.S.C. § 761 (1976); *see, e.g.,* The Buenos Aires, 5 F.2d 425, 426 (2d Cir. 1924) (ship collision at sea). Death arising from a wrongful act occurring *over* the high seas is within DOHSA. *See* Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 619 (1978) (decedents killed in helicopter crash outside territorial limits); D'Aleman v. Pan Am World Airlines, Inc., 259 F.2d 493, 496 (2d Cir. 1958) (decedent went into shock when told by pilot of plane outside territorial limits that plane in danger). *But see* Lowe v. Trans World Air-Lines, Inc., 396 F. Supp. 9, 11-12 (S.D.N.Y. 1975) (deaths over high seas from explosion of bomb planted while plane on land not necessarily within DOHSA). DOHSA may be applicable even if the tort's inception was within territorial limits as long as the wrongful act or omission had suit-producing impact on the high seas. *See, e.g.,* Lavello v. Danko, 175 F. Supp. 92, 93 & n.* (S.D.N.Y. 1959); Noel v. Airponents, 169 F. Supp. 348, 350 (D. N.J. 1958). *But see* Pearson v. Northeast Airlines, Inc., 199 F. Supp. 538, 538 (S.D.N.Y. 1961)(no DOHSA jurisdiction where decedent died in plane crash within territorial limits and decedent suffered no injury contributing to death while outside territorial limits, even if negligence committed on high seas caused plane crash).

DOHSA does not apply to death-causing torts occurring on the Great Lakes, inland waterways within state territorial limits, or navigable waters within the Panama Canal Zone. 46 U.S.C. § 767 (1976); *see* Turner v. Wilson Line of Mass., Inc., 242 F.2d 414, 418 (1st Cir. 1957). DOHSA is also inapplicable to deaths occurring on artificial island drilling riggs located outside territorial limits. Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352, 365-66 (1969); *see* 43 U.S.C. §§ 1331-1343 (1976); 395 U.S. at 360-61; Bertrand v. Shell Oil Co., 489 F.2d 293, 294-95 (5th Cir. 1973).

sue on behalf of the decedent's spouse, parents, children, or dependent relatives.[43] The representative must prove that the defendant's "wrongful act, neglect, or default" caused the decedent's death.[44] The basis of a DOHSA recovery is unseaworthiness, in the case of a seaman, or negligence in the case of a person, including a seaman.[45] Either a federal admiralty court[46] or a state court[47] may take jurisdiction of the action, which the personal representative may bring *in rem* or *in personam*.[48] A suit under DOHSA is barred unless the libellant files a libel within two years from the date of the death causing act.[49]

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[43] 46 U.S.C. § 761 (1976). Since a DOHSA action is not a survival action, the personal representative can only maintain the action if the beneficiaries specified in § 761 exist. *See* note 56 *infra*, *e.g.*, Decker v. Moore-McCormack Lines, Inc., 91 F. Supp. 560, 561 (D. Mass. 1950).

[44] 46 U.S.C. § 761 (1976).

[45] *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 396 n.12 (1970); Kernan v. American Dredging Co., 355 U.S. 426, 430 n.4 (1958); 2 BENEDICT ON ADMIRALTY, § 81, at 7-5 n.15 (Rev. 7th ed. 1975); Note, 53 TUL. L. REV. 254, 257 n.21 (1978) [hereinafter cited as TUL. L. REV.]. Only seamen have a DOHSA cause of action for unseaworthiness. *E.g.*, Gibboney v. Wright, 517 F.2d 1054, 1059 (5th Cir. 1975). *But see* Seas Shipping Co. v. Sieracki, 328 U.S. 85, 100 (1946) (non-seaman aboard vessel doing work traditionally done by seaman entitled to seaworthiness warranty). Passengers are not seamen; therefore, a shipowner does not warrant the seaworthiness of a vessel to passengers. *See, e.g., In re* Companie Generale Transatlantique, 392 F. Supp. 973, 975 (D. P.R. 1975). The shipowner, however, owes passengers the highest degree of care and diligence. *Id. See also* Talton v. United States Lines Co., 203 F. Supp. 17, 18 (S.D.N.Y. 1962). The duty of care and diligence is unlike the duty to provide a seaworthy ship, since due diligence will not satisfy the absolute warranty of seaworthiness. *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 399 (1970). Some courts have erroneously assumed that the seaworthiness warranty extends to passengers. *See, e.g., In re* Wood, 145 F. Supp. 848, 855-56 (W.D. Mo. 1956), *aff'd sub nom.* Loc-Wood Boat & Motors, Inc. v. Rockwell, 245 F.2d 306 (8th Cir. 1957). *See generally* note 15 *supra*.

[46] *See* 46 U.S.C. § 761 (1976); *e.g.*, Noel v. Linea Aeropostal Venezolana, 318 F.2d 710, 711 (2d Cir. 1963); Higa v. Transocean Airlines, 230 F.2d 780, 786 (9th Cir.), *cert. dismissed*, 352 U.S. 802 (1956).

[47] *E.g.*, Ledet v. United Aircraft Corp., 10 N.Y.2d 258, 261, 219 N.Y.S.2d 245, 247, 176 N.E.2d 820, 821 (1961). *Contra, e.g.*, Boudreau v. Boat Andrea G. Corp., 350 Mass. 473, ___, 215 N.E.2d 907, 908-09 (1966). While 28 U.S.C. § 1333(1) (1976) provides that the federal courts shall have exclusive original jurisdiction of civil admiralty and maritime claims, that statute does not require that only federal courts may try admiralty cases. Only federal courts can exercise the powers of admiralty courts when trying admiralty cases. 1 M. NORRIS, *supra* note 1, § 4, at 8. For example, state courts cannot exercise admiralty *in rem* jurisdiction. *See* note 25 *supra*. However, under the Savings to Suitors Clause of § 1333(1), a litigant with an *in personam* admiralty claim has the option to sue in a state court if he meets that court's jurisdictional requirements. The remedy that the state court may grant is a remedy over which common law and admiralty courts had concurrent jurisdiction when the Constitution was adopted. *See* Waring v. Clarke, 46 U.S. (5 How.) 456, 466 (1847); 1 M. NORRIS, *supra* note 1, § 4, at 8-9.

[48] *See* 46 U.S.C. § 761 (1976); note 25 *supra*.

[49] *Id.* § 763; *see* Abbott v. United States, 207 F. Supp. 468, 471-72 (S.D.N.Y. 1962); Brown v. Anderson-Nichols & Co., 203 F. Supp. 489, 491 (D. Mass. 1962).

Courts may grant an exception to the two-year statute of limitations period if the plaintiff has had no reasonable opportunity to obtain jurisdiction over the potential defendant. The cause of action becomes barred, however, at the expiration of 90 days after the plaintiff

DOHSA damages are limited to pecuniary losses suffered by the beneficiaries,[50] and these damages cannot be supplemented by general maritime law.[51] Recovery cannot be decreased except upon application of the comparative negligence doctrine.[52]

The federal personal injury statute specifically restricted to seamen is the Jones Act.[53] The Jones Act allows a seaman[54] to maintain an action

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has been offered a reasonable opportunity to secure jurisdiction. 46 U.S.C. § 763 (1976).

[50] 46 U.S.C. § 762 (1976); *see, e.g.*, Solomon v. Warren, 540 F.2d 777, 786 (5th Cir. 1976) (pecuniary loss is monetary benefits which could have been generated over decedent's normal life span). The court may also assess pre-judgment or moratory interest from the date of the decedent's death. Moore-McCormack Lines, Inc. v. Richardson, 295 F.2d 583, 594 (2d Cir. 1961). A DOHSA libellant may not recover damages for funeral expenses, *e.g.*, The Culberson, 61 F.2d 194, 195 (3d Cir. 1932), conscious pain and suffering of the decedent prior to death, *e.g.*, Brown v. Anderson-Nichols & Co., 203 F. Supp. 489, 490 (D. Mass. 1962), or loss of society. *E.g.*, First Nat'l Bank in Greenwich v. National Airlines, Inc., 288 F.2d 621, 624 (2d Cir.), *cert. denied*, 368 U.S. 859 (1961).

[51] Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625-26 (1978).

[52] 46 U.S.C. § 766 (1976). *See generally* note 39 *supra*.

[53] 46 U.S.C. § 688 (1976). The Jones Act provides that a seaman's personal representative may maintain an action in cases where the seaman dies as a result of injuries for which the seaman could bring action under the statute. *See id.* Thus, the Jones Act provides a survival action, as opposed to a wrongful death action. A survival action is maintained for the damages the deceased could have recovered had he lived. A wrongful death action is for harm suffered by the beneficiaries of the suit as a result of the seaman's death. Swain, *supra* note 7, at 3; *see* Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 575 n.2 (1974).

[54] The Jones Act does not define the term "seaman." *See* 46 U.S.C. § 688 (1976). Under 46 U.S.C. § 713 (1976), a seaman is defined as an employee engaged to serve in any job on any United States citizen's vessel. The § 713 definition of a seaman, however, is not part of the Jones Act. *See* Warner v. Goltra, 293 U.S. 155, 160-62 (1934). The term "seaman" is flexible, and in suits under the Jones Act the term is given a broad and liberal meaning. *See, e.g.*, Senko v. LaCrosse Dredging Corp., 352 U.S. 370, 372, 374 (1957). To qualify as a "seaman," a person must be permanently assigned to a vessel or perform a substantial part of his work on a vessel. The capacity in which the person is employed or the work that he does must contribute to the vessel's functioning, accomplishment of the vessel's mission, or operation or welfare in terms of the vessel's maintenance during movement or during anchorage for future trips. Davis v. Hill Eng'r, Inc., 549 F.2d 314, 326 (5th Cir. 1977) (citing Offshore Drilling Co. v. Robinson, 266 F.2d 769, 779 (5th Cir. 1959)); *see, e.g.*, Swanson v. Marra Bros., Inc., 328 U.S. 1, 7 (1946) (vessel's crew members are seamen); Keefe v. Matson Nav. Co., 46 F.2d 123, 123 (W.D. Wash, 1930) (on-board telephone operator is seaman); Taylor v. Packer Diving & Salvage Co., 342 F. Supp. 365, 371 (E.D. La. 1971), *aff'd*, 457 F.2d 512 (5th Cir. 1972) (divers are seamen); Neville v. American Barge Line Co., 105 F. Supp. 408, 411 (W.D. Pa. 1952) (laundress is seaman). *Compare* Cox v. Otis Eng'r Corp., 474 F.2d 613, 613 (5th Cir. 1973) (wireman unassigned to any specific drilling barge who only performed work on vessel for two days not seaman); Labit v. Carey Salt Co., 421 F.2d 1333, 1334-35 (5th Cir. 1970) (worker employed by salt company to load vessels with salt by conveyor belt not seaman); Whittington v. Sewer Constr., 367 F. Supp. 1328, 1329-30 (S.D. W.Va. 1973) (crane operator working on bridge demolition not seaman). A seaman's status is not dependent upon the possession of "seaman's papers." Noble Drilling Corp. v. Smith, 412 F.2d 952, 957 (5th Cir. 1969). Further, a seaman's status does not turn upon the length of the voyage. George v. The C. & O. Ry. Co., 348 F. Supp. 283, 286 (E.D. Va. 1972). However, a person with merely transitory connection with a vessel is not a seaman. Keener v. Transworld Drilling Co., 468 F.2d 729, 732 (5th Cir. 1972); Mietla v. Warner Co., 387 F. Supp. 937, 938 (E.D. Pa. 1975).

for injury or a seaman's personal representative to maintain an action for the seaman's death due to negligence.[55] The place of the tort is irrelevant[56] as long as the injury or death occurs within the scope of the seaman's employment.[57] Since the provisions of the Jones Act must be read in conjunction with the provisions of the Federal Employer's Liability Act (FELA),[58] a seaman's personal representative may sue only on behalf of specified beneficiaries.[59] As under general maritime law and DOHSA, a

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The Longshoremen's and Harbor Workers Compensation Act, 33 U.S.C. § 901-950 (1976), now provides the exclusive remedy for longshoremen, who previously had been covered under the Jones Act. *See* International Stevedoring Co. v. Haverty, 272 U.S. 50, 52 (1926). Since longshoremen serve on vessels as laborers, they are distinguishable from the vessel's sea-going personnel, who are primarily aboard to aid in navigation. *See* South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 260 (1949); Sullivan v. American Pres. Lines, Ltd., 206 F. Supp. 547, 548 (N.D. Cal. 1961).

[55] 46 U.S.C. § 688 (1976). Negligence under the Jones Act differs from unseaworthiness. *See* Lindgren v. United States, 281 U.S. 38, 47-48 (1930); TUL. L. REV., *supra* note 45, at 257 n.26 (1978). *See also* note 24 *supra*. A shipowner is liable for negligence if he knowingly or carelessly breaches any duty he owed to the seaman. Koehler v. Presque-Isle Transp. Co., 414 F.2d 490, 491 (2d Cir.), *cert. denied*, 322 U.S. 674 (1944); *see* Rogers v. Missouri Pacific R.R. Co., 352 U.S. 500, 506 (1956)(FELA); Wisconsin Barge Line, Inc. v. Barge Chem., 300 F.2d 1125, 1129 (5th Cir. 1977); Spinks v. Chevron Oil Co., 507 F.2d 216, 223 (5th Cir. 1975).

The doctrine of *res ipsa loquitur* applies to actions under the Jones Act. *See* Johnson v. United States, 333 U.S. 46, 49 (1948). Literally meaning "the thing speaks for itself," the doctrine allows an inference of negligence from the facts of an unexplained injury-causing occurrence when direct evidence of negligence is lacking. *See* Jesionowski v. Boston & Me. R.R. Co., 329 U.S. 452, 457 (1947) (FELA); Sweeney v. Erving, 228 U.S. 233, 240 (1913). *See generally* Savard v. Marine Contr'g., Inc., 471 F.2d 536, 542-43 (2d Cir. 1972), *cert. denied*, 412 U.S. 943 (1973); Olsen v. State Line, 378 F.2d 217, 220 (9th Cir. 1967).

[56] 46 U.S.C. § 688 (1976); Lindgren v. United States, 281 U.S. 38, 46-47 (1930). The Jones Act is applicable in domestic waters, *e.g.*, Ivy v. Security Barge Lines, 606 F.2d 524, 525 (5th Cir. 1979) (en banc), *cert. denied*, 100 S. Ct. 2927 (1980), on the high seas, *e.g.*, Antypas v. Cia. Maritima San Basilio, S.A., 541 F.2d 307, 310 (2d Cir. 1976), *cert. denied*, 429 U.S. 1098 (1977), and in foreign waters. *E.g.*, Farmer v. Standard Dredging Corp., 167 F. Supp. 381, 384 (D. Del. 1958).

[57] 46 U.S.C. § 688 (1976). A Jones Act seaman must be an employee of the defendant to recover. *See* Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783, 790 (1949); Williams v. McAllister Bros., Inc., 534 F.2d 19, 21 (2d Cir. 1976); Spinks v. Chevron Oil Co., 507 F.2d 216, 224 (5th Cir. 1975); 2 M. NORRIS, *supra* note 1, § 670, at 308. *But see* TUL. L. REV., *supra* note 45, at 256 n.19. An employee is within the scope of his employment if he acts at the request, express or implied, or for the benefit and under the direction of the employer. J. DOOLEY, *supra* note 37, § 16.06, at 343-44.

[58] 45 U.S.C. §§ 51-60 (1976). The FELA provides a remedy for the personal injury of railway employees, and the Jones Act provides that all federal statutes "modifying or extending the common law right or remedy in cases of personal injury to railway employees" are applicable. *See* 46 U.S.C. § 688 (1976). Thus the Jones Act incorporates the FELA by reference. *See* Lindgren v. United States, 281 U.S. 38, 40 (1930); Panama R.R. Co. v. Johnson, 264 U.S. 375, 391-92 (1924); Igneri v. Cie de Transport Oceaniques, 323 F.2d 257, 266 (2d Cir. 1963), *cert. denied*, 376 U.S. 949 (1964).

[59] The personal representative of a seaman must sue on behalf of the surviving spouse and children. If there is no surviving spouse or children, the parents must be the beneficiaries. If there are no living parents, the action may be maintained for the seaman's dependent next of kin. 45 U.S.C. § 51 (1976); *see* Bailey v. Baltimore Mail S.S. Co., 43 F. Supp. 243, 244-45 (S.D.N.Y. 1941); *In re* Rademaker's Estate, 166 Misc. 201, 208, 2 N.Y.S.2d 309,

Jones Act claim may be prosecuted in federal or state court.[60] The Jones Act plaintiff has the right, however, to trial by jury in federal court,[61] without fulfilling diversity[62] or jurisdictional amount requirements.[63] Unlike general maritime law and DOHSA libellants, a Jones Act plaintiff may only proceed against the defendant *in personam.*[64] If the plaintiff brings the action in federal court against a corporate defendant, venue[65] lies in any district where the corporation is licensed to do business or is doing business.[66] The statute of limitations under the Jones Act bars ac-

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315-16 (1938). The surviving spouse and minor children need not show actual proof of monetary loss due to the seaman's death unless the spouse and children were living in a state of unjustifiable separation from him at the time of the death. Cleveland Tankers, Inc. v. Tierney, 169 F.2d 622, 625 (6th Cir. 1948); The Erie Lighter 108, 250 F. 490, 498-99 (D. N.J. 1918). Illegitimate children may be beneficiaries. *E.g.,* Hebert v. Petroleum Pipe Inspectors Corp., 396 F.2d 237, 237 (5th Cir. 1968). The parents of a deceased adult seaman, however, must allege and prove monetary loss. Garrett v. Louisville & Nashville R.R. Co., 235 U.S. 308, 312, 313 (1914) (FELA); *see* Wade v. Rogala, 270 F.2d 280, 285 (3d Cir. 1959) (parent's reasonable expectation of future contributions from deceased sufficient). A dependent relative may be a beneficiary even though the seaman has more closely related nondependent next of kin. Poff v. Pennsylvania R.R. Co., 327 U.S. 399, 401 (1946) (FELA). A fiancee is not a "next of kin" and thus cannot be a Jones Act beneficiary. Hamilton v. Canal Barge Co., 395 F. Supp. 978, 988 (E.D. La. 1975).

[60] *See* 46 U.S.C. § 688 (1976); note 48 *supra;* H. BAER, *supra* note 13, § 1-11, at 73.

[61] 46 U.S.C. § 688 (1976); H. BAER, *supra* note 13, § 1-11, at 73. Though not specified in the Jones Act, the plaintiff may bring suit in admiralty without a jury. *See* Panama R.R. Co. v. Johnson, 264 U.S. 375, 391 (1924).

[62] *See* McCarthy v. Eastern Corp., 175 F.2d 724, 726-27 (3d Cir.), *cert. denied,* 338 U.S. 868 (1949); Van Camp Sea Food Co. v. Nordyke, 140 F.2d 902, 904, 905 (9th Cir.), *cert. denied,* 322 U.S. 760 (1944).

[63] Ballard v. Moore-McCormack Lines, Inc., 285 F. Supp. 290, 293, 295 (S.D.N.Y. 1968); Richardson v. St. Charles-St. John The Baptist Bridge & Ferry Auth., 274 F. Supp. 764, 768 (E.D. La. 1967). *Contra,* Turner v. Wilson Line of Mass., Inc., 142 F. Supp. 264, 267 (D. Mass. 1956), *aff'd,* 242 F.2d 414 (1st Cir. 1959); Rowley v. Sierra S.S. Co., 48 F. Supp. 193, 194 (N.D. Ohio 1942).

[64] Plamals v. The Pinar Del Rio, 277 U.S. 151, 155, 156 (1926). A Jones Act suit cannot be *in rem* even if brought in admiralty. *Id.*

[65] The Supreme Court has construed the Jones Act term "jurisdiction" to mean "venue." *See* Panama R.R. Co. v. Johnson, 264 U.S. 375, 383-85 (1924). *See also* 46 U.S.C. § 688 (1976). Jones Act cases arise under United States laws. Congress need not enact a separate jurisdictional provision for cases already under the general jurisdiction of the district courts. 264 U.S. at 383-84. The purpose of the Jones Act "jurisdiction" provision is to prevent defendants from being sued in remote districts. *Id.* at 384.

[66] Pure Oil Co. v. Suarez, 384 U.S. 202, 204-05 (1966). The Jones Act states that the plaintiff must sue in the district of the employer's residence or place of principal office. *See* 46 U.S.C. § 688 (1976). As under the general federal venue statute, *see* 28 U.S.C. § 1391(c) (1976), a Jones Act corporate defendant "resides" in any district where the corporation is licensed to do business or is doing business. 384 U.S. at 204-05. The broad concept of residence under the Jones Act furthers the intent of Congress, since the Jones Act is not primarily directed at venue, but at providing seamen and their representatives substantive rights and a federal forum for vindication. *Id.* at 205, 207.

The Jones Act venue provision does not apply to actions brought in state court. *See* Panama R.R. Co. v. Vasquez, 271 U.S. 557, 561-62 (1926). Whether the provision applies to claims brought in admiralty in unclear. *See* Brown v. C.D. Mallory & Co., 122 F.2d 98, 102 (3d Cir. 1941); Baliff v. Storm Drilling Co., 356 F. Supp. 309, 311 (E.D. Tex. 1972).

tions not prosecuted within three years of accrual.[67]

Pecuniary damages are recoverable in an action brought under the Jones Act.[68] Non-pecuniary damages may also be recovered, since the Jones Act places no specific restrictions on potential damages.[69] A Jones Act plaintiff's recovery may be reduced only under the comparative negligence doctrine.[70]

The general maritime law, DOHSA, and the Jones Act collectively provide liberal sources of recovery to effectuate the humanitarian objectives of admiralty law. A recent Supreme Court decision, however, has caused confusion in the field of admiralty death actions. In *Mobil Oil Corp. v. Higginbotham*,[71] the Supreme Court held that the personal representatives of passengers killed on the high seas due to the defendant's negligence were restricted to recovery for pecuniary damages under DOHSA.[72] The Court refused to allow the libellants to recover non-pecu-

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A Jones Act defendant may waive venue. Panama R.R. Co. v. Johnson, 264 U.S. 375, 385 (1924).

[67] *See* 45 U.S.C. § 56 (1976); McAllister v. Magnolia Petroleum Co., 357 U.S. 221, 225 n.6 (1958) (Jones Act limitations period three years even though FELA period two years when Jones Act enacted).

[68] *See, e.g.*, Van Beeck v. Sabine Towing Co., 300 U.S. 324, 347 (1937); Michigan Cent. R.R. Co. v. Vreeland, 227 U.S. 59, 68-70 (1913) (FELA); Ivy v. Security Barge Lines, 606 F.2d 524, 526 (5th Cir. 1979) (en banc); Pollard v. Seas Shipping Co., 146 F.2d 875, 877-78 (2d Cir. 1945). Funeral expenses generally are not recoverable. *E.g.*, Cities Serv. Oil Co. v. Launey, 403 F.2d 537, 540 (5th Cir. 1968). There is no recovery for loss of society or consortium under the Jones Act. *E.g., In re* M/V Elaine Jones, 513 F.2d 911, 912-13 (5th Cir.), *cert. denied*, 423 U.S. 840 (1975); Igneri v. Cie de Transports Oceaniques, 323 F.2d 257, 266-67 (2d Cir. 1963), *cert. denied*, 376 U.S. 949 (1964).

[69] *See* 46 U.S.C. § 688 (1976); Note, 11 J. MAR. L. & COM. 139, 144 (1979). *But see, e.g.*, Ivy v. Security Barge Lines, Inc., 606 F.2d 524, 528-29 (5th Cir. 1979) (en banc) (plaintiff can only recover pecuniary damages under Jones Act). The personal representative may recover damages for the pain and suffering of the decedent prior to death. 45 U.S.C. § 59 (1976); *see, e.g.*, Blanco v. Phoenix Compania de Navegacion, S.A., 304 F.2d 13, 16 (4th Cir. 1962) ($75,000). Pain and suffering damages may include compensation for worry, fear, and anxiety. *See* Deitz v. United States, 228 F.2d 494, 495 (3d Cir. 1955).

[70] *See* 45 U.S.C. § 53 (1976); note 39 *supra*. A court will reduce recovery if a seaman was even slightly negligent. *See, e.g.*, Fleming v. American Export Isbrandtsen Lines, Inc. 451 F.2d 1329, 1331 (2d Cir. 1971) (seaman who leaned on work table which moved and caused his injury by sawblade found negligent upon showing that table top had never moved before). The assumption of risk doctrine does not apply to actions under the Jones Act. *See* Tiller v. Atlantic Coastline R.R. Co., 318 U.S. 54, 64 (1943) (FELA amended to remove assumption of risk defense); Fonsell v. New York Dock Ry., 198 F. Supp. 332, 337 (E.D.N.Y. 1961).

[71] 436 U.S. 618 (1978).

[72] *Id.* at 619, 625-26. In *Higginbotham*, the defendant's helicopter crashed outside territorial waters, killing the pilot and three passengers. The personal representatives of the passengers brought suit, and the district court denied recovery for loss of society, though the district court valued the loss of society suffered by the families of two passengers at $100,000 and $155,000. *Id.* at 619. The Supreme Court, reversing the court of appeals, upheld the judgement of the district court. *Id.* at 619-20. *See generally* Maraist, *Maritime Wrongful Death*—Higginbotham *Reverses Trend and Creates New Questions*, 39 LA. L. REV. 81 (1978) [hereinafter cited as Maraist].

niary loss of society damages under general maritime law.[73] Thus, absent application of the Jones Act, the representative of a person killed on the high seas may only recovery under DOHSA.[74] *Higginbotham* revives the territorial distinction rejected by *Moragne* that non-pecuniary damages are recoverable if the death occurs within territorial waters, while only pecuniary damages are recoverable if the death occurs on the high seas.[75] In the wake of *Higginbotham,* this territorial distinction has been applied in the case of seamen's deaths due to unseaworthiness.

In *Smith v. Ithaca Corp.,*[76] the United States Court of Appeals for the Fifth Circuit faced the issue of whether damages for loss of society are recoverable under general maritime law when the general maritime law claim is joined with claims under DOHSA and the Jones Act.[77] The Fifth Circuit determined that recovery of pecuniary damages for negligence under the Jones Act does not preclude recovery for non-pecuniary damages for unseaworthiness under general maritime law.[78] The court specifically held, however, that non-pecuniary damages are recoverable for the death of a seaman *in territorial waters.*[79] The court also allowed recovery under DOHSA, but the court affirmed the district court's award of non-pecuniary damages because such damages are recoverable in territorial waters.[80] The *Smith* court reasoned that because the record did not show where the death occurred, unfairness would result if the court denied non-pecuniary damages where the unseaworthiness occurred in both territorial and non-territorial waters.[81] The court therefore impliedly held that recovery for non-pecuniary damages due to unseaworthiness occurring outside territorial waters is not permissible. Since an unseaworthiness allegation is actionable under DOHSA,[82] the Fifth Circuit has determined that after *Higginbotham,* the personal representative of a seaman killed on the high seas as a result of unseaworthiness may recover only pecuni-

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[73] *Id.* at 625-26. The *Higginbotham* Court ruled that DOHSA provides the exclusive remedy for wrongful death on the high seas in cases where DOHSA applies, recognizing that the remedy for deaths occurring in United States waters may be greater than that authorized by DOHSA. *Id.* at 624. The Court considered itself powerless to prevent the lack of uniformity caused by its holding since Congress had determined the permissible recovery for deaths on the high seas by enacting DOHSA. *Id.* at 625-26.

[74] *See* Christovich, *The High Risk of "Sifting"*—Mobil Oil Corp. v. Higginbotham, 45 INS. COUNSEL J. 554, 557-58 (1978).

[75] *See generally* TUL. L. REV., *supra* note 45.

[76] 612 F.2d 215 (5th Cir. 1980). In *Smith,* the seaman was a member of the crew of a cargo ship which sailed between Florida and Puerto Rico. The decedent suffered a fatal heart attack caused by toxic benzene fumes which permeated the ship's living quarters and exacerbated the seaman's pre-existing heart disorder and arteriosclerosis. *Id.* at 217.

[77] *Id.* at 216, 225.

[78] *Id.* at 225-26.

[79] *Id.* at 226.

[80] *Id.* at 216-17, 226.

[81] *Id.* at 226.

[82] *See* text accompanying note 45 *supra.*

ary damages under DOHSA.[83]

The territorial distinction revived by the *Higginbotham* decision, however, should not apply to seamen's actions for unseaworthiness. The *Higginbotham* Court stated that the general maritime law could not provide additional recovery where Congress already specifically legislated the permissible recovery.[84] DOHSA provides that only pecuniary damages are recoverable for death caused by wrongful act, neglect, or default beyond territorial limits,[85] and a seaman's unseaworthiness allegation states a cause of action under DOHSA.[86] In *Higginbotham,* however, the decedents were not seamen,[87] and their personal representatives sought recovery for negligence, not unseaworthiness.[88] Also, DOHSA is not essentially a seamen's act.[89] A seaman's personal representative may bring an action for wrongful death occurring outside territorial waters under either DOHSA or the Jones Act, but the representative certainly is not compelled to sue under DOHSA. Consequently, Congress has not specifically legislated on the issue of whether a seaman's cause of action for unseaworthiness outside territorial waters must be brought under DOHSA.[90] A seaman's personal representative should therefore be allowed to recover pecuniary damages for negligence under the Jones Act and non-pecuniary damages under general maritime law, regardless of the place of the tort, without running afoul of *Higginbotham.*[91]

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[83] *Accord* Public Adm'r of N.Y. v. Angela Compania Naviera, S.A., 592 F.2d 58, 63 (2d Cir. 1979).

[84] 436 U.S. at 625.

[85] 46 U.S.C. § 761 (1976).

[86] *See* text accompanying note 45 *supra. See also* note 24 *supra.*

[87] *See* 436 U.S. at 619.

[88] *See id.* Since passengers may not allege unseaworthiness as a basis for recovery, *see* note 45 *supra,* the *Higginbotham* Court could could not have decided whether a seaman's personal representative alleging unseaworthiness as the cause of death outside of territorial waters must sue under DOHSA as opposed to general maritime law.

[89] Campbell v. Luckenbach S.S. Co., 5 F.2d 674, 675 (D. Or. 1925); *see In re* Dearborn Marine Serv., Inc., 499 F.2d 263, 270 n.10 (5th Cir. 1974); Puamier v. Barge BT 1793, 395 F. Supp. 1019, 1032 & n.6 (E.D. Va. 1974). *See also* The Four Sisters, 75 F. Supp. 399, 400-01 (D. Mass. 1947) (DOHSA gives remedy for additional beneficiaries of seaman not covered by Jones Act); *In re* Rademaker's Estate, 166 Misc. 201, 208, 2 N.Y.S.2d 309, 315 (1938) (Jones Act applies FELA provisions not expressly covered by DOHSA to maritime law, giving additional coverage if death occurs within territorial waters or where injury not fatal).

[90] *But see, e.g.,* Maraist, *supra* note 72.

[91] In Gillespie v. United States Steel Corp., 379 U.S. 148 (1965), the Court held that a wrongful death claim based on unseaworthiness could not be joined with a Jones Act claim. *Id.* at 154-55. The *Gillespie* decision, however, dealt with an unseaworthiness allegation under a state statute. Moreover, no federal wrongful death cause of action existed when Gillespie was decided. Hamilton v. Canal Barge Co., 395 F. Supp. 978, 984-85 (E.D. La. 1975). Hence, a personal representative may join an unseaworthiness claim under general maritime law with a Jones Act claim. *Id.* at 984-85. Similarly, a plaintiff may join an unseaworthiness claim under DOHSA with his Jones Act negligence claim. *See, e.g.,* Doyle v. Albatross Tanker, 367 F.2d 465, 466, 468 (2d Cir. 1966); Hamilton v. Canal Barge Co., 395 F. Supp. 978, 985 (E.D. La. 1975). The plaintiff, however, would only be entitled to pecuniary damages on the unseaworthiness claim. *See* text accompanying note 50 *supra.* Also, the

While the general maritime law, DOHSA, and the Jones Act all grant causes of action for wrongful death, only the Jones Act confers the right to a jury trial.[92] Therefore, a representative with a claim for the negligently-caused death of a seaman-employee could prefer to sue under the Jones Act rather than under DOHSA. If the representative's claim is based on unseaworthiness, however, the representative has no chance of getting a jury trial unless diversity and jurisdictional amount requirements in federal court are satisfied[93] or unless the action is brought in a state court which will grant a jury trial.[94] A representative, then, must plan his strategy in order to take advantage of the Jones Act jury trial right. The simplest way for a deceased seaman's personal representative to obtain a jury trial for an unseaworthiness claim is to join that claim with a Jones Act negligence claim.[95] Allowance of such joinder helps preserve uniformity in seamen's actions.

A personal representative bringing an action for the death of a seaman has the benefit of the humanitarian policy of admiralty.[96] The representative may be entitled to sue under one or more of three federal causes of action for seamen's deaths.[97] Pecuniary damages for deaths due to negligence or unseaworthiness are recoverable regardless of the place of the tort.[98] Notwithstanding the interpretation given the *Higginbotham* decision by some courts, non-pecuniary damages for seamen's deaths due to unseaworthiness should likewise be recoverable without regard to the place of death.[99] Finally, the representative may enhance the possibilities

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DOHSA two year limitations period is more stringent than the doctrine of laches under general maritime law. *See* text accompanying notes 30 & 49 *supra.*

[92] *See* text accompanying note 61 *supra.*

[93] *See, e.g.,* Fitzgerald v. Angela Companie Naviera, S.A., 417 F. Supp. 151, 153-54 (S.D.N.Y. 1976). *See also* text accompanying notes 24, 28, 45 & 46 *supra.*

[94] *See* note 30 *supra.*

[95] *See* Fitzgerald v. United States Lines, 374 U.S. 16, 18-19, 21 (1963); H. BAER, *supra* note 14, § 1-11, at 74-75. A plaintiff can also join a Jones Act negligence claim with a DOHSA unseaworthiness claim and get a jury trial as to both claims. *See* Peace v. Fidalgo Island Packing Co., 419 F.2d 371, 372 (9th Cir. 1969); Gvirtsman v. Western King Co., 263 F. Supp. 633, 634-35 (C.D. Cal. 1966). An unseaworthiness claim under DOHSA, however, has disadvantages. *See* note 91 *supra.* Negligence is harder to prove than unseaworthiness, since the plaintiff alleging negligence must show lack of due care on the part of the shipowner. *Compare* note 55 *with* note 24 *supra.* There are some instances, however, when a negligence claim may provide a personal representative with a better chance for recovery than an unseaworthiness claim. A Jones Act defendant may be liable for non-compliance with any statute or regulation which was the proximate cause of the death, regardless of whether the statute or regulation was designed for the seaman's safety. *See* 45 U.S.C. § 54 (1976) (FELA). The Jones Act allows recovery even when an intervening cause directly caused the seaman's death, while this is not true for unseaworthiness claims. Also, an unseaworthiness claim will not succeed if operational negligence has occurred. 1B BENEDICT, *supra* note 9, § 21, at 3-3 to 3-4; *see* note 24 *supra.*

[96] *See* text accompanying notes 1-6 *supra*

[97] *See* text accompanying notes 24-70 *supra.*

[98] *See* text accompanying notes 33-34, 50 & 68 *supra.*

[99] *See* text accompanying notes 71-91 *supra.*

of recovery by securing a jury trial on both negligence and unseaworthiness theories.[100]

HENRY DARNELL LEWIS

[100] *See* text accompanying notes 92-95 *supra.*