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THE DEATH ON THE HIGH SEAS ACT: TWO REMAINING PROBLEMS

The common law of England and in this country had no right of action for death [T]his was remedied by Lord Campbell's act and following it our States have passed statutes conferring certain remedies for death On the Continent of Europe a recovery may be had for death . . . and [t]here is no reason why the admiralty law of the United States should longer depend on the statute laws of the States and lag behind the general laws of Europe. Congress can now bring our law into line with the laws of those enlightened nations which confer a right of action for death at sea.¹

Thus the Honorable Harrington Putnam of the Supreme Court of the State of New York urged passage of the bill that was to become known as the Death on the High Seas Act.²

Although DOHSA was passed into law in 1920, a reevaluation of its provisions has been prompted by the United States Supreme Court's recognition of a general maritime action for wrongful death³ and by the growing number of American-based companies which own or operate oil wells within the territorial waters of foreign nations. This comment attempts to provide insight⁴ into the applicability of DOHSA within foreign territorial waters and its possible supplementation by foreign law and general maritime law.

The Use of Section 4 of DOHSA to Supplement Recovery Under Section 1

Section 1 of DOHSA⁵ recognizes a cause of action for death caused by a wrongful act occurring on the high seas; section 2

1. S. REP. NO. 216, 66th Cong., 1st Sess. 7590, 2-4 (1919) [hereinafter cited as S. REP. NO. 216].

2. 46 U.S.C. §§ 761-66 (1976).

3. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

4. It should be noted at the outset that this comment will not broach the subject of choice of law and DOHSA, but will treat only the more limited situation when, under the application of choice of law principles, DOHSA would apply and a remedy exists under foreign law. For a discussion of choice of law, see Watson, *Applicable Law In Suits By Foreign Offshore Oil Workers*, 41 LA. L. REV. 827 (1981).

5. Sections 761, 762, and 764 of DOHSA are referred to as sections 1, 2, and 4 respectively. Section 1 reads:

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 of any State, or the District of Columbia or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit

specifies the recovery allowed and limitations of that cause of action.⁹ Section 4 is different, in that it does not expound on the established cause of action. Rather, it recognizes that whenever "a right of action is granted by the law of a foreign State, . . . such right may be maintained . . . in the courts of the United States, without abatement in respect to the amount for which recovery is authorized"⁷ The placement of this provision in DOHSA has generated speculation that the recovery authorized by sections 1 and 2 might be supplemented by foreign law, thus expanding recovery. Such speculation has become even more inviting since the Supreme Court, through its decision in *Mobil Oil Corp. v. Higginbotham*,⁸ closed the door on possible supplementation of DOHSA by general maritime law or state law.

Although jurisprudence in this area is far from definitive, three cases are generally cited for the proposition that sections 1 and 4 can be maintained concurrently.⁹ *The Presidente Wilson*,¹⁰ a 1929 case dealing with the deaths of American citizens on an American ship involved in a collision with the Italian *Presidente Wilson*, summarily stated that damages for death were recoverable under Italian law and thus the case was within the provisions of both section 1 and section 4; no authority for this proposition was cited, nor was any consideration given as to why both sections should apply.¹¹

for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

46 U.S.C. § 761 (1976).

6. Section 2 provides:

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.

46 U.S.C. § 762 (1976).

7. 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 upon 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.

46 U.S.C. § 764 (1976).

8. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978).

9. *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).

10. 30 F.2d 466 (D. Mass. 1929).

11. *Id.*

In *Iafrate v. Compagine Generale Transatlantique*,¹² a federal district court dismissed a claim based upon French law as insufficiently pleaded and sustained a libel under section 1 of DOHSA, although the death occurred aboard a French vessel. The court did not hold expressly that concurrent actions would be allowed, although from the opinion it might be inferred that a cause of action under section 1 was present and that, had libellant pleaded foreign law with greater particularity, an additional cause of action under section 4 would have existed.

A decision which perhaps more directly addressed the issue was *Fernandez v. Linea Aeropostal Venezolana*.¹³ In *Fernandez* the libelants, as administrators of the estate of a stewardess killed in the crash of a Venezuelan airliner thirty miles off the coast of New Jersey, brought a libel for wrongful death against the Venezuelan airline based on section 1 of DOHSA. Respondents moved to dismiss for failure to state a claim under section 1, urging that only section 4 is applicable when death occurs on a foreign vessel outside United States territorial waters. The court dismissed the motion and indicated that cumulative causes of action can be maintained as to American deaths on foreign vessels.¹⁴ However, the applicable foreign law did not supply a cause of action for wrongful death and, had the court found section 1 inapplicable, the plaintiffs might have been denied a remedy; absent this concern a different result might have been reached.

Such is the interpretation given *Fernandez* by the court in *Bergeron v. Koninklijke Luchtvaart Maatschappij, N. V.*¹⁵ *Bergeron* held that concurrent causes of action under sections 1 and 4 are not maintainable and noted that "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)."¹⁶ *Bergeron* includes a review of the then-existing jurisprudence

12. 106 F. Supp. 619 (S.D.N.Y. 1952).

13. 156 F. Supp. 94 (S.D.N.Y. 1957).

14. In order to determine whether sections 1 and 4 are mutually exclusive, the court defined DOHSA as conferring a "power" rather than a "right," distinguishing the two situations by proclaiming that a "right" depends upon whether a wrong was committed, which in turn depends upon where the wrong was committed. "Power" depends upon the forum which exercises the power, and the right within the power depends upon the locus of the accident. The remainder of the decision is no clearer than the above mentioned "distinction"; the resulting decision is not in accord with prior law. Note, *Admiralty—Federal Legislation: In General—Section 1 of Death on High Seas Act gives cause of action for death occurring in crash of foreign airplane on High seas—Fernandez v. Linea Aeropostal Venezolana*, 71 HARV. L. REV. 1152, 1153 (1958).

15. 188 F. Supp. 594 (S.D.N.Y. 1960).

16. *Id.*

dealing with the question. In *The Vestris*¹⁷ the court explicitly held that an option did not exist as between section 1 and section 4 and required the claimants to bring their action under section 4. In *The Vulcania*¹⁸ decision, a New York district court sustained a libel brought under section 1, even though a foreign vessel was involved, because foreign law had not been pleaded sufficiently; once foreign law was sufficiently pleaded, the court dismissed the section 1 claim,¹⁹ refusing to allow both actions to stand concurrently.

The same airplane crash that gave rise to the *Fernandez* litigation led to a series of decisions by federal courts in Delaware and New Jersey. Of these, *Noel v. Airoponents Inc.*²⁰ was correctly interpreted by the court in *Bergeron*²¹ as not having held that cumulative remedies were available. Instead, the tenor of the *Noel* opinion indicates that the court was attempting to find *one* applicable body of law.²²

Out of the same crash and subsequent series of decisions emerged *Noel v. Linea Aeropostal Venezolana*²³ which included broad language stating that only one cause of action exists for wrongful death, whether grounded in section 1 or section 4.²⁴ Because Venezuelan law allowed elements of damage for conscious pain and suffering and mental distress not allowed under Section 2 of DOHSA, libelants were permitted to assert their claims for those damages as well. The *Noel* court qualified its broad language and expanded recovery by citing, in a footnote,²⁵ *Bergeron* and its holding that concurrent causes of actions under sections 1 and 4 are not maintainable. The court also referred to an earlier footnote²⁶ in which the *Noel* court had assumed that the question surrounding sections 1 and 4 was not settled authoritatively, contrasting *Bergeron* and its line of cases with *Fernandez* and *Irafrate*. The footnotes in *Noel v. Linea Aeropostale* would seem to suggest that, although concurrent causes of action are not maintainable, additional damages may be obtained, even though not authorized under DOHSA, if they are available under applicable foreign law. Because such an expanded recovery is exactly the one inventive plaintiffs' at-

17. 53 F.2d 847 (S.D.N.Y. 1931).

18. 32 F. Supp. 815 (S.D.N.Y. 1940).

19. 188 F. Supp. 594, 595 (S.D.N.Y. 1940).

20. 169 F. Supp. 348 (D.N.J. 1958).

21. 188 F. Supp. at 596-97.

22. *Id.* at 596.

23. 260 F. Supp. 1002 (S.D.N.Y. 1966).

24. *Id.* at 1006.

25. *Id.* at n.24.

26. *Id.* at 1005 n.18.

torneys desire, it is likely that this later *Noel* decision will be cited and urged as authority for the proposition that section 4 and foreign remedies can be used to supplement section 1.²⁷

The legislative history of DOHSA is helpful in determining whether this result was intended by Congress. The original drafts of the bill that was to become DOHSA did not contain the language today recognized as section 4. It was not until Mr. Kellogg's²⁸ report to the Senate, dated September 23, 1919,²⁹ that such an amendment was proposed.³⁰ The amendment was considered necessary by Mr. Kellogg because a "review of authorities" did not indicate that Congress had "the power to create a substantive right of action to recover damages against foreigners and their vessels for wrongful death on the high seas."³¹ He explained that the bill was "particularly designed to provide a law of the forum for American courts . . . and a law of the flag for American vessels."³² Nonetheless, he felt that an action clearly would lie in the United States courts when the foreign country of the vessel granted a right of action for negligence.³³ Notwithstanding the fact that a foreign vessel was involved, the Supreme Court had "held that the limited liability statute" of the United States applied to foreign ships seeking such limitation of liability in American courts.³⁴ As a result, the committee recommended the passage of the amendment which is now section 4. Hence, it is submitted that, by recommending the addition of section 4, the committee intended to change recovery under DOHSA only with respect to limitation of liability. Robert Hughes of the Virginia Bar, who was involved extensively in the drafting of the original bill, called section 4 "superfluous," as it was "apparently added for the purpose of giving our courts the power to enforce such a right of action arising under a foreign law against a foreign vessel . . . for it is an elementary doctrine of marine law that an admiralty claim against a ship can be enforced against her, wherever

27. This result could be supported by analogy to the present status of recovery under workers' compensation. In workers' compensation, recovery under one state's statute does not preclude supplemental recovery under another state's workers' compensation statute. The argument is that the original recovery is only a basic remedy which can be supplemented unless expressly prohibited by the granting statute. W. MALONE & H. JOHNSON, *WORKERS' COMPENSATION LAW AND PRACTICE* § 409, in 13 *LOUISIANA CIVIL LAW TREATISE* 329-31 (1980).

28. Mr. Kellogg was a member of the Committee on the Judiciary who submitted his report on DOHSA to the Senate.

29. S. REP. NO. 216, *supra* note 1, at 1.

30. *Id.* at 5.

31. *Id.* at 4.

32. *Id.*

33. *Id.* at 4-5.

34. *Id.*

she may be found."³⁵ The intended purpose of section 4 would appear to have been to deny limitation of liability to claimants urging foreign law in United States courts. If this was not the intent of Congress, then the argument has been made that section 4 is superfluous and should have no effect upon the limitation of recovery under section 1.³⁶

The Applicability of DOHSA Within Foreign Territorial Waters

The question of DOHSA's applicability within foreign territorial waters is one of practical importance as a result of the growing number of United States-based oil companies operating submersible and semisubmersible rigs within foreign territorial waters. The Supreme Court in *Moragne*³⁷ recognized the existence of a maritime common law which is preempted only when it conflicts with express statutory provisions. This general maritime law action, which grants a broader recovery than that allowed under DOHSA, would be a more inviting alternative to plaintiffs than DOHSA if DOHSA were found not to be applicable within foreign territorial waters. Alternatively, expanded recovery beyond that offered by DOHSA might be found under applicable foreign law. The arguments against DOHSA's applicability are strengthened by the ambiguous language of the Act itself and by the accepted adage in maritime law that it is preferable "to give than to withhold the remedy";³⁸ if a person were entitled to an expanded recovery under general common law or applicable foreign law, arguably a strained reading of DOHSA should not be found to foreclose such recoveries.

Case law dealing with DOHSA's applicability within foreign territorial waters is limited and flawed. Three cases³⁹ have dealt with the question, and the later two cite the first as authority for the proposition that DOHSA is applicable within foreign territorial waters.

In *Roberts v. United States*,⁴⁰ the first case to deal with the problem, the court expressly refused to rule on the question.⁴¹ Nonetheless, *Roberts* is cited in later decisions as authority for the proposition that DOHSA is applicable within the territorial waters

35. Hughes, *Death Actions in Admiralty*, 31 YALE L.J. 115, 118 (1921).

36. 46 U.S.C. § 762 (1976).

37. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

38. See note 67, *infra*.

39. *Roberts v. United States*, 498 F.2d 520 (9th Cir. 1974); *Mancuso v. Kimex, Inc.*, 484 F. Supp. 453 (S.D. Fla. 1980); *Cormier v. Williams/Sedco/Horn*, 460 F. Supp. 1010 (E.D. La. 1978).

40. 498 F.2d 520 (9th Cir. 1974).

41. *Id.* at 524.

of foreign countries. The cited language comes not from the text of the *Roberts* opinion, wherein the court casts grave doubt upon the act's applicability,⁴² but rather from a footnote⁴³ in which the court, without citing any authority, supposes that "because Congress only has power to fix the extent of territorial waters measured from the shore of its own country it may well have considered all waters beyond one marine league . . . to be 'high seas' for purposes of DOHSA . . . even though within territorial waters of a foreign state."⁴⁴ It is submitted that this supposition, although not entirely without merit, is invalid upon reflection. If one accepts the proposition that Congress's power to determine its territorial waters is limited to the shores of its own country, then it should follow that Congress has no power to establish substantive law within the territorial waters of a foreign sovereign. However, the original supposition itself is questionable, because Congress's power to determine admiralty jurisdiction is not limited by the United States Constitution to its own shores. Only the doctrines of international law work to limit admiralty jurisdiction, and these doctrines urge mutual respect of sovereigns and their territories. In support of this argument it has been urged that, given the established concepts of international law in the 1900's, the broad language of section 1 should not be taken literally to mean that the statute is applicable to all deaths beyond three miles from the United States wherever occurring; rather, it should be "construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law."⁴⁵

Additionally, the court in the *Roberts* decisions does not distinguish among the different types of jurisdiction and thereby commits an error in the reasoning urged. For present purposes, admiralty jurisdiction can be said to have three different meanings. First, jurisdiction can be the court's power to adjudicate as to a particular defendant. Second, jurisdiction can be the power of the sovereign to apply a substantive law to a given controversy; and, third, jurisdiction can mean the court's power to hear a matter in admiralty. The latter two types of jurisdiction are not recognized as

42. *Id.*

43. *Id.* at 524 n.7.

44. *Id.*

45. Note, *supra* note 14, at 1154. See Cheatham & Reese, *Choice of Applicable Law*, 52 COLUM L. REV. 959, 961 (1952). See also *Lauritzen v. Larsen*, 345 U.S. 571, 577 (1953); *The Queen v. Jameson*, [1869] 2 Q.B. 425, 430.

Also, at the time DOHSA was enacted, Congress viewed international law as precluding even the assertion of an American wrongful death action against a ship of foreign flag under the belief that this would infringe on the foreign nation's sovereignty. S. REP. NO. 216, *supra* note 1; Hughes, *supra* note 34.

separate and independent by the *Roberts* decision. This error is illustrated when the court cites a commentator⁴⁶ who suggests that the scope of DOHSA is the same as "general admiralty jurisdiction."⁴⁷ Because general admiralty jurisdiction—the court's power to hear a matter in admiralty—extends beyond the United States shores and into foreign territorial waters, it does not necessarily follow that a statute establishing substantive law is thereby intended to have application within the entire scope of that jurisdiction.⁴⁸ The question at issue is what Congress meant by the phrase "high seas," rather than what the scope of general admiralty jurisdiction might be.

Existing case law interpreting the phrase "high seas" illustrates the necessity for determining the context in which the phrase is used in order to establish its meaning.⁴⁹ The phrase, as used in DOHSA, reflects the accepted concepts of international law in the late 1800's and early 1900's and Congress's intent to provide a cause of action when death results from a wrongful act occurring on the high seas.⁵⁰

The accepted doctrines of international law of that period included an understanding of the mutual respect among sovereigns as to their territories and territorial waters. The United States Supreme Court in *The Scotia*⁵¹ illustrated this understanding of the international law of the sea in 1872 when the Court announced that the "law of the sea is of universal obligation and no single nation, and certainly not a single State, should be allowed to create obligations for the world." One contemporary writer,⁵² citing *The Scotia*, also recognized the existing foreign causes of action and the United

46. Ball, *Wrongful Death at Sea—The Death on the High Seas Act*, 51 CAL. L. REV. 389, 397 (1963).

47. 498 F.2d at 525 n.7.

48. Although maritime jurisdiction extends beyond the shores of the United States, the Longshoremen's and Harbor Workers' Compensation Act by its terms does not.

49. *United States v. Flores*, 289 U.S. 137 (1933); *United States v. Rodgers*, 150 U.S. 249 (1893); *United States v. Ross*, 439 F.2d 1355 (9th Cir. 1971).

50. 59 CONG. REC. 4482, 4482 (1920) (remarks of Mr. Volstead). As the author of the bill in the House of Representatives, Volstead noted that all major European countries and England recognized a cause of action when death resulted and that the purpose of the Act was to provide a remedy where none existed. His understanding of the bill's purpose and his recognition that such causes of action existed within waters controlled by the states and within waters where foreign law would apply tends to support the proposition that DOHSA was intended to apply only to those remaining waters where no cause of action would exist in United States courts. See Whitelock, *A New Development in The Application of Extra-Territorial Law to Extra-Territorial Marine Torts*, 22 HARV. L. REV. 403 (1909) (a summation of existing causes of action).

51. 81 U.S. 170 (14 Wall.) (1872).

52. Whitelock, *supra* note 50, at 415.

States courts' deference to such causes of action in the early 1900's.⁵³ The Senate report⁵⁴ on DOHSA stated that, with the proposed legislation, "Congress can now bring our maritime law into line with the laws of those enlightened nations which confer a right of action for death at sea."⁵⁵ The authorities of the period recognized that all civilized nations other than the United States had recognized the necessary cause of action for death resulting from acts on the high seas and, consequently, that the United States should provide such a cause of action for its courts. There is no indication that the United States remedy was intended to usurp the already existing foreign causes of action arising within a foreign sovereign's territorial waters. Given the tenor of the scholarly authority and case law cited, the better argument would seem to be that Congress intended only to supply a cause of action where none existed and, therefore,

53. In addition, Robert M. Hughes of the Virginia Bar was involved in writing the original drafts of DOHSA. He cited case law in which the United States courts had recognized foreign substantive law in death actions even before DOHSA and urged that an act of Congress should not be held to affect the conduct of foreign ships on the high seas, because the then-accepted choice of law doctrine of law of the flag should operate in order to equalize the exercise of power among sovereigns. Note, *Recovery from Airlines Under the Death on the High Seas Act: A Conflict Rule Suggested*, 67 YALE L.J. 1445 (1958).

54. S. REP. NO. 741, 64th Cong., 1st Sess. 6899 (1916) [hereinafter cited as S. REP. NO. 741].

55. *Id.* at 4. In the same report, Mr. George W. Whitelock, on behalf of the American Bar Association, declared that each nation has the right to declare the laws which will be applicable to the sea in its courts and that every country of Europe had declared a cause of action to exist for wrongful death on the seas and that American courts should be given the "very same" right of recovery.

Each nation may declare what it will accept, and by its courts enforce, as laws of the sea, when parties choose to resort to its forum for redress. . . . Every country of western Europe is believed to recognize the right of recovery for death . . . and assuredly there is no hardship in giving in American courts the very same right of recovery to withhold a foreign defendant and his ship would be liable under the law of the vessel's home port.

S. REP. NO. 741, *supra* note 53, at 4-5, quoting *The Scotland*, 105 U.S. 24 (1851). Mr. Fitz-Henry Smith, Jr., writing on behalf of the Maritime Law Association in the Senate Report, S. REP. NO. 216, *supra* note 1, at 1-2, reprinted in H. REP. NO. 674, 66th Cong. 2d Sess. 7653 (1920), pointed out that although jurisdiction of the admiralty courts of the United States extends over the high seas and all navigable waters, maritime law can have the effect of law in a given country only to the extent permitted and recognized. And although the maritime law of nations had a common origin, there is no such thing as a code of maritime law practiced by all nations except that which is adopted and used by such nations. He also urged that the United States courts were not bound to exercise jurisdiction over all controversies which fall within its maritime jurisdiction and, in fact, should not always do so, citing *The Scotland*, 105 U.S. 24 (1851), as authority for the proposition that courts should sometimes refrain from exercising their broad jurisdictional powers in deference to the independent sovereignty of nations.

did not, with its use of the term "high seas," contemplate that the territorial waters of foreign nations would be included within the scope of the proposed substantive law.

The second case which addressed the question of DOHSA's applicability within foreign territorial waters was *Cormier v. Williams/Sedco/Horn*,⁵⁶ wherein Judge Cassibry determined that DOHSA does apply within foreign territorial waters. The rationale used is based upon dicta taken from *Moragne v. States Marine Lines, Inc.*⁵⁷ urging that Congress passed DOHSA to provide "a corresponding remedy for deaths occurring *outside the reach of state law.*"⁵⁸

To cite dicta from *Moragne* for the proposition that DOHSA was intended to apply outside the reach of state law *ad infinitum* ignores the presence of the maritime law of foreign sovereigns which existed and was recognized by the initiators of DOHSA in 1920 when DOHSA was debated and passed into law. One cannot ignore the accepted belief in the 1900's that, in maritime matters, no one "country should be able to create obligations for another."⁵⁹ The understanding of international law accepted during the era was that each sovereign created the laws applicable within its territory and other sovereigns respected this exercise of power.

In addition to relying upon dicta from *Moragne*, the *Cormier* decision notes that the statutory language of DOHSA includes all waters beyond three miles from the shores of a state.⁶⁰ The true issue is whether Congress, through the language used, intended to legislate substantive law not only for the seas beyond three miles from a state, but also for all foreign territorial waters generally regarded in the 1900's as being under the legislative power of the foreign sovereign. To state that the language on its face includes foreign territorial waters is to avoid the true question. No further authority is given in *Cormier* other than the *Roberts* footnote⁶¹ which has already been discussed. It is submitted that *Cormier* offers no new authority for the proposition its holding urges.

Mancuso v. Kimes, Inc.,⁶² the last of the cases dealing with the question, cites only *Roberts* and *Cormier* for its holding that the court "has proper jurisdiction under DOHSA"⁶³ within foreign terri-

56. 460 F. Supp. 1010, 1011 (E.D. La. 1978).

57. 398 U.S. 375 (1970).

58. 460 F. Supp. at 1011.

59. *The Scotia*, 81 U.S. 170 (14 Wall.) (1872). See *Whitelock*, *supra* note 47, at 415.

60. 460 F. Supp. at 1011.

61. *Id.* at 1012.

62. 484 F. Supp. 453 (S.D. Fla. 1980).

63. 484 F. Supp. at 455.

torial waters. *Mancuso* is to be distinguished, as the issue was couched in terms of admiralty jurisdiction rather than in terms of the scope of DOHSA independent of such jurisdiction. The inquiry in *Mancuso* should be whether DOHSA, as substantive law, is applicable within foreign territorial waters; the case does not distinguish the two questions.⁶⁴ No authority is cited to uphold the court's ruling that DOHSA is applicable within foreign territorial waters other than the *Roberts* and *Cormier* decisions. It becomes strikingly clear that a flaw in a law review article⁶⁵ bred dicta in *Roberts* which reflected and compounded an error which has been cited as authority for the 1978 *Cormier* decision and for the 1980 *Mancuso* decision. While additional jurisprudence is lacking on the question and no definitive answer has been given, in light of the legislative history and the status of international law in the early 1900's, it is urged that the better argument is that DOHSA should not apply within foreign territorial waters.

If one accepts that DOHSA is not applicable within foreign territorial waters, the question then becomes what law is applicable. Two obvious possibilities exist in foreign law and the general maritime law recognized by the United States Supreme Court in *Moragne*.⁶⁶ The decision to be made between the two is one governed by choice of law considerations beyond the scope of this comment. However, an interesting question arises if one determines that foreign law applies: can such foreign law be supplemented by the general maritime law recognized as applicable in *Moragne*? It is accepted that if a general maritime law exists it is applicable everywhere unless supplanted by statute. Unless foreign law bars its application, the general maritime law should be available to supplement recovery, especially in view of the long-established premise that in admiralty proceedings it is more blessed to give than to withhold.⁶⁷ Perhaps the more intriguing questions are raised if one determines that DOHSA is applicable within foreign territorial waters. A possible postulate is that either foreign law or the general

64. See text at note 45, *supra*.

65. Ball, *supra* note 45, at 389.

66. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

67. This premise found its beginning over 100 years ago when Mr. Chief Justice Chase, sitting on the circuit in *The Sea Gull*, 21 F. Cas. 909, 910 (No. 12,578) (C.C. Md. 1865), wrote: "[C]ertainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." The doctrine has been cited subsequently by the courts on numerous occasions, the most recent and relevant of which are in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 629-30 (1978), *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 583 (1974), and *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 387 (1970).

maritime law of *Moragne* can supplement recovery under DOHSA. The factors to consider in determining whether foreign law is to supplement the recovery provided by DOHSA are much the same as previously discussed.⁶⁸ Although the factors remain relevant, the context has changed. At issue is application of foreign law to supplement recovery under DOHSA within the territorial waters of that foreign sovereign. Viewed in this context and recognizing comity as an additional factor, a different result than that reached earlier could be supported. On first glance one might presume that the United States Supreme Court with its decision in *Mobil Oil Corp. v. Higginbotham*⁶⁹ answered the question of whether general maritime law can supplement DOHSA; however, this is not the case. The *Higginbotham* Court pronounced DOHSA to be Congress's considered opinion on a variety of subjects such as beneficiaries and contributory negligence, but did not include within the list DOHSA's applicability within foreign territorial waters.⁷⁰ The rationale used by the Court in holding that general maritime law cannot be used to supplement DOHSA is based on the premise that Congress had spoken to the question raised in *Higginbotham* by passing DOHSA and that when Congress has spoken directly to a question, the courts are not free to supplement the Act to such an extent as to render the Act meaningless. Given the ambiguity of the statute and its legislative history, it seems unlikely that Congress has spoken directly to the question at hand. Therefore, the sustaining rationale of the *Higginbotham* decision is not present. Additionally, if federal courts apply DOHSA within foreign territorial waters, such application arguably is not mandated by Congress, but instead constitutes a judicial choice among possible alternatives. The decision will be the courts' and not Congress's answer to the question; in an area wherein Congress has not spoken directly, the courts should be free to fashion their answer without the limitation of the *Higginbotham* decision. Thus, a solid argument exists that general maritime law can be used to supplement recovery when DOHSA is applied by the courts within foreign territorial waters. Whether the courts will be receptive to such an argument, given the spirit of the *Higginbotham* decision, remains to be seen.⁷¹

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68. See notes 55-66, *supra*, and accompanying text.

69. 436 U.S. 618 (1978). The Court held that the general maritime law as recognized in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), and *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974), could not be used to supplement recovery under DOHSA where Congress has spoken directly to a question. 436 U.S. at 625.

70. 436 U.S. at 625.

71. The question is not settled; consequently, the courts will be called upon to make decisions based in part upon policy considerations. It is urged that no pressing

social policy will be served by extending DOHSA into the territorial waters of another sovereign. DOHSA is not necessary in order to insure an adequate remedy, as the general maritime law recognized by *Moragne* is available and offers recovery broader than that of DOHSA. Also, uniformity of application would not be served by extending DOHSA into foreign territorial waters. DOHSA by its own terms does not apply within the coastal waters of the individual states, in deference to their sovereignty; therefore, uniform application suggests that DOHSA should not apply within the coastal waters of foreign states, also in deference to their sovereignty. Comity would be served by the court's exercising restraint and by not applying DOHSA within the coastal waters of foreign sovereigns.