



CENTER FOR JUSTICE & DEMOCRACY'S
PUBLIC POLICY CLINIC
NEW YORK LAW SCHOOL
185 WEST BROADWAY
NEW YORK, NY 10013

MEMORANDUM IN SUPPORT OF AMENDING THE DEATH ON THE HIGH SEAS ACT AND LIMITATION OF LIABILITY ACT

INTRODUCTION:

Those who are injured at sea, whether on a ship, commuter ferry, oil rig, or any other kind of vessel, do not have the same tort rights as other Americans. Their rights are determined by federal maritime law, which often limits victims' ability to receive a fair recovery, or in some cases, any recovery at all. These laws also mean that the cruise line and other industries can completely escape accountability when passengers or workers are killed. Congress enacted two of those laws – the Death on the High Seas Act¹ (DOHSA) and the Limitation of Liability Act² (LOLA) – over a century ago. Both laws are in desperate need of reform.

In recent years, several bills have been introduced to amend DOHSA and LOLA, but few have gained traction.³ However, following the tragic crash of TWA flight 800 into the Atlantic near New York, Congress did amend DOHSA⁴ to allow full recovery for victims killed when airplanes crash into the sea. After the tragic 2010 Deepwater Horizon oil rig explosion, Congress came close to amending these laws again⁵. The House passed H.R.5503, which would have reformed DOHSA and repealed LOLA. However, the bill died in the Senate after heavy lobbying by the cruise industry. We urge Congress to try again.

WHAT IS THE DEATH ON THE HIGH SEAS ACT (DOHSA), AND WHY IS IT A PROBLEM?

DOHSA dictates remedies available to victims of torts occurring on the high seas beyond a marine league (three nautical miles) from the shore of any state or the territories of the United States. The Act states that recovery for tort on high seas is limited to “the pecuniary loss

¹ Death on the High Seas Act, 46 U.S.C. §30301.

² Limitation of Liability Act of 1851, 46 U.S.C. §30501.

³ In 2017, U.S. Senator Blumenthal and U.S. Representative Himes introduced the Cruise Passenger Protection Act, H.R.2173, 115th Cong. (2017), which would raise the safety requirements of vessels and allow the recovery of nonpecuniary damages. Senator Deb Fisher proposed such amendment in 2019, which was titled Hammers' Law, S.1062, 116th Cong. (2019), which would hold cruise lines accountable for negligent deaths occurring aboard of their vessels.

⁴ 46 U.S.C. §30307.

⁵ Securing Protection for the Injured from Limitations on Liability Act, H.R.5503, 111th Cong. (2010).

sustained by the individuals for whose benefit the action is brought.” “Pecuniary loss” means the loss of economic support and funeral expenses. Therefore, families of a drowned child or a retired parent injured on a cruise ship can be left without the right to recover any damages. The Act does not provide the right for compensation for pre-death pain and suffering or emotional loss of surviving family.

While DOHSA was created with good intentions, the law’s failure to adapt to evolving society has turned the Act into a true danger to people’s civil rights. In 1920, the majority of people on the high seas included commercial fishermen and staff on commercial import/export vessels. The Act assured that families of these workers received funeral expenses and their potential income after their death. An issue arises in cases where the deceased person is a retiree, a child, a stay-at-home mother, or a single person without any dependents. Under this Act, the death of any person without earning potential leaves the family without any means for recovery or justice. Lastly, even the recovery of very limited funeral expenses is often lost due to the decedent’s prepaid funeral expenses or insurance covering the expense. This Act leaves the injured or family of the decedent without legal recovery for their loss.

Even though DOHSA was only amended once in the 101 years, there is a clear precedent for Congress remedying a DOSHA injustice. After the tragic crash of TWA Flight 800 in 1996, Congress amended DOHSA⁶ to limit its coverage in commercial aviation disasters beyond the twelve nautical miles (instead of three) and to allow the compensation of non-pecuniary damages.

WHAT IS THE LIMITATION OF LIABILITY ACT (LOLA), AND WHY IS IT A PROBLEM?

LOLA⁷ was enacted in 1851 and is the definition of an antiquated statute. LOLA provides an avenue for vessel owners to drastically limit their liability in mass casualty cases. Public transportation vessels, such as commuter ferries, can often cause injury or death to a large number of passengers. In these cases, LOLA forces victims to prove that the owner had privity or knowledge of the negligent or unseaworthy conditions of the vessel when it left the dock. If they cannot, liability for an entire accident is limited to the value of the boat. This means that a tragic incident with mass casualties may only allow the families of deceased passengers to recover the split value of the vessel after the accident. For example, in the case of Missouri’s recent tragic duck boat accident⁸ in 2018, under LOLA, the families of 17 deceased victims could jointly recover only the cost of a sunken duck boat for their losses.

While victims can often ultimately prove the owner had knowledge of the ship’s negligent conditions, LOLA creates terrible burdens on victims because it allows the shipowner to sue the victims preemptively, which then provides a very limited window for the victims or surviving families to sue for recovery. If victims do not respond to a notice of the incident printed in a local

⁶ 46 U.S.C. §30307.

⁷ 46 U.S.C. §30501.

⁸ Antonia Noori Farzan, *Captain in Missouri duck boat accident that killed 17 is charged with seaman’s manslaughter*, Washington Post (Nov. 9, 2018, 5:37 AM), <https://www.washingtonpost.com/nation/2018/11/09/captain-missouri-duck-boat-accident-that-killed-is-charged-under-little-known-th-century-law/>.

newspaper, they often lose all their rights and remedies if they do not act quickly. LOLA is an arbitrary and unjust Act that shields large corporations from liability for their negligence and discourages maintaining safety aboard their vessels.

WHAT WE PROPOSE?

DOHSA has left many victims stripped of their civil rights for recovery. We propose that the Act be amended to allow non-economic damages to victims of torts at the sea as they are allowed for those on land. Mainly, the amendment should allow recovery for the loss of care, comfort, and companionship of the survivors, pre-death pain and suffering of the decedent, and economic losses. This amendment will promote a higher level of safety and care provided by the employer on commercial vessels and cruise providers.

To mirror the previous amendments and expand the coverage to all accidents occurring at sea, we propose to include the following wording in 46 U.S. Code section 30303⁹ titled “Amount and apportionment of recovery:”

“[I]n an action under this chapter, if the death or injury resulted from a wrongful act, neglect, or default on the high seas, additional compensation is recoverable for nonpecuniary damages, but punitive damages are not recoverable. In this section, the term “nonpecuniary damages” means damages for loss of care, comfort, and companionship.”

The liability limitation statutes were created to encourage shipbuilding during the early 20th century. This is no longer a pressing governmental interest to promote the industry at the expense of victims of torts at the high sea. We propose to repeal LOLA, as previously attempted by H.R.5503¹⁰. It would remove the liability limits of the vessel owner beyond the value of the vessel in all cases of personal injury or death. Additionally, it would no longer allow vessel owners to sue victims and put undue stress on the surviving families.

WHAT DO BILL OPPONENTS SAY?

The cruise lines are powerful and wealthy opponents to amendments of this legislation. Business groups and cruise line associations actively lobbied against any change, arguing that it would expose their industry to new costs and legal burdens¹¹. However, to fully recover after the pandemic, the cruise industry must restore passengers’ confidence in the safety of their ships. It is now more urgent than ever that they show passengers that they will stand behind their safety by ensuring their full legal rights by amending these antiquated laws.

⁹ 46 U.S.C. §30303.

¹⁰ Securing Protection for the Injured from Limitations on Liability Act, H.R.5503, 111th Cong. (2010).

¹¹ Kim Geiger, *House OKs bill to allow Deepwater Horizon victims’ families to sue*, Los Angeles Times (Jul. 1, 2010, 12:00AM), <https://www.latimes.com/archives/la-xpm-2010-jul-01-la-na-high-seas-20100702-story.html>.

EXPECTED SUPPORTERS

These changes in legislation are expected to have widespread support from families of injured or deceased oil rig workers and cruise tort victims, such as the International Cruise Victims Association, which actively advocates for the much-needed change to the remedy offered to victims of torts on high seas.

For more information, please contact student Katerina Pluhacek Garcia at Katerina.PluhacekGarcia@law.nyls.edu, or Adjunct Professor and Executive Director of the Center for Justice & Democracy at New York Law School Joanne Doroshow at JoanneD@CenterJD.org.

APPENDIX: VICTIM STORIES

THE DEEPWATER HORIZON DISASTER IN GULF OF MEXICO¹²

An Oil Rig in the Gulf of Mexico included navigation and a drill crew in charge of drilling wells. The drilling crew lost control of the well, and the drilling vessel exploded, causing eleven deaths, 126 injured, and billions of dollars in environmental damage. The vessel owner Transocean sought protection under LOLA and filed a complaint for exoneration for limitation in federal court. The owner claimed that the accident happened without privity and knowledge of the vessel's management and that the liability to surviving families should be limited to the value of the vessel sunk in the Gulf of Mexico. The cost of the sunken ship would then have to suffice cover not only the deaths and injuries of their workers but also the billions of dollars of environmental damage. Because of DOHSA, families of victims such as Adam Weise, 24, who did not have any dependents upon his death, could only recover funeral expenses.

CRASH OF U.S.S. JOHN S. MCCAIN¹³

In August 2017, U.S.S. John S. McCain vessel collided with the ALNIC MC tanker. Ten Navy sailors lost their lives, and 48 were injured during this tragic incident. It took several days to recover the bodies of sailors killed in this accident, putting their families through unthinkable pain. Families of the lost soldiers filed claims against the owner of the oil tanker in hopes of recovery for their lost relatives. However, DOHSA limited the recovery to nothing more than the funeral and burial expenses of the unmarried sailors.

DUCK BOAT TRAGEDY¹⁴

Duck boats are a favorite tourist attraction in large cities near water. In 2018, a Duck boat in Missouri ventured into bad weather on a lake and resulted in the death of seventeen people. The vessel was not able to handle the weather conditions and quickly sunk to the bottom of the lake. The duck boat owner was negligent in many ways, including entering the lake in dangerous weather conditions and not removing the boat's canopy, which ended up trapping passengers in and drowning them. This was a foreseeable and readily preventable disaster. The owner of the boat used LOLA in attempt to limit any liability to the surviving families of the drowned people. The fact that the owner had the option to do so is simply unconscionable. Among the 17 drowned victims were four children of the ages 1, 2, 7, 9, and 15. Tragically, nine of the victims were three generations of a single family.

¹² *Deepwater Horizon – BP Gulf of Mexico Oil Spill*, United States Environmental Protection Agency, <https://www.epa.gov/enforcement/deepwater-horizon-bp-gulf-mexico-oil-spill>.

¹³ Paul M. Sterbcow, *Commercial and Passenger Vessel Safety: Challenges and Opportunities*, Testimony before the House Committee on Transportation and Infrastructure, p. 3 (2019), <https://transportation.house.gov/imo/media/doc/Sterbcow%20Testimony.pdf>.

¹⁴ Antonia Noori Farzan, *Captain in Missouri duck boat accident that killed 17 is charged with seaman's manslaughter*, Washington Post (Nov. 9, 2018, 5:37 AM), <https://www.washingtonpost.com/nation/2018/11/09/captain-missouri-duck-boat-accident-that-killed-is-charged-under-little-known-th-century-law/>.