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Compensating Victims of Aviation Disasters: Establishing Uniform and Equitable Remedies for Accidents Over Water

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Abstract

This Comment tracks the development U.S. law, and international law, as it pertains to aviation crashes off the coast of the United States. Part I of this Comment details the vehicles for providing relief to the families of victims killed in aviation disasters. U.S. federal statutes, international agreements, maritime common law, and U.S. state law, depending on the circumstances, now may apply to actions for the recovery of damages for wrongful death. Part II discusses the recent initiatives proposed by the U.S. Senate and the U.S. House of Representatives to provide equitable treatment to the families of disaster victims. This part specifically concentrates on the Ford Act that was the interim solution ultimately adopted by the U.S. Legislature. Part III argues that the current system of recovery falls short of its purpose of providing equitable relief for the families of aviation accident victims and proposes new legislation that would remedy the situation.

COMMENT

COMPENSATING VICTIMS OF AVIATION DISASTERS: ESTABLISHING UNIFORM AND EQUITABLE REMEDIES FOR ACCIDENTS OVER WATER

*Melissa Pucciarelli**

INTRODUCTION

From the inception of commercial aviation, lawmakers have striven to establish a uniform body of law to provide relief to victims of aviation accidents.[1] The Death on the High Seas Act[2] ("DOHSA"), passed on March 30, 1920, in response to the harsh ruling in *The Harrisburg*,[3] eradicated any semblance of uniformity that may have existed in the United States.[4] Over the years, however, legislation such as the Jones Act,[5] treaties such as the Convention for the Unification of Certain Rules[6] ("Warsaw Con-

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1. *See* Vance E. Ellefson, *Here There Be Dragons*, 33rd Annual SMU Air Law Symposium (1999) (discussing remedies that courts have made available to families of those killed in aviation and maritime disasters).

2. Death on High Seas Act ("DOHSA"), 46 U.S.C. app. §§ 761–67 (1920) (establishing cause of action for families of those killed on high seas).

3. *See* The Harrisburg, 119 U.S. 199 (1886) (holding that no common law right of action exists for survivors of deceased who died in collision between steamer and schooner which occurred in territorial waters).

4. *See id.* at 213. The Court stated:

> Since, however, it is now established in the courts of the United States no action at law can be maintained for such a wrong in the absence of a statute giving the right, and it has not been shown that maritime law, as accepted and received by maritime nations generally, has established a different rule for the government of the courts of admiralty from those which govern courts of law in matters of this kind, we are forced to the conclusion that no such action will lie in the courts of the United States under the general maritime law.

Id.

5. Jones Act, 46 U.S.C.S. app. § 688 (1915) (providing seamen with remedy for personal injury in course of employment).

6. *See* Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 137 U.N.T.S. 11 [hereinafter Warsaw Convention] (governing litigation for aviation accidents involving international transportation).

vention"), and numerous cases[7] have supplemented DOHSA to collectively create a body of law to compensate the family members of air crash victims.[8]

As a consequence of DOHSA and case law,[9] the extent of recovery obtained by a victim's family depends upon the locus of the incident in relation to the nearest shore.[10] A family can recover pecuniary damages as well as damages for loss of society, survivor's grief, pain and suffering, and possibly punitive damages for crashes over land.[11] Now, if a plane crashes between the shore and twelve nautical miles[12] ("territorial waters" or "U.S. territorial waters"), U.S. general maritime law provides the substantive law.[13]

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7. *See* Dooley v. Korean Air Lines Co., 524 U.S. 116 (1998) (holding that DOHSA expressed Congress' intent to preclude recovery for pre-death pain and suffering and provided for exclusive means of recovery for death on high seas through DOHSA); Zicherman v. Korean Air Lines Co., 516 U.S. 217 (1996) (holding that DOHSA supplied substantive law where incident occurred on high seas); Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986) (holding that DOHSA provides exclusive remedy for death on high seas).

8. *See Accident Compensation in International Transportation, Testimony before United States Senate Committee on Commerce, Science and Transportation*, 105th Cong. (Nov.-Dec. 1997), *reprinted in* 63 J. AIR L. & COM. 425, 428-29 (1997) (statement of Andreas F. Lowenfeld, professor at New York University's School of Law who worked at State Department during mid-1960s in attempt to raise liability limits under Warsaw Convention) (stating that there is no justification for distinguishing between victims of accidents over land, high seas, and in between). "In between" refers to the gap created by U.S. President Reagan's 1988 Proclamation extending territorial waters to 12 nautical miles. *Id.*

9. *See* Yamaha Motor Corp. v. Lucien B. Calhoun, 516 U.S. 199, 201 (1995) (holding that state law governs damages available to plaintiffs for death of their daughter who died in jet ski incident in navigable waters off Puerto Rico).

10. *See* Ellefson, *supra* note 1 (stating that instead of uniform world of law that U.S. Supreme Court and lower courts described, United States has variety of remedies which may be applicable after one crosses shoreline).

11. *See Damage Limits for TWA Flight 800 Lawsuits, Hearing of the Senate Commerce, Science and Transportation Committee*, 105th Cong. (Oct. 29, 1997) (statement of Senator John McCain) (mentioning inequity for victims of aviation disasters over land versus high seas). Senator McCain also discussed Section 943, legislation that attempts to remedy inequity by excluding aviation litigation from DOHSA's reach. *Id.*

12. *See* Submerged Lands Act, 43 U.S.C. § 1301 (1953) (establishing territorial waters as between shore and three nautical miles out); Proclamation No. 5928, 54 Fed. Reg. 777, (Dec. 27, 1988) (extending U.S. territorial waters to 12 nautical miles).

13. *See* Ellefson, *supra* note 1 (citing TWA 800 disaster as best and most recent example and explaining that victim's family, however, can recover under U.S. state law, which often allows punitive damages and pre-death pain and suffering if U.S. state law does not conflict with U.S. federal law); *see also* Yamaha Motor Corp. v. Lucien B. Calhoun, 516 U.S. 199, 201 (1995) (holding that state law that does not conflict with federal law may supply remedy).

Prior to April 5, 2000, if an incident occurred beyond territorial waters, DOHSA, and possibly the Warsaw Convention with its numerous protocols, provided the substantive law.[14] In this outermost zone, DOHSA prohibited a victim's family from collecting pre-death pain and suffering and punitive damages.[15] For crashes involving international flights, the Warsaw Convention limited a family's recovery to an amount of US$75,000 or less.[16] All U.S. carriers and many external carriers, however, agreed to waive the US$75,000 liability limit in the International Aviation Transport Association[17] ("IATA") Intercarrier Agreements.[18]

On April 5, 2000, President Clinton signed the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century[19] ("Ford Act"). The Ford Act expressly states that DOHSA does not apply to aviation accidents occurring between three and twelve nautical miles from shore and allows recovery of nonpecuniary damages.[20] U.S. courts have yet to decide a case to which the Ford Act would be applicable, but judges must still consider the limitations that the Warsaw Convention imposes when deciding cases involving international flights.[21]

This Comment tracks the development U.S. law, and inter-

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14. *See* Blanca I. Rodriguez, *Montreal Convention: Is It The Answer TO Plaintiff's Prayers?*, LAW. PILOT B. ASS'N J., 9 (1999) (detailing origins of Warsaw Convention and various protocols that have amended it).

15. *See* DOHSA, 46 U.S.C. app. § 762 (1920) (limiting damages to pecuniary loss).

16. *See* Rodriguez, *supra* note 14, at 11-12 (discussing 1966 Montreal Convention which raised Article 22 limit of liability to US$75,000); *see also* Warsaw Convention art. 22 (setting carriers' liability limit at US$75,000 through Article 22 as amended by 1966 Montreal Convention).

17. *See IATA Legal, at* www.iata.org/legal/intercarrier_agreements.htm (noting that the International Air Transport Association ("IATA") is voluntary organization of domestic and foreign carriers).

18. *See IATA Legal: Intercarrier Agreements on Passenger Liability (IIA), at* www.iata.org/legal/passenger_liability.htm (agreeing to waive US$75,000 liability limit that 1966 Montreal Protocol provided and establishing two tiered liability system). IIA was approved by the U.S. authorities on January 8, 1997 in DOT Order 97-1-2.

19. *See* Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("Ford Act"), Pub. L. 106-181, 114 Stat. 61 (Apr. 5, 2000) (providing for reform in aviation industry).

20. *See id.* (stating that DOHSA does not apply to aviation accidents occurring on high seas 12 nautical miles or closer to U.S. shore or its Territories or Dependencies and that nonpecuniary damages are recoverable if aviation accident occurs beyond 12 nautical miles).

21. *See generally* Warsaw Convention. *See also* Rodriguez, *supra* note 14, at 14 (stating that various protocols and amendments must also be considered if applicable).

national law, as it pertains to aviation crashes off the coast of the United States. Part I of this Comment details the vehicles for providing relief to the families of victims killed in aviation disasters. U.S. federal statutes, international agreements, maritime common law, and U.S. state law, depending on the circumstances, now may apply to actions for the recovery of damages for wrongful death. Part II discusses the recent initiatives proposed by the U.S. Senate and the U.S. House of Representatives to provide equitable treatment to the families of disaster victims. This part specifically concentrates on the Ford Act that was the interim solution ultimately adopted by the U.S. Legislature. Part III argues that the current system of recovery falls short of its purpose of providing equitable relief for the families of aviation accident victims and proposes new legislation that would remedy the situation.

I. *APPROACHES FOR PENDING RELIEF IN AVIATION DISASTERS*

Lawmakers have proposed various approaches to provide recovery for the wrongful death of those killed when an aircraft crashes over water.[22] The U.S. Congress has legislated in this area to provide relief[23] where none could formerly be obtained.[24] International Agreements have also been drafted, sometimes ratified, and often amended to provide family members of victims with a system of recovery.[25] Finally, U.S. federal maritime law, which often looks to state wrongful death statutes,

22. *See* DOHSA, 46 U.S.C. app. §§ 761-67 (1920) (providing for relief for death on high seas by Congressional act); Moragne v. State's Marine Lines, Inc., 398 U.S. 375, (1970) (holding that general maritime law provides cause of action for death in territorial waters). *See generally* Warsaw Convention (providing system of recovery through international convention).

23. *See* Jones Act, 46 U.S.C.S. app. § 688(a) (1915) (allowing for recovery for wrongful death of seamen); DOHSA, 46 U.S.C. app. §§ 761-67 (1920) (allowing for recovery for wrongful death of any person on high seas).

24. *See* The Harrisburg, 119 U.S. 199 (1886) (holding that child of deceased killed in collision on high seas could not obtain relief). U.S. Congress had not provided for a remedy, and the Court was unable to fashion relief in absence of a statute. *Id.* at 213-14.

25. *See* Warsaw Convention (providing for, in addition to documentation requirements, system of recovery for victims of aviation crashes); *see also* Montreal Protocol No. 4 (adopted Sep. 25, 1975) (amending DOHSA by increasing liability limits); IATA Intercarrier Agreements, Jan. 8, 1997 (raising Warsaw liability limits through agreement among carriers).

governs to provide relief to families of those killed in territorial waters.[26]

A. *U.S. Federal Statutes*

The U.S. Congress has enacted legislation intended to clarify the applicability of existing U.S. laws and to provide more equitable relief to the families of those killed in aviation disasters.[27] Prior to 1915, family members of a person killed on the high seas were unable to obtain any relief.[28] The U.S. Congress, then, in 1915, enacted the Jones Act to provide a means of recovery for the families of seamen killed on the high seas.[29] Five years later, the U.S. Congress enacted DOHSA, which provided for the recovery of pecuniary damages for the wrongful death on the high seas of any person, not just seamen.[30]

1. The Harrisburg

In deciding *The Harrisburg*, the U.S. Supreme Court held that general maritime law does not afford a cause of action for wrongful death.[31] The family of the decedents on the Harrisburg could not obtain relief since no statute provided a cause of action in such circumstances.[32] U.S. admiralty courts, much like courts of law, cannot fashion relief in the absence of a statute permitting such recovery.[33] Therefore, unless a U.S. state en-

26. *See* Yamaha Motor Corp. v. Calhoun, 515 U.S. 199 (1996) (stating that U.S. state law which is not inconsistent with U.S. maritime law may be applied in U.S. state territorial waters).

27. *See* Ford Act, 106 P.L. 181 (2000) (clarifying that DOHSA does not apply to aviation accidents, and consequently, providing families right to recover for nonpecuniary damages).

28. *See The Harrisburg*, 119 U.S. at 213 (stating that as U.S. courts cannot change law, but only interpret it, and Court cannot fashion relief where U.S. Congress has not provided for any such remedy).

29. *See* Jones Act, 46 U.S.C.S. app. § 688 (1915) (providing right of action for wrongful death of seamen killed on high seas).

30. *See* DOHSA, 46 U.S.C. app. §§ 761-67 (1920) (providing right of recovery for person killed on high seas due to wrongful act, neglect, or default).

31. *See The Harrisburg*, 119 U.S. at 213-14 (involving suit to recover damages for death caused by negligence in operation of steamer Harrisburg in collision with schooner Marietta Tilton in state waters).

32. *See id.* (maintaining that no maritime statute existed to provide right of action). The U.S. Court did not consider relevant Massachusetts and Pennsylvania wrongful death statutes, as statute of limitations had run. *Id.* at 214.

33. *Id.* at 213 (explaining that court is unable to provide relief to Plaintiff because court may only declare what law is and not create new law in absence of statute).

acted a wrongful death statute, the decedent's family was unable to obtain a remedy.[34]

2. Legislative Action

The U.S. Congress, recognizing the inequity of *The Harrisburg* Court's holding that there is no remedy for death on the high seas,[35] enacted two statutes.[36] In 1915, U.S. Congress passed the Jones Act,[37] which provided a remedy for seamen who were injured or killed in the course of employment.[38] Then, in 1920, the U.S. Congress passed DOHSA,[39] which provided for the recovery of pecuniary damages for the death of those killed on the high seas.[40] U.S. President Ronald Reagan's 1988 Proclamation,[41] ("the Proclamation" or "Reagan's Proclamation"), which extended United States' waters to twelve nautical miles offshore, caused confusion regarding DOHSA's applicability in U.S. waters.[42]

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34. *Id.* at 213-14 (maintaining that, in absence of statute, claimants have no right of action because maritime law, which provides for same rights as those at common law, does not establish such right).

35. *See* Steven R. Pounian, *TWA 800 and Death on the High Seas Act*, N.Y.L.J., Aug. 29, 1997, at 3 (stating that DOHSA was enacted as "stopgag measure" to remedy unfairness of state of law reflected in *The Harrisburg* Court's ruling).

36. *See* Jones Act, 46 U.S.C.S. app. § 688 (1915) (applying solely to seamen); DOHSA, 46 U.S.C. app. §§ 761-67 (1920) (applying to all persons killed on high seas).

37. *See* Jones Act, 46 U.S.C.S. app. § 688 (1915) (providing that seaman is able to obtain recovery under applicable U.S. statutes regulating right of death in case of railway employees).

38. *See id.* (excluding application of Jones Act to situations involving persons who are not citizens or permanent resident aliens of United States while employed for purposes of "exploration, development or production of offshore mineral or energy resources").

39. *See* DOHSA, 46 U.S.C. app. §§ 761-67 (1920) (providing exclusive remedy for deaths on high seas and restricting recovery to economic losses). DOHSA applies depending on where accident occurs. *Id.*

40. *See id.* at § 762 (establishing that compensation must be fair and just).

41. Proclamation No. 5928, 54 Fed. Reg. 777, (Dec. 27, 1988) (extending U.S. territorial waters to 12 nautical miles to advance national security).

42. *See* In re Air Crash Off Long Island, New York, On July 17, 1996, 1998 U.S. Dist. LEXIS 8044, *25-34 (S.D.N.Y. June 2, 1998) (stating that at time DOHSA enacted, high seas lay beyond three nautical miles off U.S. coast). U.S. President Reagan's proclamation, however, pushed the high seas out to 12 miles. *Id.* Two DOHSA conditions of high seas and beyond marine league, or three nautical miles, were no longer equivalent. *Id.* The Court then determined that DOHSA conditions of beyond marine league and beyond high seas were independent conditions. *Id.*

a. Jones Act

Between 1915 and 1920, the Jones Act[43] and DOHSA, respectively, made available remedies for seamen injured in the course of their employment, whether on the high seas or navigable waters, and provided remedies for the wrongful death of any person on the high seas.[44] The Jones Act, which was passed on March 4, 1915, provides that any seaman who suffers personal injury while in the course of his or her employment may maintain an action for damages.[45] In the case of death, a personal representative of the seaman may bring an action for damages.[46]

b. Death on the High Seas Act

Prior to DOHSA's enactment, family members were unable to obtain any recovery for death on the high seas,[47] except that, after 1915, family members could recover for the death of seamen only.[48] DOHSA, however, permitted the recovery of pecuniary losses due to the death of any individual on the high seas.[49] Over the years, the courts have interpreted DOHSA's

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43. Jones Act, 46 U.S.C.S. app. § 688 (1915) (providing relief to seaman injured or killed on high seas).

44. *See* Jones Act, 46 U.S.C.S. app. § 688 (1915) (providing right of action for personal injury suffered by seamen in course of his employment); DOHSA, 46 U.S.C. app. § 762 (1920) (permitting decedent's family to recover pecuniary loss).

45. *See* Jones Act, 46 U.S.C.S. app. § 688 (1915). Section 688 states that:

> Any seaman who shall suffer personal injury in course of his employment may, at his election, maintain action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending common-law right or remedy in cases of personal injury of railway employees shall apply.

Id.

46. *See* Jones Act, 46 U.S.C.S. app. § 688 (a) (1915). Section 688(a) states that:

> [I]n case of death of any seaman as result of any such personal injury personal representative of such seaman may maintain action for damages at law with right of trial by jury, and in such action all statutes of United States conferring or regulating right of action for death in case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of district in which defendant employer resides or in which his principal office is located.

Id.

47. *See The Harrisburg*, 119 U.S. at 213-14 (1886) (holding that no remedy can be obtained for death on high seas because no federal statute provides that right).

48. *See* Jones Act, 46 U.S.C.S. app. § 688 (1915) (providing right of action for seamen injured or killed on high seas after 1915).

49. *See* DOHSA, 46 U.S.C. app. §§ 761-62 (1920) (referring to death of "a person" and not specifying any limitations such as occupation of decedent).

provisions.[50]

i. Summary of DOHSA

At the time of DOHSA's[51] passage, international waters, or the high seas, began where the then territorial waters ended.[52] The boundary between the two waters was three nautical miles or one marine league[53] from shore, which was derived from the historic estimated range of a cannon.[54] The Submerged Lands Act established that the territorial waters of the states was within three miles of shore.[55]

Although the U.S. legislators intended DOHSA to apply to maritime incidents, the courts have applied DOHSA primarily in aeronautic cases.[56] DOHSA applies irrespective of whether or

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50. *See* Dooley v. Korean Air Lines Co., 524 U.S. 116, 121 (1998) (explaining each section of DOHSA and concluding that DOHSA does not permit recovery of nonpecuniary losses for death on high seas); Offshore Logistics, Inc., v. Tallentire, 477 U.S. 207 (1986) (holding that DOHSA provides sole remedy for death on high seas).

51. DOHSA, 46 U.S.C. app. § 761 (1920) (providing recovery for action brought for death caused by "wrongful act, neglect, or default occurring on high seas beyond a marine league from the shore of any State, or the District of Columbia, or Territories or dependencies of United States"); *see also* Ellefson, *supra* note 1 (stating that legislators considered various remedies for not only death on high seas but on "Great Lakes" and "any navigable waters of United States" when legislation was first proposed in 1903 and over years, until 1915). Legislators also suggested remedies for "death on high seas and other navigable waters" on subsequent occasions. *Id.*

52. *Id.* (stating that Submerged Lands Act established three mile limit as territorial waters of states, and then in 1988, U.S. President Reagan's Territorial Sea Proclamation extended territorial waters to 12 nautical miles from baselines of United States). *See* Presidential Proclamation No. 7219, 64 Fed. Reg. 48, 701 (Aug. 2, 1999) (stating that territorial seas shall be extended to 24 nautical miles).

53. *See* In re Air Crash Off Long Island, New York, On July 17, 1996, 209 F.3d 200, 201-02 nn. 1-2 (2d Cir. 2000) (explaining that one marine league equals approximately three nautical miles, while one nautical mile equals approximately 1.15 land miles). When DOHSA was passed, the term "high seas" was synonymous with international waters, although the term was never formally defined. *Id.* at 205-09.

54. *See id.* at 205 (explaining that in 1793 when U.S. Secretary of State Thomas Jefferson claimed extent of U.S. Territorial Seas as range of cannon ball, which is usually stated as one sea league, he was attempting to remain neutral in war between France, Britain, and Spain in Atlantic Ocean). Jefferson did, however, reserve "ultimate extent" of claim "for future deliberation" and noted that ultimate extent should be 20 nautical miles). *Id.* at 205.

55. *See* Ellefson, *supra* note 1 (stating that when Submerged Lands Act, 43 U.S.C. § 1301 (1953), was passed, it excluded from its coverage Florida, Louisiana, and Texas, which had historical boundaries beyond three miles when they were acquired by United States).

56. *See* V. FOSTER ROLLO, AVIATION LAW: AN INTRODUCTION, 254-55 (3d ed. 1985) (explaining U.S. legislature's original intent and how act is actually applied in majority of modern cases).

not the aircraft engaged in interstate or international commerce.[57] Therefore, an airplane flying from the continental United States to Hawaii is subject to DOHSA if the plane crashes beyond twelve miles from the coast, notwithstanding that both the departure and destination are within the United States.[58]

Although still limited, the recovery permitted under DOHSA tempered the harshness of *The Harrisburg* Court's ruling that maritime law provided no recovery at all for wrongful death.[59] DOHSA specifies who may bring an action.[60] DOHSA permits the survivors of those who died in maritime accidents to sue, but it prohibits actions brought on behalf of the decedent.[61] DOHSA allows for compensation of any pecuniary loss sustained by the person bringing suit or the person for whose benefit the suit was brought.[62] DOHSA also grants relief to aggrieved parties in proportion to the loss they suffered due to the accident.[63] DOHSA does not, however, impose any monetary limit on the amount that may be recovered by a plaintiff.[64]

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57. *See* Ellefson, *supra* note 1 (maintaining that DOHSA would apply to domestic flights from Houston, Texas or New Orleans, Louisiana to Tampa, Florida or Miami, Florida); Zicherman v. Korean Air Lines, 116 S.Ct. 629 (1996) (holding that DOHSA governed issue of damages for families of those on board Korean Air Lines Flight 007, which was shot down over Sea of Japan).

58. *See* Warsaw Convention (applying to international flights). In this example, Warsaw Convention would not apply, because it is a domestic flight. *Id.*

59. *See Dooley*, 524 U.S. at 121 (stating that *The Harrisburg* Court could not provide remedy to Plaintiff because no statute existed which would allow U.S. Court to do so). U.S. Congress subsequently enacted DOHSA, which authorized recovery for death on high seas. *Id.*

60. *See* DOHSA, 46 U.S.C. app. §§ 761-62 (1920) (limiting persons for whose benefit suit can be brought to those exclusively provided for).

61. *See id.* at app. § 761 (1920). Section 761 states:

> [T]he personal representative of the decedent may maintain a suit 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.

Id.

62. *See id.* at app. §§ 761-62 (1920) (explaining that recovery of pecuniary loss is limited to decedent's wife, husband, parent, child, or dependent relative).

63. *See id.* at § 762 (detailing how recovery is to be apportioned among those permitted by DOHSA to maintain suit for damages).

64. *See id.* at § 762 (setting forth recoverable damages and apportionment of recovery and, in doing so, not limiting amount of recovery).

ii. Judicial Interpretation of DOHSA

Two significant cases in which the Supreme Court interpreted DOHSA and determined when it applied were *Dooley v. Korean Air Lines, Co.*[65] and *Offshore Logistics, Inc. v. Tallentire.*[66] In *Dooley*, the U.S. Supreme Court decided that the U.S. Congress intended DOHSA to provide the sole means of recovery for death on the high seas, and consequently, families of victims of aviation disasters could not obtain recovery under state wrongful death statutes.[67] In *Offshore Logistics v. Tallentire*, the U.S. Supreme Court held that because DOHSA preempts U.S. state law, the wives of two men killed in a helicopter crash could not obtain recovery for loss of consortium, service, and society.[68]

aa. *Dooley v. Korean Air Lines Co.*

In *Dooley v. Korean Air Lines Co.*,[69] the U.S. District Court jury found the airline guilty of willful misconduct, and the court awarded punitive damages.[70] The Court of Appeals for the District of Columbia vacated the award of punitive damages, holding that the Warsaw Convention did not allow punitive awards.[71] The U.S. Supreme Court denied certiorari.[72]

Following remand to the District Court while the representatives' cases were awaiting trial and after the Supreme Court ren-

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65. Dooley v. Korean Air Lines, Co., 524 U.S. 116 (1998).

66. Offshore Logistics, Inc., v. Tallentire, 477 U.S. 207 (1986).

67. *See Dooley* 524 U.S. at 123 (stating that U.S. Court is unable to provide plaintiff with recovery for pre-death pain and suffering).

68. *See Offshore Logistics*, 477 U.S. at 222 (stating that although allowing recovery under Louisiana statute would bring recovery for death on high seas in line with those obtainable for death in territorial waters, U.S. Court must defer to U.S. Congress' purpose in creating uniform recovery for death on high seas).

69. *See In re* Korean Air Lines Disaster of Sept. 1, 1983, 524 U.S. 116 (1998) (arising out of incident where Soviet Air Force shot down Korean Airlines Flight KE007 bound for New York to Seoul on August 30, 1983). Petitioners sought recovery for decedent's pre-death pain and suffering. *Id.*

70. *See In re* Korean Air Lines Disaster of Sept. 1, 1983, civil action No. 83-0345 (returning liability verdict against KAL and, in subsequent verdict, awarding plaintiffs US$50,000,000 in punitive damages).

71. *See In re* Korean Air Lines Disaster of Sept. 1, 1983, 932 F.2d 1475, 1484-1488 (D.C. Cir. 1991) (holding that punitive damages are contrary to purposes of Article 17 of Warsaw Convention, which contemplates nature of liability of carriers, although it does not expressly prohibit punitive damages).

72. *See Dooley*, 502 U.S. at 994 (denying petitions for writs of certiorari by both sides on December 2, 1991).

dered a verdict in *Zicherman v. Korean Air Lines Co.*,[73] Korean Air Lines ("KAL") moved to dismiss the representatives' claims in *Dooley* for nonpecuniary damages.[74] The District Court granted the motion.[75] The Court of Appeals affirmed the District Court's dismissal of the representatives' claims for nonpecuniary damages on the ground that DOHSA did not permit an award for pre-death pain and suffering.[76] On certiorari, the U.S. Supreme Court affirmed and reiterated that the U.S. Congress did not provide for a decedent's own losses or for nonpecuniary losses when it enacted DOHSA.[77] Conceding this point, the petitioners then sought to recover pre-death pain and suffering under general maritime law.[78] The U.S. Supreme Court held that Congress intended DOHSA to preclude such recovery and provide the exclusive means of recovery for death on the high seas.[79] Consequently, the Court deemed itself unable to provide such relief where Congress chose not to establish such remedies.[80]

bb. *Offshore Logistics Inc. v. Tallentire*

In *Offshore Logistics, Inc. v. Tallentire*,[81] the U.S. District Court

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73. Zicherman v. Korean Air Lines Co., 516 U.S. 217 (1996) (arising out of same incident as *Dooley v. Korean Airlines*). The U.S. Supreme Court in *Zicherman* held that DOHSA supplied the substantive law where the incident occurred on the high seas. *Id.*

74. *See In re* Korean Air Lines Disaster of Sept. 1, 1983, 935 F. Supp. 10, 12-15 (2d Cir. 1996) (basing their motion on *Zicherman*, plaintiffs argued that DOHSA supplied substantive law when plane crashed on high seas).

75. *See id.* (holding that U.S. law, particularly DOHSA, which prohibits nonpecuniary damages, governed these cases, not South Korean law).

76. *See In re* Korean Air Lines Disaster of Sept. 1, 1983, 326 U.S. App. D.C. 127, 117 F.3d 1477 (D.C. Cir. 1997) (stating that, under general maritime law, survival cause of action is unavailable when death is on high seas).

77. *See Dooley*, 524 U.S. at 122 (explaining each section of DOHSA and demonstrating that although § 761 provides cause of action to recover pecuniary loss sustained, DOHSA does not provide for nonpecuniary loss or pain and suffering).

78. *See id.* at 123 (arguing that U.S. general maritime law recognizes survival action that permits decedent's family to recover for damages that decedent could have obtained had he survived).

79. *See id.* (disagreeing and stating that "[b]y authorizing only certain surviving relatives to recover damages, and by limiting damages to the pecuniary losses sustained by those relatives, U.S. Congress provided the exclusive recovery for deaths that occur on high seas").

80. *See id.* (maintaining that because U.S. Congress chose to allow recovery by certain relatives only and not to provide for nonpecuniary losses or for pain and suffering, courts are unable to enlarge either class of beneficiaries or available damages).

81. Offshore Logistics, Inc., v. Tallentire, 477 U.S. 816 (1986) (concerning suit

ruled that DOHSA provided the exclusive remedy and dismissed petitioners claims based on the Louisiana wrongful death statute.[82] The District Court awarded only pecuniary damages.[83] The District Court, in rendering its decision, stated that DOHSA limits recovery to fair and just compensation for pecuniary losses.[84]

The wives of the decedents appealed contending that the Louisiana statute applied due to either (1) the Outer Continental Lands Shelf Act[85] ("OCSLA"), which adopts the law of the adjacent state as an alternate to federal law to the extent the state law is consistent with applicable federal laws,[86] or (2) Section 7 of DOHSA, which provides that state statutes granting death remedies shall not be affected by DOHSA.[87] The Court of Appeals reversed the District Court's denial of benefits under Louisiana law.[88] As to the first theory advanced by petitioners, the Court held that even if OCSLA applied, it adopts state law as surrogate federal law only to the extent that it is consistent with federal law or regulations.[89] The Court then assumed that OCSLA applied, and continued by analyzing whether the Louisiana

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brought by wives of two male decedents killed when helicopter crashed approximately 35 miles off coast of Louisiana).

82. *See* LA. CIV. CODE ANN. art. 2315(B) (West 1986) (permitting recovery for pecuniary and nonpecuniary damages, including loss of consortium, service, and society).

83. *See* Tallentire v. Offshore Logistics, 754 F.2d 1274, 1276 (5th Cir. 1985) (referring to District Court's denial of plaintiffs' claims for nonpecuniary loss including loss of consortium, service, and society).

84. *See id.* (preventing, thereby, recovery of damages for nonpecuniary losses).

85. Outer Continental Lands Shelf Act, 43 U.S.C.S. §§ 1331-1356, 1331(a) (1953) [hereinafter OCSLA] (applying to "all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in § 2 of the Submerged Lands Act, and of which the subsoil and seabed appertain to the United States are subject to its jurisdiction and control"). OCSLA, passed in 1953, extended Constitution and U.S. laws and laws of adjacent states—provided that they are "applicable and not inconsistent with [OCSLA] or with other federal laws and regulations"—to subsoil and seabed of Outer Continental Shelf. *Id.*

86. *See* Tallentire v. Offshore Logistics, 754 F.2d 1274, 1278-1279 (5th Cir. 1985) (arguing that because OCSLA provides essentially nonmaritime remedy and controls only on subsoil and seabed of Outer Continental Shelf, and to all artificial islands and fixed structures erected thereon, and because decedents were platform workers being transported from work to mainland, OCSLA should apply).

87. *See id.* at 1279 (arguing that U.S. state statutes granting right to recover for high seas death are not preempted by DOHSA).

88. *See id.* at 1282 (holding that Louisiana had jurisdiction to extend its wrongful death statute to remedy deaths on high seas).

89. *See id.* at 1279 (stating that even if OCSLA applied, it would not permit recovery of nonpecuniary damages).

statute is inconsistent with applicable federal law.[90] Citing Fifth Circuit precedent,[91] the Court held that because DOHSA applies to the crash of a helicopter on the high seas, Louisiana law should be applied to the extent it is not inconsistent with DOHSA.[92] The Court of Appeals held that Section 7 of DOHSA intended to preserve the state's cause of action for death and that the Louisiana statute allowed its application to actions on the high seas.[93] Although the Court of Appeals mentioned the non-uniformity that the ruling would create, the Court maintained that its decision conformed with legislative intent.[94]

The U.S. Supreme Court granted certiorari[95] and reversed.[96] The U.S. Supreme Court held that neither OCSLA nor DOHSA permits the application of state law in actions to recover for death on the high seas.[97] DOHSA provides the exclusive wrongful death remedy to recover for deaths on the high seas and preempts state laws that provide damages for nonpecuniary losses.[98] This ruling clarifies that state law cannot be applied to

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90. *See id.* (stating that OCSLA would not provide recovery of nonpecuniary damages because such awards are not allowed under DOHSA).

91. *See* Smith v. Pan Air Corp., 684 F.2d 1102, 1111-1112 (5th Cir. 1982); *see also* Kimble v. Noble Drilling Corp., 416 F.2d 847, 850 (5th Cir. 1969), *cert. denied*, 397 U.S. 918, 90 S. Ct. 924, 25 L. Ed. 2d 99 (1970) (establishing that DOHSA applies to crash of helicopter on high seas).

92. *See Tallentire*, 754 F.2d at 1279 (continuing to answer more difficult question of whether U.S. state wrongful death statutes are preempted by DOHSA, which U.S. Court held that they are not).

93. *See Tallentire*, 754 F.2d at 1279-1284 (holding that U.S. state law is not preempted by DOHSA even though this holding does not promote uniformity in maritime law, which has been goal of U.S. Supreme Court).

94. *See id.* at 1278 (stating that Louisiana wrongful death statute permits recovery for nonpecuniary losses, while DOHSA is limited to compensation for pecuniary losses).

95. *See* Offshore Logistics, Inc., v. Tallentire, 477 U.S. 816 (1985) (granting certiorari and stating that "the Fifth Circuit's decision creates the potential for disunity in the administration of wrongful death remedies for causes of action arising from accidents in the high seas and is in conflict with the prevailing view in other courts that DOHSA preempts state law wrongful death statutes in the area of its operation").

96. *See Offshore Logistics*, 474 U.S. at 207 (reversing and holding that neither OCSLA nor DOHSA permits application of Louisiana law in this case).

97. *See id.* at 221-22 (stating that OCSLA does not govern this action and ultimately concluding that after examining language of § 7, legislative history of § 7, congressional purpose of DOHSA, and importance of admiralty law, it is evident that DOHSA preempts state law on high seas).

98. *See id.* at 225 (maintaining that U.S. legislators "stated their firm intent to make exclusive federal jurisdiction over wrongful death actions arising on the high seas by restricting the scope of § 7 to territorial waters").

actions to recover for death on the high seas.[99]

c. President Reagan's Proclamation

DOHSA, by its terms, is applicable for deaths on the high seas beyond a marine league; however, in 1988, President Ronald Reagan issued a proclamation that changed the definition of high seas.[100] President Reagan proclaimed that the territorial boundaries of the United States were to be pushed out from three nautical miles to twelve nautical miles.[101] The court involved in the TWA Flight 800 litigation, consequently, was forced to determine whether President Reagan's Proclamation had any effect on the application of DOHSA for deaths in what was once, but is no longer, the high seas.[102]

i. Summary of President Reagan's Proclamation

When the U.S. Legislature first enacted DOHSA, international waters began one marine league or approximately three nautical miles from shore.[103] The 1988 Proclamation, issued by President Reagan, however, extended the territorial boundary to twelve nautical miles.[104] Originally the two phrases, "one marine league" and "high seas" were equivalent, but the term "high seas" in the Proclamation refers to waters twelve nautical miles from shore.[105] President Reagan's goal in extending the territorial boundary was to advance the national security and other na-

99. *See id.* at 233 (deferring "to Congress' purpose in making a uniform provision for the recovery for wrongful deaths on the high seas, an area where the federal interests are primary").

100. *See* Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988) (changing territorial boundary to twelve nautical miles on December 27, 1988).

101. *See id.* (extending territorial sea over which United States exercises sovereignty and jurisdiction). U.S. sovereignty and jurisdiction extends to the airspace over this zone and its bed and subsoil. *Id.*

102. *See In re* Air Crash Off Long Island, New York, On July 17, 1996, 1998 U.S. Dist. LEXIS 8044 at *7-8 (stating that resolution of issues on appeal requires interpretation of DOHSA's language, consideration of what high seas means for DOHSA's purposes, and effect of resolution).

103. *See* DOHSA, 46 U.S.C. app. § 761 (1920) (providing for right of action when wrongful act, neglect, or default occurred beyond marine league from shore).

104. *See* Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988) (stating that "the territorial sea of the United States henceforth extends to 12 nautical miles from the baselines of the United States determined in accordance with international law").

105. *See In re* Air Crash Off Long Island, New York On July 17, 1996, 1998 U.S. Dist. LEXIS 8044 at *28 (arguing that "President cannot revise, amend, or alter legislation enacted by Congress," and therefore, Proclamation can have no effect on DOHSA).

tional interests.[106]

ii. TWA Flight 800

In *In re Air Crash Off Long Island, New York, On July 17, 1996*,[107] the District Court for the Southern District of New York held that DOHSA did not apply to the crash of TWA Flight 800.[108] Flight 800, departing from John F. Kennedy Airport on Long Island, New York, and bound for Paris, France, and Rome, Italy, crashed eight miles off the coast of New York.[109] The Court held that the plain meaning of the DOHSA requires that the phrases "one marine league" and "high seas" have independent significance.[110]

The TWA District Court rejected the defendants' contention that the meaning of the phrase "high seas" encompasses waters beyond one marine league.[111] The Court stated that if the defendant was correct, the phrase "high seas" would be superfluous. Citing *Gustafson v. Alloyd Co.*,[112] the District Court followed the convention of reading statutes to avoid rendering some phrases or words superfluous.[113]

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106. *See* Proclamation 5928, 54 Fed. Reg. 777 (Dec. 27, 1988) (extending U.S. territorial sea in accordance with international law).

107. *In re* Air Crash Off Long Island, New York, On July 17, 1996, 1998 U.S. Dist. LEXIS 8044 (1998), *affirmed, In re* Air Crash Off Long Island, New York, On July 17, 1996, 209 F.3d 200 (2000) (involving Oct. 24, 1996 crash of TWA Flight 800 departing from John F. Kennedy Airport in New York and bound for Paris, France, and Rome, Italy). Flight 800 crashed approximately eight nautical miles off shore of Long Island, New York, killing all 230 persons aboard. *Id.*

108. *See id.* at *33 (stating that difficult choice of law issues arise when plane carrying international passengers crashes in territorial waters not belonging to any one state). The question before the Court, however, was to determine if DOHSA applied to the instant action, which the Court held that it did not. *Id.*

109. *See id.* at *32-33 (stating that "[i]n sum, since the 'high seas' are the waters beyond the territorial sea, and since the Proclamation extends the territorial sea to 12 miles from the shore, then the deaths in the instant case occurring eight miles from the shore of New York occurred in the territorial sea, and not in the high seas").

110. *See id.* at *24 (explaining intent of early drafts was to establish "comprehensive scheme whereby DOHSA would apply on high seas, Great Lakes, and other navigable waters of United States"). In these early drafts, it is evident that drafters intended two different bodies of waters when they referred to high seas and navigable waters. *Id.*

111. *See id.* at *25-26 (holding that DOHSA applied to international waters and since President Reagan's Proclamation extended territorial waters to 12 nautical miles, DOHSA is only applicable beyond 12 miles).

112. Gustafson v. Alloyd Co., 513 U.S. 561, 574 (1995) (involving interpretation of word "prospectus" as used in Securities Act of 1933).

113. *See id.* (stating "[t]he Court will avoid a reading which renders some words altogether redundant").

The District Court further explained that the structure of DOHSA is consistent with the court's holding.[114] The Court noted that DOHSA applies when an incident occurs both beyond one marine league and on the high seas.[115] The defendants contended that Section Seven[116] describes waters that are not subject to DOHSA.[117] At the time of DOHSA's enactment, territorial seas were limited to the waters three miles from shore.[118] Therefore, defendants asserted that Section One[119] limits the definition of the high seas to water beyond one marine league, or approximately three nautical miles.[120] The defendants claimed their position was consistent with Congress's intention to apply DOHSA to all waters except state territorial waters.[121]

The Court rejected the defendants' arguments for three reasons.[122] The first reason the Court provided was that defendants' contention had no sound textual basis.[123] Second, if DOHSA applied to all waters except state waters, there would be

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114. *See In re* Air Crash Off Long Island, New York, On July 17, 1996, 1998 U.S. Dist. LEXIS 8044 at *24 (stating that consistency with U.S. Legislature's intent in 1920 requires that navigable waters refer to both U.S. state and U.S. federal waters).

115. *See id.* at *14 (rebutting defendants assertion that DOHSA applies everywhere but in U.S. state territorial waters).

116. DOHSA, 46 U.S.C. app. §767 (1920) (stating "nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any state, or to the navigable waters in the Panama Canal Zone").

117. *See In re* Air Crash Off Long Island, New York, On July 17, 1996, 1998 U.S. Dist. LEXIS 8044 at *13 (arguing that U.S. court should interpret § 1 to define high seas for DOHSA purposes at marine league is consistent with what defendants purport to be U.S. Congressional intent of excluding solely state waters from DOHSA's reach).

118. *See id.* at *11-12 (stating that Submerged Lands Act fixes U.S. state territorial boundaries at three nautical miles with words "[t]he seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary").

119. *See* DOHSA, 46 U.S.C. app. § 761 (1920) (stating that action for wrongful death may be brought under DOHSA when wrongful act occurs "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").

120. *See id.* at § 761 (establishing where and by whom action may be brought).

121. *See In re* Air Crash Off Long Island, New York, On July 17, 1996, 1998 U.S. Dist. LEXIS 8044 at *11-12 (defendants state that because DOHSA applies to accidents in all waters except U.S. state waters, DOHSA applies to Flight 800 because Flight 800 did not crash in U.S. state waters).

122. *See id.* at *12-15 (concluding that high seas for DOHSA purposes is not limited to one marine league and that Congress did not intend merely to exclude state territorial waters from DOHSA's scope).

123. *See id.* at *8 (explaining that most natural reading of DOHSA is to give high seas independent meaning from marine league).

inconsistency with Section One, which excludes waters within a marine league of the District of Columbia, or the Territories or dependencies of the United States. Section Seven, however, does not name the aforementioned waters, and, therefore, it cannot define all excluded waters.[124] Finally, defendants did not support their contention with an explanation of why Section Seven purportedly repeats what Section One conveyed.[125]

The TWA District Court also stated that the legislative history of DOHSA is consistent with the court's decision that the phrases "high seas" and "beyond one marine league" have independent meanings.[126] In the formulation of the original bill,[127] the U.S. Legislature intended that DOHSA encompass all international and U.S. waters, but, in the final draft of the bill, all states' rights were left unimpaired.[128] The legislative record suggests that when the changes to the draft were discussed, the legislators did not solely have state waters in mind and meant to also exclude territorial waters.[129] The changes in the original and final drafts are evidence that the two phrases have independent meanings, and the court stated that it is hard to believe that the addition of the phrase "beyond one marine league" would alter the intention to give independent meanings.[130]

The District Court also supported its interpretation of the phrase "high seas" by mentioning other instances where "high

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124. *See id.* at *13 (maintaining that DOHSA expressly excludes U.S. federal waters, such as those surrounding territories or dependencies). Since these waters are not mentioned in § 7, this section cannot define all waters not affected by DOHSA. *Id.*

125. *See id.* at *13-14 (explaining that although U.S. Court does not need to adopt alternative explanations, at least one alternative exists that would not lead to redundant results).

126. *See id.* at *15 (stating that "[d]efendants cite no direct legislative history to support their conclusion that 'marine league' defines high seas, or that 'high seas' requirement should be ignored, or that DOHSA should apply within federal territory").

127. *See id.* at *18; *see also* H.R. 15810 (1909); S. 6291 (1910); H.R. 24764 (1912); H.R. 6143 (1913); H.R. 6143 (1915) (applying DOHSA "on the high seas, the Great Lakes, or any navigable waters of the United States").

128. *See In re* Air Crash Off Long Island, New York, On July 17, 1996, 1998 U.S. Dist. LEXIS 8044 at *19-20 (explaining that leaving states' laws unaffected was considered factor as many of House and Senate reports include debates concerning DOHSA's impact on U.S. state laws within U.S. state territories).

129. *See id.* (stating that drafters' focus, as evidenced by entries in legislative record on subject of impact, if any, of DOHSA on U.S. state remedies in U.S. state territorial waters supports inference that this was not drafters' only concern).

130. *See id.* at *20-23 (explaining that "defining high seas flexibly to mean non-sovereign waters is consistent with the common usage of the term at the time DOHSA was enacted, subsequent use of the term, and the legislative history").

seas" had been defined similarly to the court's definition.[131] The District Court cited *United States v. Louisiana*,[132] in which the Court stated that the high seas are outside the territorial waters, and so are international waters not subject to the control of any one nation.[133] The TWA Court also mentioned that their definition is consistent with the 1958 Convention on the High Seas.[134] The Court, additionally, noted that precedent defined the "high seas" similarly.[135]

The TWA Court held that the term "high seas" is flexible and not definitional, and, therefore, changing the boundaries of international waters also alters what the term encompasses.[136] The defendants appealed the District Court's decision to the Second Circuit, challenging the judicial interpretation of the phrase "high seas," and contending that such an interpretation does not align with the intent of Congress in adopting DOHSA.[137] The defendants, believing that the term "high seas" referred to waters beyond three nautical miles, claimed that the judge could not change DOHSA terms to now conform with U.S. President Reagan's Proclamation.[138] The Court of Appeals for the Second Circuit, however, affirmed the District Court's rul-

131. *See id.* at *23 (stating that since DOHSA was enacted and subsequent to its enactment, this definition has prevailed).

132. United States v. Louisiana, 394 U.S. 11, 23 (1907).

133. *See In re* Air Crash off Long Island, New York, On July 17, 1996, 1998 U.S. Dist. LEXIS 8044 at *23 (*citing* United States v. Louisiana, 394 U.S. 11, 23 (1969) and Cove Tankers Corp. v. United Ship Repair, Inc., 683 F.2d 28, 40 & n.1 (2d Cir. 1982)).

134. *See* Convention on the High Seas, Apr. 29, 1958, art. 2, 13 U.N.T.S. 2312, 2314 (maintaining that high seas are all waters of ocean beyond territorial waters).

135. *See In re* Air Crash Off Long Island, New York, On July 17, 1996, 1998 U.S. Dist. LEXIS 8044 at *22 (*citing Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 122-23 (1923) stating that no sovereign has territorial waters on high seas).

136. *See id.* at *30 (stating that outcome would not "'revise, amend, or alter legislation enacted by Congress,' but rather would give it its intended effect").

137. *See In re* Air Crash Off Long Island, New York, On July 17, 1996, 209 F.3d 200 (2nd Cir. 2000) (*affirming* District Court's interpretation of 'high seas').

138. *See* Matthew L. Wald, *Senate Votes to Revise Law that Limits Payments in Air Crashes*, N.Y. TIMES, Mar. 9, 2000, at B9 (stating that change in law is not major concern because there has yet to be finding of willful malfeasance on part of TWA); *see also*, Presidential Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988) (pushing boundary to twelve nautical miles from coast of United States or any territory or possession of United States in 1988); Presidential Proclamation No. 7219, 64 Fed. Reg. 48,701 (Aug. 2, 1999) (furthering boundaries of contiguous zone of United States to 24 nautical miles). The TWA Court did not consider the impact of U.S. President Clinton's Proclamation extending the U.S. boundary to 24 miles, as the TWA 800 incident predated the Proclamation. *See In re* Air Crash Off Long Island, New York, On July 17, 1996, 209 F.3d 200 n.3 (2nd Cir. 2000).

ing, holding that the DOHSA does not apply to federal territorial waters.[139] The Court of Appeals concluded that the plaintiff's interpretation of the statutory language more accurately reflects the meaning and purpose of DOHSA.[140]

B. *International Agreements*

Nations throughout the world and carriers from those nations have put in place various international agreements to provide relief in the event of an aviation disaster.[141] The Warsaw Convention sets forth uniform rules for documentation and for aviation accidents involving international transportation.[142] Under the leadership of the IATA, all U.S. carriers and a majority of non-U.S. carriers voluntarily undertook to waive the US$75,000 limit[143] in a series of agreements known as the 1996 IATA Intercarrier Agreements.[144]

1. Warsaw Convention

The Warsaw Convention of 1929[145] also governs litigation for aviation accidents involving international transportation.[146] The Warsaw Convention became effective in the United States in

139. *See In re Air Crash Off Long Island, New York, On July 17, 1996*, 209 F.3d at 201 (agreeing with District Court that DOHSA does not apply to TWA crash which occurred eight miles off U.S. coast in U.S. territorial waters).

140. *See id.* at 215 (maintaining that intent of U.S. Legislature in 1920 was to draft DOHSA as law that is applicable to incidents occurring in international waters and thus DOHSA applies beyond 12 nautical miles and not to litigation in question); *see also* Wald, *supra* note 138, at 9 (explaining that cause of accident is still under investigation and as of March 2000 there had been no finding of liability against TWA and Boeing manufacturer).

141. *See generally* Warsaw Convention (setting forth documentation requirements and liability system); IATA Intercarrier Agreements, Jan. 8, 1997 (agreeing to waive Warsaw Convention Article 22 limit of liability).

142. *See* Rodriguez, *supra* note 14, at 9 (stating that Warsaw Convention was subject of much criticism in part due to its low limit of carrier liability). *See generally* Warsaw Convention (coming into effect in United States in 1934).

143. *See* Rodriguez, *supra* note 14, at 12 (stating that at 1966 Montreal Convention, carriers agreed only with United States to engage in special contract to raise Article 22 limits to US$75,000 from US$16,600 limit set at 1955 Hague Protocol, and waived Article 22 all necessary measures defense).

144. *See* IATA Intercarrier Agreements, Jan. 8, 1997 (realizing that public perceives Warsaw limit to be too low). Therefore the carriers voluntarily waived limit. *Id.*

145. *See generally* Warsaw Convention (concluded on October 12, 1929 and entered into force February 13, 1933).

146. *See* Warsaw Convention art. 1 (governing international air transportation).

1934.[147] The Warsaw Convention prescribes uniform rules for documentation and for aviation accidents involving international transportation.[148] The Warsaw Convention defines international transportation as transportation involving a departure and destination in the place of two signatory parties, or in the place of one signatory party with a stop in another country.[149]

Article 17 of the Warsaw Convention creates a cause of action for passenger injury or death in aeronautical accidents.[150] Article 17 also begins with the presumption of fault of the carrier, if the plaintiff proves that an accident[151] occurred causing either death or bodily injury to a passenger,[152] while on board or during the embarkation or disembarkation of the aircraft.[153] The carrier is jointly and severally liable for all damages sustained if these prerequisites are met, not withstanding any domestic law that might establish proportionate liability only.[154] Article 17, however, does not determine the damages, but instead refers to domestic law.[155]

Article 22 of the Warsaw Convention places a severe limita-

147. Rodriguez, *supra* note 14, at 9 (discussing initial criticism and shortcomings of original 1929 Warsaw Convention).

148. *Id.* at 9 (noting that if countries of departure and destination are parties to different versions of Warsaw Convention, version that is lowest common denominator applies).

149. *See* Warsaw Convention art. 1 (defining international transportation); Rodriguez, *supra* note 14, at 9 (discussing when Warsaw Convention applies and, when it is applicable, which version is used in litigation). Noting also that the liability system of the Warsaw Convention closely resembles the European civil law system becaues the courts presume the carrier's fault provided that the plaintiff meets the very low threshold of proof. The plaintiff must prove that plaintiff or decedent was injured or killed due to accident that occurred while plane was in-flight or while passenger was embarking or disembarking. *See* Rodriguez, *supra* note 14, at 10.

150. *See* Warsaw Convention art. 17 (listing prerequisites which plaintiff must establish before court will presume carrier's fault).

151. *See* Rodriguez, supra note 14, at 10 (mentioning that older cases which narrowly define accident must be re-examined in light of *El Al Israel Airline v. Tseng*, 525 U.S. 155 (1999), which held that term accident must be liberally construed).

152. *See* Warsaw Convention art. 17; Rodriguez, *supra* note 14, at 10 (stating that U.S. Supreme Court has held that physical injury includes physical injury or physical manifestations of injury but excludes psychic injury).

153. *See id.* (noting difficulty of applying this criteria in reality).

154. Warsaw Convention art. 17 (explaining that carrier is fully liable to passenger, but, pursuant to domestic law, may seek contribution from other tortfeasors).

155. *See* Rodriguez, *supra* note 14, at 10 (noting that if U.S. Second, Eleventh, and District of Columbia Circuit Court of Appeals decisions, which held that Article 17 excludes punitive damages were wrongly decided as some state they were, then availability of punitive damages is also subject to choice of law analysis).

tion on Article 17 damages, which in its original form provided for limited liability up to US$8300.[156] The claimant must prove that the carrier committed willful misconduct or its equivalent fault under domestic law to supersede the limit.[157] Article 22, however, allows the carrier and the passenger to agree to a higher limit of liability.[158]

A carrier may rebut Article 17's presumption of liability with two possible defenses.[159] Under Article 20, the carrier may rebut the presumption of liability by showing that the carrier took all necessary measures to avoid the accident or by proving the impossibility of such measures.[160] Article 21 permits the exoneration of the carrier, in whole or in part, if the passenger is at fault.[161]

In Article 28, the Warsaw Convention specifies where suit may be brought.[162] Articles 28 requires that plaintiff bring suit in a signatory country of the Warsaw Convention.[163] Aside from the requirements set out by the Warsaw Convention, the court must also have personal and subject matter jurisdiction.[164]

Since the inception of the Warsaw Convention, member states have passed subsequent protocols to amend the original

156. Warsaw Convention art. 22 (limiting recovery to US$8300 unless plaintiff can establish willful misconduct in accordance with Article 25).

157. Warsaw Convention art. 25 (requiring that plaintiff prove "willful misconduct" or its equivalent fault under domestic law).

158. *See* Warsaw Convention art. 22 (allowing higher limit of liability by special contract between carrier and passenger).

159. *See* Warsaw Convention art. 20-21 (providing, respectively, that carrier is not presumed to be liable if carrier took all necessary measures, or such measures were impossible to take, or that passenger was at fault).

160. *See* Rodriguez, *supra* note 14, at 11 (explaining how Article 20 has not been a problem for passengers because burden of proof is very high). Carriers voluntarily waived this defense in 1966 Montreal Agreement, however, defense still exists due to 1996 IATA Agreements and 1999 Montreal Convention. *Id.*

161. *See* Rodriguez, *supra* note 14, at 11 (referring to Warsaw Convention Article 21, and stating that passenger fault has rarely been issue in international air crash litigation).

162. Warsaw Convention art. 28 (prescribing that plaintiff must bring suit in nations that (1) carrier has its principle place of business, (2) carrier is incorporated, (3) carrier has place of business through which ticket was purchased, or (4) final destination of ticket is located).

163. Warsaw Convention art. 28 (stating that statute of limitations question shall be governed by court to which case is submitted).

164. Rodriguez *supra* note 14, at 11 (stating that proper treaty jurisdiction is considered prerequisite or non-waivable condition).

treaty.[165] Although over one hundred countries ratified the 1955 Hague Protocol, the United States did not ratify it because of objections to the low limit of airline liability.[166] Instead, the United States entered into a private agreement with non-U.S. and United States air carriers to raise the liability limit to US$75,000.[167] Other protocols, such as the 1971 Guatemala Protocol, never went into effect,[168] while other amendments or protocols, such as the 1975 Montreal Protocol No. 4, have been ratified.[169] Also, during 1999, the International Civil Aviation Organization[170] ("ICAO") held another Montreal Convention[171] ("1999 Montreal Convention") that established an entirely new treaty which hopefully will be in effect by 2001.[172]

a. 1975 Montreal Protocol No. 4

A number of countries and, recently, the United States,[173] have ratified the Montreal Protocol No. 4 ("the Protocol").[174]

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165. *See, e.g.*, Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sep. 28, 1955, 478 U.N.T.S. 371 [hereinafter Hague Protocol]; Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Civil Aeronautics Board Agreement No. 18,900, approved by Exec. Order No. 23,680, 31 Fed. Reg. 7302 (1966) [hereinafter Montreal Agreement].

166. *See* Hague Protocol art. 22 (increasing limit of liability to US$16,600).

167. *See* Rodriguez, *supra* note 14, at 15-16 (describing 1966 Montreal Agreement). The US$75,000 limit includes costs and fees. *Id.*

168. *See* Rodriguez, *supra* note 14, at 9 (explaining that some of protocols were drafted to deal with shortcomings of initial 1929 Montreal Convention).

169. *See* Montreal Protocol No. 4, Sep. 25, 1975 (pertaining to mainly cargo cases); *see also* IATA Intercarrier Agreements, Jan. 8, 1997 (waiving all Warsaw Convention Article 22 limitations of liability for personal injury or death).

170. *See* Rodriguez, *supra* note 14, at n.2 (explaining that International Civil Aviation Organization ("ICAO") is U.N. Agency that develops international air transport standards and regulations for its 185 member states). ICAO also oversees Warsaw Convention and related treaties. *Id.*

171. *See* Rodriguez, *supra* note 14, at 15 (explaining that this agreement is noteworthy because air transportation industry is sole transportation industry that provides for strict liability for 100,000 SDRs and shifts burden to carrier to establish its non-negligence or pay full compensation).

172. *See* Rodriguez, *supra* note 14, at 13-15 (remarking that Montreal Protocol is remarkable and that, although some deterrence is lost because punitive damages are not provided for, plaintiffs are guaranteed full compensation).

173. *See id.* at 13 (stating that Montreal Protocol No. 4 became effective in United States on March 4, 1999).

174. *See* Montreal Protocol No. 4 (adopted Sep. 25, 1975). Countries that ratified Protocol as of December 31, 1999 are Argentina, Australia, Bahrain, Bosnia and Herzegovina, Brazil, Canada, Colombia, Croatia, Democratic Republic of Congo, Denmark, Ecuador, Egypt, Estonia, Ethiopia, Federal Republic of Yugoslavia, Ghana, Greece, Gua-

The Protocol affects reform primarily in cargo cases.[175] The Protocol also binds the United States to the 1955 Hague Protocol amendments to the Warsaw Convention.[176] The Hague Protocol amended Article 25(1) of the Warsaw Convention, which sets forth what conduct or omission of a carrier is sufficient to circumvent the limited liability under Article 22.[177] The Protocol also adopts the Hague Protocol limit of liability of US$16,600.[178]

b. 1999 Montreal Convention

In 1999, ICAO held another Montreal Convention to create a new treaty.[179] The 1999 Montreal Convention destroys the uniformity and liability limits that the Warsaw Convention and the subsequent protocols established.[180] The 1999 Montreal Convention establishes a two-tiered system for the compensation of victims.[181] Article 21 of the 1999 Montreal Convention maintains that a carrier is strictly liable for injury and death up to a limit of 100,000 Special Drawing Rights[182] ("SDRs") which is approximately US$140,000, and for amounts over 100,000 SDRs, the carrier may evade liability if it is able to prove its non-negli-

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temala, Guinea, Honduras, Hungary, Ireland, Israel, Italy, Jordan, Kenya, Kuwait, Mauritius, Naura, Netherlands, New Zealand, Niger, Norway, Oman, Portugal, Singapore, Slovenia, Spain, Sweden, Switzerland, Former Yugoslav Republic of Macedonia, Togo, Turkey, United Kingdom, United States, Uzbekistan, and Venezuela.

175. *See* Rodriguez, *supra* note 14, at 13 (affecting reform particularly in documentation requirements concerning cargo).

176. *See* Blanca I. Rodriguez, *Recent Developments in Aviation Liability Law*, 34 J. AIR L. & COM. 15 (2000) (stating that new Article 25 no longer uses term willful misconduct).

177. *See id.* at 39 (explaining that Article 25 has waned in importance due to IATA Agreements waiving Article 22 and expected ratification of 1999 Montreal Convention, however, Article 25 is still relevant in cargo cases).

178. *See id.* (stating that limit of liability will have no effect in United States because of IATA Intercarrier Agreements in which all U.S. carriers and majority of external carriers have agreed to waive Warsaw limits of liability).

179. *See* Rodriguez, *supra* note 14, at 9 (stating that on May 28, 1999, 52 countries, including United States, signed new convention). ICAO and adopting countries hope that 1999 Montreal Convention will be ratified and in effect by 2001. *Id.*

180. *See id.* at 13 (stating that Article 55 expressly states that "this agreement supersedes Warsaw Convention and its protocols and intercarrier agreements").

181. *See id.* at 14 (explaining that Article 21 supersedes "all necessary measures" defense of Warsaw Convention with requirement that plaintiff prove that damage was not due to negligence or other wrongful act or omission of carrier).

182. *See International Monetary Fund, at* www.mf.org/external/np/tre/sdr/drates/rmcdwn4.htm (defining Special Drawing Rights ("SDRs")). The International Monetary Fund converts SDRs into national currencies based on applicable exchange rate of appropriate currency. *Id.*

gence.[183] Under Article 20 of the 1999 Montreal Agreement, the carrier may also raise the defense of passenger's contributory fault.[184] Article 29 of the 1999 Montreal Convention specifically states that punitive damages are prohibited.[185] Furthermore, Article 33 (1) of the 1999 Montreal Convention provides that a plaintiff may bring an action at the place where the passenger had his or her principal and permanent residence at the time of the accident.[186] A Court, however, only has jurisdiction if the carrier provides service to that location either with its own aircraft or with another carrier's aircraft pursuant to a commercial agreement.[187] At least 30 nations must formally ratify the convention for it to come into effect.[188]

2. International Aviation Transport Association Intercarrier Agreements

Under the leadership of IATA, recognizing that the public perceived the Warsaw Convention limits on liability to be woefully inadequate, airlines voluntarily undertook to waive the US$75,000 limit in a series of agreements known as the 1996 IATA Intercarrier Agreements.[189] All U.S. carriers and a majority of non-U.S. carriers[190] have signed the agreements.[191] The

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183. *See* Montreal Convention art. 21 (allowing carrier to prove either that damage was not due to its own negligence or wrongful act or that third party was solely responsible for damage).

184. *See* Rodriguez, *supra* note 14, at 14 (stating that Article 20 establishes defense which is rarely applicable).

185. *See* Montreal Convention art. 29 (clarifying ambiguity caused by failure of Warsaw Convention to address issue of punitive damages).

186. *See id.* art. 33 (insistance by U.S. Department of Transportation for inclusion of this provision for fifth jurisdiction delayed approval).

187. *See* Rodriguez, *supra* note 14, at 15 (stating that inclusion of this provision addresses inequity of not allowing plaintiff to sue in plaintiff's place of domicile).

188. *See* Rodriguez, *supra* note 176, at 2 (noting that on August 24, 1999, Belize already ratified new convention).

189. *See* Rodriquez, *supra* note 6, at 12 (explaining that these agreements would operate in any country involved in Warsaw System, provided carrier being sued entered into agreements).

190. *See* Rodriguez, *supra* note 176, at app. B (listing the carriers which have signed the IATA Intercarrier Agreements as of June 30, 1999) The IATA signatories are:

> Aer Lingus plc; Aeroflot; Aerolineas Argentinas S.A.; Aeromexpress; Aerovias de Mexico, S.A. de C.V.; Air Afrique; Air Aruba; Air Baltic Corporation SIA; Air Canada; Air China International; Air Excel Commuter; Air France; Air Jamaica Limited; Air Mauritius; Air New Zealand; Air Pacific Limited; Air UK Group Limited; Air Vanuatu; Alaska Airlines; Alitalia; All Nippon Airways Co.,

agreements establish a two tiered system, however, at the outset, the carriers agree to waive all Article 22 limitations of liability for personal injury or death.[192] In the first tier of the agreements, the airlines would be liable for damages up to 100,000 SDRs or approximately US$140,000.[193] Under the second tier, there are no limits, but the airline can invoke the defense under Article 20

Ltd.; Allegheny Airlines, Inc.; America West Airlines, Inc.; American Airlines; American Trans Air, Inc.; Ansett Australia; Asiana; Augsburg Airways GmbH; Austrian Airlines; Avianca; Azerbaijan Hava Yollary; Braathens S.A.F.E.; British Airways p.l.c.; Canadian Airlines International; Cathay Pacific Airways Ltd.; Central Mountain Air Ltd.; China Eastern Airlines, Co., Ltd.; China Southern Airlines Co., Ltd.; Cimber Air A/S; Compagnie Air France Europe; Compania Panamena de Aviacion (COPA); Continental Airlines Inc.; Continental Express; Continental Micronesia; Croatia Airlines; Crossair; CSA—Czech Airlines; Cubana de Aviacion S.A.; Cyprus Airways Ltd.; Delta Air Lines, Inc.; Deutsche BA Luftfahrtgesellschaft mbH; Deutsche Lufthansa AG; Ecuatoriana de Aviacion S.A.; Egyptair; Emirates; Estonian Air; Eurocypria Airlines Ltd.; Eurowings Luftverkehrs AG; Finnair OY; Garuda Indonesia; GB Airways; Hawaiian Airlines; Heli Air AG; Iberia; Icelandair; Interimpex-Avioimpex; JAL Express Co. Ltd.; Japan Air Charter (JAZ); Japan Air System Co., Ltd; Japan Airlines Co., Ltd.; Japan Asia Airways (JAA); Japan TransOcean Co., Ltd.; Jet Airways (India) Pvt Ltd.; Kenya Airways; Kiwi International Air lines; KLM Cityhopper B.V.; KLM Royal Dutch Airlines; Korean Air Lines Co. Ltd.; LanChile; LAPSA Lineas Aereas Paraguayas; Lauda Air Luftfahrt AG; Lithuanian Airlines; LOT Polish Airlines; Luxair; Maersk Air A/S; Maersk Air Ltd.; Malaysia Airlines; Malev-Hungarian Airlines Public Ltd. Co.; Martinair Holland N.V.; Midwest Express Airlines, Inc.; Northwest Airlines, Inc.; Pakistan International Airlines (PIA); PGA Portugalia Airlines; Piedmont Airlines, Inc.; Qantas Airways Limited; Reeve Aleutian Airways, Inc.; Regional Airlines; Royal Air Maroc; Royal Brunei Airlines; SABENA; Saudi Arabian Airlines Corp.; Scandinavian Airlines System (SAS); Singapore Airlines Ltd.; Sobelair; South African Airways; Swissair; TACA; TAP Air Portugal; TAT European Airlines; Thai Airways International; Trans World Airlines Inc. (TWA); Transavia Airlines C.V.; Transbrasil S/A Linhas Aereas; Turk Hava Yollari A.O. (Turkish Airlines); Tyrolean Airways-Tiroler Luftfahrt-AG; United Airlines; UPS Airlines; USAir, Inc.; Varig S.A.; Viacao Aerea Sao Paulo-VASP; VIASA.

Id.

191. *See* Rodriguez, *supra* note 176, at 15 (stating that those carriers who did not sign IATA Intercarrier Agreements are bound by 1966 Montreal Agreement, which raised limit of liability to US$75,000 for any travel stopping, departing, or arriving in United States).

192. *See* Rodriguez, *supra* note 14, at 12 (distinguishing between 1996 Agreement on Measures to Implement IATA Intercarrier Agreements ("MIA") and implementation agreement ("IPA") of United States trade association, Air Transport Association, which was signed by all American carriers). Under first tier, MIA permits carrier to waive Article 20(1) defense for lower amount or on certain routes. *Id.* All American carriers, however, under IPA, must waive Article 20(1) defense for recoveries up to US$140,000. *Id.*

193. Rodriguez, *supra* note 14, at 12 (stating that signatories agreed to waive all defenses allowed under Article 20 (1) of Warsaw Convention).

that it took all necessary measures to avoid the damage or that such measures were impossible to take.[194]

C. *Maritime Common Law*

U.S. Courts have struggled to decipher what law applies in U.S. territorial waters.[195] The U.S. Court in *Moragne v. States Marine Lines* held that general maritime law provides an action for death in territorial waters.[196] The *Moragne* Court's decision, however, does not preclude the application in territorial waters of state law that does not conflict with federal law.[197]

1. The Application of Federal Maritime in *Moragne v. States Marine Lines*

In June of 1970, the U.S. Supreme Court overruled *The Harrisburg* in *Moragne v. States Marine Lines, Inc.*[198] by holding that general maritime law provides an action to recover for wrongful death.[199] The *Moragne* incident allegedly occurred while the deceased worked as a longshoreman aboard a vessel within Florida state waters.[200] The defendants removed the case from Florida state court to the District Court for the Middle District of Flor-

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194. Warsaw Convention art. 20 (by invoking this defense, airline is able to escape liability over US$140,000).

195. *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403, 409 (1970) (overruling *The Harrisburg* and holding that maritime law provides remedy). The Court noted that courts should not lightly overrule past decisions. *Id.*

196. *See id.* (stating that providing remedies for death in U.S. territorial waters under maritime law will create much fewer problems than those created by *The Harrisburg*).

197. *See* Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 215 (1996) (holding that U.S. state law that is not inconsistent with U.S. federal maritime law may be applied where death occurred in U.S. territorial waters).

198. *See Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) (dealing with suit based on negligence and unseaworthiness of vessel in Florida state court to recover damages for wrongful death of her husband).

199. *See id.* at 388-89, 409 (maintaining that remedy does exist, but declining to decide what remedy applies in this situation). The Court cites Lord Atkin's statement in *Rose v. Ford*, 1937 A.C., 826, 848. Lord Atkin stated:

> [I]t is true that no money can be compensation for life or the enjoyment of life, and in that sense it is impossible to fix compensation for the shortening of life. But it is the best the law can do. It would be paradoxical if the law refused to give any compensation at all because none could be adequate.

Id. at 389.

200. *See Moragne*, 398 U.S. at 376 (claiming that relief should be granted on both negligence and unseaworthiness of vessel Palmetto State).

ida, which dismissed the unseaworthiness claims.[201] The U.S. Court of Appeals affirmed, rejecting plaintiff's contention that she was entitled to reversal under federal maritime law.[202] The U.S. Supreme Court reversed and remanded the case,[203] holding that general maritime law permits a claim based on unseaworthiness in the absence of a state statute providing for such a claim.[204] The U.S. Supreme Court answered whether such federal maritime law controls to the exclusion of state law within navigable waters in a later case.[205]

The U.S. Supreme Court read legislative history in a way that suggested that the U.S. Congress, when it adopted DOHSA in 1920, did not intend to rule out a remedy for deaths within navigable waters.[206] The Court believed, rather, that Congress intended to guarantee the continued availability of remedies historically provided by the states, which were often more generous than the remedies provided for by DOHSA.[207] According to the Court, Congress probably did not extend this remedy to navigable waters because of lack of necessity.[208] Furthermore, the

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201. *See id.* at 375-76 (basing removal on diversity of citizenship and subsequently filing third party complaint against decedent's employer Gulf Florida Terminal Company). States Marine Lines claimed that Gulf had contracted to perform stevedoring services on vessel and therefore, Gulf's negligence was cause of accident. The Court dismissed case and relied on *Tungus v. Skovgaard*, 358 U.S. 588 (1959), which held that "where a death on state territorial waters is left remediless by the general maritime law and by federal statutes, a remedy may be provided under any applicable state law giving a right of action for wrongful death without regard to the scope of the state statute."

202. *See* Moragne v. States Marine Lines, 409 F.2d 32 (5th Cir. 1969) (affirming U.S. District Court's order after receiving answer from Florida Supreme Court, Moragne v. States Marine Lines, 211 So. 2d 161 (Fla. 1968), whether Florida state wrongful death statute allowed recovery for unseaworthiness).

203. *See Moragne*, 398 U.S. at 375.

204. *See id.* at 409. Writing for unanimous court, U.S. Justice Harlan stated that "[w]e accordingly overrule The Harrisburg, and hold that an action does lie under general maritime law for death caused by violation of maritime duties."

205. *See* Yamaha Motor Corporation v. Calhoun, 516 U.S. at 201 (involving death of 12 year old girl upon navigable waters of Puerto Rico). U.S. Supreme Court held that state law applied in these circumstances. *Id.*

206. *See Moragne*, 398 U.S. at 397 (analyzing DOHSA in light of state of maritime law in 1920). At that time, U.S. Congress' concern was for lack of remedy for death on high seas. *Id.*

207. *See id.* (interpreting U.S. Congress' sole intention as being to fill void in law where no remedy existed and not wanting to solve this problem while creating another by "inviting the courts to find that the Act preempted the entire field, destroying the state remedies that had previously existed").

208. *See id.* (stating that Congress' "failure to extend the Act to cover such deaths primarily reflected a lack of necessity for coverage by a federal statute, rather than an

Court noted that the U.S. Congress did not want to create confusion regarding preemption of U.S. state laws by DOHSA and disturb the U.S. state remedies, which were more familiar and often more generous than DOHSA remedies.[209]

The *Moragne* Court also stated that the U.S. Supreme Court's decision in *Mahnich v. Southern S.S. Co.*[210] that a shipowner has an absolute duty to provide a seaworthy ship, which is not satisfied by mere due diligence, was a significant change since 1920.[211] The doctrine of unseaworthiness became the principal means for recovery. As a consequence, vast discrepancies arose between the remedies available for DOHSA claims versus those brought under state wrongful death statutes that do not encompass unseaworthiness.[212] The U.S. Supreme Court concluded that Congress could not have foreseen this discrepancy.[213]

The Court went on to state that the drafters of DOHSA did not intend to preclude the application of remedies under general maritime law in situations not covered by DOHSA.[214] The U.S. Supreme Court also overruled *The Harrisburg*.[215] Should the lower courts have to resolve any unaddressed issues, the *Moragne* Court maintained that they can draw analogies from DOHSA and U.S. state wrongful death actions.[216]

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affirmative desire to insulate such deaths from the benefits of any federal remedy that might be available independently of the Act").

209. *See id.* at 397-98 (maintaining that U.S. state remedies in territorial waters were not disturbed by DOHSA and that in certain instances state remedies were often more generous than that provided by Act).

210. Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944).

211. *See Moragne*, 398 U.S. at 399 (explaining that prior to U.S. Supreme Court's decision in *Mahnich*, unseaworthiness was relatively unused because shipowner's duty merely was to use due diligence to provide seaworthy ship).

212. *See id.* at 399-400 (stating that U.S. Congress' desire to leave undisturbed state remedies "cannot be read as an instruction to the federal courts that deaths in territorial waters, caused by breaches of the evolving duty of unseaworthiness, must be *damnum absque injuria* unless the States expand their remedies to match the scope of the federal duty").

213. *See id.* at 399 (stating that U.S. Congress merely intended to leave undisturbed U.S. state remedies that were adequate at time, however, vast discrepancies resulted).

214. *See id.* at 402-03 (stating that refusal of U.S. maritime laws to provide remedy in instances not covered by DOHSA is jurisprudentially unsound, has produced serious confusion, and hardship).

215. *See id.* at 409 (holding that U.S. general maritime law affords remedy for maritime wrongs).

216. *See id.* at 408 (noting that both DOHSA and U.S. state wrongful death remedies have been implemented successfully for decades).

2. The Application of State Law

Twenty-four years after the U.S. Supreme Court decision in *Moragne*, the U.S. Supreme Court decided *Yamaha Motor Corporation v. Lucien B. Calhoun*.[217] The Court interpreted *Moragne* as providing an additional remedy, holding that causes of action for wrongful death, under federal maritime law, do not *per se* displace state remedies.[218] Two years later, the Supreme Court held that there is no admiralty jurisdiction over claims arising from crashes of land-based aircraft, even though they may crash into water.[219] Following the *Yamaha* and the *Executive Jet* decision, the U.S. Court of Appeals for the Sixth Circuit held that the applicable state law conflicted with federal maritime law and cautioned that when courts look to state law to provide recourse, the necessity of a uniform maritime law must always be kept in mind.[220]

a. Yamaha Motor Corporation v. Lucien B. Calhoun

The *Yamaha* case involved Natalie Calhoun, a twelve year old resident of Pennsylvania who was killed while riding a jet ski in Puerto Rico's territorial waters.[221] Yamaha contended that state remedies did not apply because the accident occurred on territorial waters and as a result, judge-made U.S. federal mari-

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217. 516 U.S. 199 (1996) (holding that U.S. state law was not displaced by U.S. federal maritime law where decedent was not seafarer and death occurred in state territorial waters).

218. *See Yamaha*, 516 U.S. at 201-02 (alleging that jet ski was defectively designed or made). Calhouns, who sued Yamaha in District Court for Eastern District of Pennsylvania based on both diversity of citizenship and admiralty, invoked Pennsylvania's wrongful-death and survival statutes. *Id.* at 202. The family claimed several bases for recovery (including negligence, strict liability, and breach of implied warranties) and sought damages for funeral expenses, loss of support and services, and punitive damages. *Id.*

219. *See* Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972) (holding that admiralty jurisdiction did not exist over claims arising from crash of plane departing Cleveland, Ohio, and bound for Portland, Maine, and White Plains, New York, even though plane crashed into Lake Erie). Court stated that locality test is not always appropriate when deciding jurisdictional questions and instead considered whether a relationship existed between the wrong and the maritime service. *Id.* at 261.

220. *See In re* Amtrak "Sunset Limited" Train Crash, on Sept. 22, 1993, 121 F.3d 1421, 1426, 1429 (1997) (stating that state interests must be balanced against federal interests if there is admiralty-state law conflict).

221. *See Yamaha*, 516 U.S. at 201 (involving accident where Natalie Calhoun crashed into vessel off hotel frontage while riding Wavejammer).

time law controlled.[222] Yamaha also argued that the maritime wrongful death action recognized in *Moragne* provided the exclusive remedy[223] and claimed that the family could only recover the cost of the funeral expenses.[224]

The U.S. District Court agreed with Yamaha, holding that the cause of action provided for in *Moragne* displaced U.S. state remedies.[225] The Court, however, held that loss of society and loss of support and services were compensable.[226] The District Court granted Yamaha's request to certify for immediate interlocutory appeal the question of whether plaintiffs should be able to recover for loss of society.[227] Both sides requested permission to appeal.[228] The U.S. Court of Appeals granted the parties requests and consolidated the appeals.[229] The Court of Appeals

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222. *See id.* at 203 (referring to *Moragne*).

223. *See id.* at 203 (displacing all U.S. state law, and thus family could only recover funeral expenses).

224. *See id.* at 203 (arguing that Calhoun's could only recover for funeral expenses, while Calhoun's claimed they were entitled to lost future earnings, loss of society, loss of support and services, funeral expenses, and punitive damages).

225. *See* Calhoun v. Yamaha Motor Corp., U.S.A., No. 90-4295, 1993 U.S. Dist. LEXIS 8267, *23 (E.D. Pa. June 21, 1993) (transcript of bench opinion of Dec. 24, 1992) (stating that recovery for death of person who is not seaman or longshoreman is governed by U.S. uniform federal maritime claim).

226. *See id.* at *29-36 (preserving claim not governed by statute but rather by "judicially architected maritime cause of action").

227. *See* Calhoun v. Yamaha Motor Corp., U.S.A. No. 90-4295, 1993 U.S.Dist. LEXIS 9047, *7-8 (E.D. Pa. Jun. 1, 1993) (granting motion for certification to Court of Appeals portion of December 29, 1992 order denying summary judgment on plaintiff's claim for damages for loss of society). Questions certified were whether, "pursuant to a federal maritime cause of action, plaintiffs may seek to recover (1) damages for the loss of the society of their deceased minor child, (2) damages for the loss of their child's future earnings, and (3) punitive damages." Defendants based their request for interlocutory appeal on 28 U.S.C. § 1292(b).
Section 1292 provides that:

> When a district judge in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals . . . may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order.

Id.

228. *See* Calhoun v. Yamaha Motor Corp., U.S.A., 40 F.3d 622, 625-26 (3rd Cir. 1994) (briefing question of whether U.S. federal maritime law displaces U.S. state wrongful death and survivor statutes).

229. *See Calhoun*, 40 F.3d at 626 (basing jurisdiction on 28 U.S.C.A. § 1292(b)).

questioned the District Court's conclusion that the federal maritime law provided the exclusive basis for recovery.[230] Ultimately, the Court of Appeals ruled that state law remedies apply in this case.[231] The U.S. Supreme Court affirmed the judgment of the Court of Appeals and held that the wrongful death action provided by U.S. federal maritime law does not displace a U.S. state action where the decedent was not a seafarer and the accident occurred in U.S. territorial waters.[232]

Although U.S. state law may not be applied to actions arising from incidents occurring on the high seas, the *Yamaha* Court upheld its application in U.S. territorial waters where state law is consistent with U.S. federal maritime law.[233] *Yamaha* fell within admiralty jurisdiction because it involves a watercraft collision on navigable waters.[234] The existence of admiralty jurisdiction, however, does not *per se* displace state law.[235] The U.S. Court reviewed the history of maritime law for wrongful death and stated that federal admiralty courts allowed recovery under state wrongful death statutes to temper the harshness of the ruling in *The Harrisburg*.[236] The Court went on to note that state statutes that are incompatible with federal maritime law may not be applied. Where the U.S. state wrongful death statutes are compatible with substantive maritime policies, however, the state statutes

230. *See id.* at 630 (stating that determinative issue is whether application of U.S. state law would frustrate substantive admiralty rules set forth in U.S. federal statutes and common law).

231. *See id.* at 643 (seeing no congressional intent to preclude use of state statutes and believing that DOHSA preserves state remedies for death of non-seamen in U.S. territorial waters).

232. *See Yamaha*, 516 U.S. at 215 (holding that Natalie Calhoun's family could obtain relief under U.S. state statutes).

233. *See id.* at 216 (stating that U.S. state statutes may not supplement U.S. federal law where U.S. Congress has legislated, as they did on high seas with enactment of DOHSA). DOHSA, however, by its language in § 7 does not displace state law in territorial waters. *Id.*

234. *See id.* at 206 (*citing Sisson v. Ruby*, 497 U.S. 358, 361-67, 111 L. Ed. 2d 292, 110 S. Ct. 2892 (1990); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 677, 73 L. Ed. 2d 300, 102 S. Ct. 2654 (1982) (stating that prior to *Moragne*, U.S. courts routinely applied U.S. state law in maritime cases).

235. *See id.* (*citing Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 545, 130 L. Ed. 2d 1024, 115 S. Ct 1043 (1995)). The Court, however, questioned whether the U.S. Supreme Court's decision in *Moragne* prohibits this practice.

236. *See id.* (explaining that U.S. courts did not feel free to create judge made federal maritime law when U.S. Congress had not enacted statute and when no country had adopted different law for accidents occurring on sea than it maintained for those over land).

may be extended to fatal accidents in territorial waters.[237]

Until a series of U.S. Supreme Court decisions turned the maritime doctrine of unseaworthiness into a strict liability rule, U.S. state wrongful death statutes complemented federal maritime law.[238] The standard became one of strict liability, and the failure to provide a safe ship resulted in liability irrespective of contributory negligence.[239] The disparity between the maritime strict liability standard and U.S. states' negligence standards, consequently, became apparent as seen in *Moragne*.[240]

In the interests of uniformity, Yamaha contended that state law should not apply.[241] Yamaha argued that *Moragne* stands for the proposition that U.S. courts can only apply U.S. federal maritime law in territorial waters, because the *Moragne* Court intended to create a uniform system.[242] The U.S. Court explained, however, that the uniformity concerns that drove the Court to overrule *The Harrisburg* in *Moragne*, were a different order than the uniformity concerns presented by *Yamaha*.[243] The U.S. Court in *Moragne* was concerned about the availability of unseaworthiness as a basis of liability.[244] The Court, however, did ex-

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237. *See id.* at 207 (stating that subject is maritime and local in character, and extending state remedies to such accidents will not prejudice federal interests).

238. *See id.* at 207-08 (explaining that prior to 1944, plaintiffs rarely argued unseaworthiness doctrine because shipowner's duty at that time was one of due diligence to provide seaworthy ship).

239. *See id.* at 208 (stating that after *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 88 L.Ed. 561, 64 S.Ct. 455 (1944) shipowners had nondelegable duty to provide ship that was reasonably fit for its intended purpose).

240. *See id.* (stating that after *Moragne*, state statutes provided standard of liability as well as corrective standard).

241. *See id.* 209-10 (arguing that *Moragne* creates uniform maritime remedy for all deaths occurring in U.S. territorial waters, and ousts all previously available state remedies).

242. *See id.* at 210-11 (pointing out that uniformity concerns were present in *Moragne* decision).

243. *See id.* at 211-12 (explaining that prior to *Moragne*, anomalies had developed that often prevented dependents of decedents from recovering for deaths caused by unseaworthy vessels).

244. *See id.* (stating that because unseaworthiness had become principal means of recovery, three anomalies resulted which sometimes precluded plaintiff's recovery). The three anomalies are:

> 1) within territorial waters, identical conduct violating federal law produces liability for injury but often not for death, 2) identical conduct violating duty to provide seaworthy ship created liability outside territorial limit, but may not within territorial limit if state wrongful death statute does not extend to unseaworthiness, and 3) seamen were not provided with remedy for death caused by

press concern that state damage awards in maritime wrongful death cases were excessive or that the state afforded remedies threatened to interfere with the uniform operation of maritime law.[245] The *Moragne* Court sought to rectify the lack of uniformity in the extension of relief and not with the remedies provided.[246]

The *Yamaha* Court held that a court cannot provide for additional remedies where the U.S. Congress prescribed a comprehensive tort recovery regime to be uniformly applied.[247] The U.S. Court cannot supplement these damages with those which the Court believes would be better suited.[248] As far as the *Yamaha* Court was concerned, however, Congress has not provided remedies for cases arising from incidents in U.S. territorial waters.[249] The Court thus concluded that the damages available for the death of Natalie Calhoun were provided by U.S. state law.[250]

b. In re Amtrack "Sunset Limited" Train Crash in Bayou Canot, Alabama

In *In re Amtrack "Sunset Limited" Train Crash in Bayou Canot, Alabama,*[251] the U.S. Court of Appeals for the Eleventh Circuit

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unseaworthiness on territorial waters, while longshoremen, who perform work of seamen, were provided remedy when permitted by state law.

Id.

245. *See id.* (explaining that variations between U.S. state and U.S. federal law had long ago been deemed acceptable).

246. *See* Moragne v. States Marine Lines, Inc., 398 U.S. at 387 (citing *The Sea Gull,* 21 F. Cas. 909 (No. 12,578) (Md. 1865) as stating that it is better to give remedy than to withhold it when not prohibited by inflexible rules).

247. *See Yamaha,* 516 U.S. at 215 (stating that "[w]hen Congress has prescribed a comprehensive tort recovery regime to be uniformly applied, there is, we have generally recognized, no cause for enlargement of the damages statutorily provided").

248. *See id.* (stating that DOHSA provides remedy for death on high seas, and may not be supplemented by nonpecuniary damages under U.S. state statutes).

249. *See id.* at 215-16 (referencing DOHSA). DOHSA §767 states:

> The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.

Id.

250. *See Yamaha,* 516 U.S. at 216 (reserving question as to whether Pennsylvania or Puerto Rico law applied and source, U.S. federal or U.S. state, of standards governing liability, as distinguished from rules on remedies).

251. *See In re* Amtrack "Sunset Limited" Train Crash in Bayou Canot, Ala., on Sept. 22, 1993, 121 F.3d 1421, 1422-1423 (11th Cir. 1997) (pertaining to incident in which

interpreted *Yamaha* as allowing for recourse to U.S. state remedies, so long as such relief did not conflict with U.S. federal law.[252] The *Amtrack* Court, however, held that the Alabama law did conflict with U.S. federal maritime law.[253] The *Amtrack* Court cautioned that when U.S. courts look to state law to provide recourse, the necessity of a uniform maritime law must always be kept in mind.[254] The Court noted that the *Yamaha* Court required state law to yield when a court can fashion a uniform system from federal maritime law.[255] In *Amtrack*, the court refused to apply Alabama law[256] which provided for punitive damages on the showing of negligence and prohibited the apportionment of fault and damages among joint tortfeasors.[257] According to the *Amtrack* Court, Alabama law conflicted with

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vessel Mauvilla struck bridge support causing portion of railroad track to become misaligned). Amtrak train descended into bayou as result of misaligned rail. *Id.* at 1423. As result, over one hundred personal injury and wrongful death suits against owner and operator of Mauvilla, pilot and captain of Mauvilla, CSX who was owner and operator of bridge, and Amtrak were filed. *Id.* at 1433.

252. *See id.* at 1424 (explaining that decision recalled that when not prohibited by established rules, it is more humane and liberal to extend remedies rather than to withhold them).

253. *See id.* at 1426 (maintaining that Alabama law conflicts with division of damages between joint tortfeasors and relevant standard of liability for recovery of punitive damages).

254. *See id.* at 1424 (stating court must not apply U.S. state law if opportunity for uniform system is present).

255. *See id.* (maintaining that *Yamaha* Court realized potential for variation in damage awards and deemed them compatible with U.S. federal maritime interests).

256. ALA. CODE § 6-5-410 (1993).

257. ALA. CODE § 6-5-410 (1993) provides in pertinent part:

> (a) A personal representative may commence an action and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama, and not elsewhere, for the wrongful act, omission, or negligence of any person, persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, provided the testator or intestate could have commenced an action for such wrongful act, omission, or negligence if it had not caused death.
>
> (b) Such action shall not abate by the death of the defendant, but may be revived against his personal representative and may be maintained though there has not been prosecution, conviction or acquittal of the defendant for the wrongful act, omission, or negligence.
>
> (c) The damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions.
>
> (d) Such action must be commenced within two years from and after the death of the testator or intestate.

Id.

federal maritime law, which precluded punitive damages unless the defendant acted with wanton or willful misconduct and provided for apportionment of damages among joint tortfeasors.[258] The facts of the *Amtrack* case raised issues traditionally regulated by U.S. maritime law that were commercial in nature, and therefore, U.S. federal law alone could be invoked.[259] The Court held that admiralty law should apply because the U.S. Congress, with the passage of the Admiralty Extension Act,[260] intended that federal admiralty law apply when a vessel and a shore object[261] collide.[262]

c. *Executive Jet Aviation, Inc. v. City of Cleveland*

U.S. maritime law will not necessarily apply when a plane crashes in U.S. state or U.S. navigable waters.[263] In the 1968 incident from which arose *Executive Jet Aviation, Inc. v. City of Cleveland*,[264] a plane crashed into the navigable waters of Lake Erie after hitting a flock of seagulls as it took off.[265] The petitioners claimed that the respondent's negligence caused the crash and, therefore, the case lies within federal admiralty jurisdiction.[266] The U.S. District Court for the Northern District of Ohio, in an unreported decision, dismissed the claim for lack of subject matter jurisdiction.[267]

The District Court applied a two-prong test to determine

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258. *See In re Amtrak*, 121 F.3d at 1425 (noting that Alabama law allows punitive damages on showing of mere negligence).

259. *See id.* at 1424-1425 (contrasting *Yamaha*, which was products liability case arising from recreational jet ski accident).

260. Admiralty Extension Act, 46 U.S.C. app. § 740 (1975) (stating that admiralty remedy is available if vessel on U.S. navigable waters damages fixed structure on land rather than structure on water).

261. *See In re Amtrak*, 121 F.3d at 1427 (providing fixed structures such as bridge as example of shore object).

262. *See id.* (mentioning that before passage of Admiralty Extension Act, U.S. state law governed suits involving ship-to-shore tort claims).

263. *See* Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972) (involving jet owned by petitioners that struck flock of seagulls as it was taking off from Burke Lakefront Airport in Cleveland, Ohio, and crashed into Lake Erie).

264. Executive Jet Aviation, Inc. v. City of Cleveland, 1972 A.M.C. 845, 448 F.2d 151 (6th Cir. 1971), *aff'd* 409 U.S. 249 (1972).

265. *See Executive Jet*, 448 F.2d at 152 (colliding with flock of seagulls while over land, plane suffered substantial loss of power, began to descend and struck perimeter fence and pick-up truck before settling in navigable waters of Lake Erie).

266. *See Executive Jet*, 409 U.S. at 251 (alleging that respondent's negligent failure to keep runway clear of birds caused crash).

267. *See id.* (holding that suit was not cognizable in admiralty).

whether U.S. admiralty jurisdiction existed.[268] The Court held that admiralty jurisdiction over torts may be invoked when the alleged tort occurred on navigable waters and there is a relationship between the alleged tort and some maritime service, navigation, or commerce on navigable waters.[269] Holding that the petitioner's claim satisfied neither of these criteria, the District Court held that because the act of seagulls disabling the engines occurred over land; thus the fact that the plane crashed into navigable waters was fortuitous.[270] The U.S. Court held, alternatively, that the tortious conduct bore no relationship to maritime service, navigation, or commerce.[271] The U.S. Court of Appeals for the Sixth Circuit[272] and the U.S. Supreme Court affirmed.[273] The *Executive Jet* Supreme Court held that in certain circumstances, when deciding whether to apply admiralty law, U.S. courts should determine whether the incident bears a strong relationship to traditional maritime activity rather than just applying the locality test.[274] The U.S. Supreme Court went on to state that the application of the locality test in aviation tort cases causes problems.[275]

The U.S. Supreme Court stated that U.S. courts should look at whether the aviation tort bore a significant relationship to maritime activity, in addition to the locality test of aviation juris-

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268. *See id.* at 251 (relying on U.S. Sixth Circuit precedent of *Chapman v. City of Gross Pointe Farms*, 385 F.2d 962 (1967)).

269. *See id.* at 251-53 (stressing that tort must have been committed entirely upon high seas or navigable waters, or at least consummation of tort must have been on these waters).

270. *See id.* at 251-52 (stating that plane was disabled over land).

271. *See id.* (explaining that alleged wrong of failing to keep runway clear of birds is relevant to all air traffic whether over land or sea). Defendant's alleged negligence, namely maintenance and operation of runway, dealt with land-connected aspect of aviation. *Id.*

272. *See Executive Jet*, 448 F.2d at 154 (affirming on ground that alleged tort occurred on land before airplane reached navigable waters).

273. *See Executive Jet*, 409 U.S. at 274 (holding that, in absence of legislation to contrary, federal admiralty jurisdiction does not exist over flights by land-based aircraft between two points within continental United States).

274. *See id.* at 261 (referring to judicial, legislative, and scholarly recognition, over years, that often relying on relationship of wrong to traditional maritime activity is more sensible and more consistent with purposes of maritime law).

275. *See id.* (stating "[o]ne area in which the locality test of admiralty tort jurisdiction has given rise to serious problems in application is that of aviation . . . we have concluded that maritime locality alone is not sufficient predicate for admiralty jurisdiction in aviation tort cases").

diction.[276] U.S. courts need not decide whether an aviation tort can ever possess a significant relationship to maritime activity; however, the *Executive Jet* Supreme Court did provide some examples in dicta.[277] The *Executive Jet* Court also considered international air commerce factors such as choice of forum problems, choice of law problems, international law problems, and problems involving multi-nation conventions and treaties.[278] In this case, however, the U.S. Court concluded that it could not find any sufficient relationship to maritime activity where a plane was flying almost entirely over land within the continental United States.[279] Although the U.S. Supreme Court stated that actions for aviation accidents should be governed by uniform substantive and procedural laws and heard in the U.S. federal courts, the Court concluded that it would not be sensible to strive for uniformity by upholding U.S. federal jurisdiction in a few truly fortuitous cases.[280] The U.S. Court further stated that the U.S. Congress may legislate to achieve uniformity.[281] Absent legislation, however, the U.S. Court could not uphold U.S. federal admiralty jurisdiction in a case that bore no sufficient relationship to maritime activity.[282]

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276. *See id.* at 270-71 (stating that mere fact that plane goes down over navigable waters is not enough to create relationship to traditional maritime activity). The Court also explained that airplanes operate in totally different element than other forms of transportation, and therefore, place where aircraft goes down may not be enough to confer jurisdiction. *Id.*

277. *See id.* (offering their view that flight departing New York for London that then crashed in middle of Atlantic would bear sufficient relationship to maritime activity because this flight would ordinarily be made by ocean going vessels).

278. *See id.* at 272 (referring to 7A J. MOORE, FEDERAL PRACTICE, Admiralty ¶ 330[5](2d ed. 1972)). The Court quoted:

> Were the maritime law not applicable, it is argued that the recovery would depend upon a confusing consideration of what substantive law to apply, i.e., the law of the forum, the law of the place where each decedent [or injured party] purchased his ticket, the law of the place where the plane took off, or, perhaps, the law of the point of destination.

Id.

279. *See id.* (explaining that petitioners' flight from Cleveland to Portland, Maine, and then to White Plains, New York, would have been almost entirely over land).

280. *See id.* at 273 (explaining that uniformity would "avoid divergent results and duplicitous litigation in multi-party cases").

281. *See id.* at 274 (noting that U.S. Congress is free to litigate under Commerce Clause).

282. *See id.* (stating that DOHSA would be legislation to contrary when accident occurs involving flight such as from New York City to Miami, Florida, which would involve travel over high seas).

II. *RECENT LEGISLATIVE ATTEMPTS AT UNIFORM AND EQUITABLE RELIEF*

Referring to the law regarding maritime and aviation disasters, Andreas F. Lowenfeld quoted Professor Schoenbaum as stating that the result is a conglomeration of wrongful death actions.[283] Lowenfeld stated that the current scheme was not a result of careful consideration, and was not a way to compensate victims of aviation disasters.[284] In his U.S. Congressional testimony, Allen I. Mendelsohn[285] stated that a long term solution U.S. legislators should strive towards is one that treats all maritime and aviation accident victims similarly.[286] In addition to creating a U.S. federal cause of action, Mendelsohn recommended that the U.S. Congress should consider creating a U.S. federal law of damages for both types of transportation disasters that would provide uniformity of law for such an important area.[287] Mendelsohn suggested a federal statute to create a cause of action and provide for jurisdiction of the U.S. federal courts.[288] He sustained that there be no monetary limit on the recoverable damages, and that the U.S. Congress provide a substantive set of rules governing compensation for injury or death.[289] As an interim solution, both the U.S. House of Repre-

283. Lowenfeld Testimony, *supra* note 8, at 428-29 (*quoting* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 465 (2d ed. 1994)).

284. *Id.* at 428-29 (stating that he hopes TWA disaster will "spur Congress now to considered judgment on how to deal with compensation for victims of transportation accidents, or at least air transportation accidents").

285. *Accident Compensation in International Transportation: Hearings on S.943 Before the Senate Comm. on Commerce, Science, and Transportation*, 105th Cong. (1997) (testimony of Allan I. Mendelsohn) (*reprinted in* 63 J. AIR L. & COM. 433 (1997)) [hereinafter Mendelsohn Testimony] (stating that Allen I. Mendelsohn worked in U.S. State Department during mid-1960s in effort to raise liability limits under Warsaw Convention).

286. *See* Mendelsohn Testimony, *supra* note 285, at 439 (believing that U.S. Congress should attempt to obtain this goal by creating ad hoc Joint Committee composed of members of Commerce and Judiciary Committees). The Assignment of the Committee, to be completed within year, would be to draft an comprehensive Interstate and International Transport Accident Act. *Id.*

287. *See id.* (acknowledging that although this goal will not be easy to achieve, its time has come).

288. *See id.* at 434 (stating that, "[a]t best, the statute should include a substantive set of rules governing compensation for injury or death; at least as a minimum, it should contain a choice of law rule looking to the law of the domicile of the victim").

289. *See id.* (believing that victims of aviation disasters should not be treated differently from victims of maritime disasters, and neither should be subject to monetary limit).

sentatives and the U.S. Senate proposed bills,[290] and U.S. President Clinton recently made into law an act[291] providing equitable treatment to the families of passengers killed in aviation disasters.[292]

A. *Proposed Bills*

The U.S. House of Representatives and the U.S. Senate have proposed a number of bills over the last few years to resolve some of the issues presented by the system of recovery.[293] In 1997, the U.S. House proposed House of Representatives 2005 ("H.R. 2005"), which stated that DOHSA was inapplicable to aviation disasters.[294] In the same year, the U.S. Senate proposed Senate 943 ("S. 943"), which also provided that DOHSA did not govern in aviation crashes.[295] The U.S. Senate, in 1999, proposed S. 536 Section 535, which provided for nonpecuniary damages while still maintaining DOHSA.[296]

1. House H.R. 2005

The U.S. House of Representatives attempted to amend DOHSA in 1997.[297] U.S. Representative Joseph M. McDade introduced House Bill 2005, hoping to provide equitable treatment to the families of aviation disaster victims.[298] This bill was

290. *See* H.R. 2005, 105th Cong. (1997); S. 943, 105th Cong. (1997); S. 536, 106th Cong. § 535 (1999).

291. *See* Ford Act, Pub. L. No. 106-181, 114 Stat. 61 (2000).

292. *See* H.R. 2005, 105th Cong. (1997); S. 943, 105th Cong. (1997); S. 536, 106th Cong. § 535 (1999); H.R. 603, 106th Cong.(Mar. 3, 1999); Ford Act, Pub. L. No. 106-181, 114 Stat. 61 (2000) (amending title 49 of United States Code, reauthorizing programs of U.S. Federal Aviation Administration, and amending DOHSA).

293. *See* H.R. 2005, 105th Cong. (1997); S. 943, 105th Cong. (1997); S. 536, 106th Cong. § 535(1999) (attempting to provide equitable treatment, but all falling short of votes necessary to amend DOHSA and become law).

294. *See* H.R. 2005, 105th Cong.(1997) (attempting to provide fairer system of recovery where DOHSA has fallen short).

295. *See Damage Limits for TWA Flight 800 Lawsuits, Hearing of the Senate Commerce, Science and Transportation Committee*, 105th Cong.(1997) (Statement of Sen. Arlen Specter) (noting that DOHSA's reach was not intended by drafters, however, it has not been changed because it has not been focus of attention until TWA Flight 800 disaster). U.S. Sen. Specter noted recent legislative attempts to remedy inequity which application of DOHSA has created. *Id.*

296. *See* S. 536, 106th Cong. (1999).

297. *See* H.R. 2005, 105th Cong. (1997).

298. *See* John Bacon, *Crash Victims' Relatives Could Win Bigger Awards*, USA TODAY, July 29, 1997, at 3A (explaining that under bill, families can obtain rewards if they are not financially dependent on victim).

met with criticism.[299]

a. Summary of H.R. 2005

The U.S. House of Representatives proposed a bill in the 1997 session to clarify the application of DOHSA to aviation incidents.[300] The bill declared that DOHSA does not apply to aviation accidents.[301] The bill provided equitable treatment for the family members of those killed in aviation disasters where DOHSA and the Warsaw Convention fell short.[302] The U.S. House of Representatives passed this bill on July 28, 1997,[303] however, the U.S. Senate did not pass it that term.[304]

b. Critique of House of Representatives 2005

In his testimony before the United States Senate Committee

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299. *See* Mendelsohn Testimony, *supra* note 286 (stating that making DOHSA inapplicable may deprive plaintiffs of their only source of relief).

300. *See* H.R. 2005, 105th Cong. (1997) (clarifying applicability of DOHSA to aviation accidents by amending § 40120(a) of title 49 by inserting, "including the Act entitled 'An Act relating to the maintenance of actions to recover for death on the high seas and other navigable waters,'" approved March 30, 1920, commonly known as the Death on the High Seas Act (46 U.S.C. app. 761-767; 41 Stat. 537-532).

301. *See* Steven Pounian, *TWA 800 and the Death on the High Seas Act*, N.Y.L.J., Aug. 29, 1997, at 3 (stating that pending actions resulting from TWA 800 disaster were expressly covered by bill).

302. The original House Bill 2005 read as follows:

Section 1. Death on the High Seas Act.

Section 40120(c) of title 49, United States Code, is amended to read as follows:

(1) In general. Nothing in this part or the Act entitled 'An Act relating to the maintenance of actions for death on the high seas and other navigable waters' approved March 30, 1920 (46 U.S.C. app. § 761 et seq.), popularly known as the 'Death on the High Seas Act', shall, with respect to any injury or death arising out of any covered aviation incident, affect any remedy —

(A) under common law; or

(B) under State law.

(2) Additional remedies. Any remedy provided for under this part or the Act referred to in paragraph (1) for an injury or death arising out of any covered aviation incident shall be in addition to any of the remedies described in subparagraphs (A) and (B) of paragraph (1).

Covered aviation incident defined. In this subsection, the term 'covered aviation incident' means an aviation disaster occurring on or after January 1, 1995.

Id.

303. *See* Pounian, *supra* note 301, at 3 (stating that after being passed in House of Representatives, Senate will hear bill after summer recess).

304. S. 943 was Senate counterpart to H.R. 2005.

on Commerce, Science, and Transportation, Allan I. Mendelsohn criticized H.R. 2005.[305] He stated that the inapplicability of DOHSA to aviation accidents would leave a gap in the law for accidents over the high seas.[306] Mr. Mendelsohn predicted, furthermore, that what little uniformity there is in aviation law would be diminished if DOHSA is not applicable, and that the courts would struggle for years to determine what law did apply to deaths occurring on the high seas.[307]

Steven R. Pounian,[308] in support of the bill has written that DOHSA should not apply to aviation accidents.[309] He stated that the place of the accident should not govern what relief is available to families of disaster victims.[310] The place of the accident, in Pounian's opinion, should not determine relief, especially in aviation disasters where the location of the accident is fortuitous.[311]

2. Senate 943

In the same term that the U.S. House of Representatives proposed H.R. 2005, the U.S. Senate attempted to pass a similar bill.[312] S. 943 also stated DOHSA was inapplicable to aviation

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305. Mendelsohn Testimony, *supra* note 286, at 433 (stating that H.R. 2005 seeks to provide remedies available under U.S. common law or U.S. state law, however, in fact, it provides remedies under neither of these). Mendelsohn also remarked that H.R. 2005 does not remove any of ambiguities which exist pertaining to DOHSA and aviation accidents.

306. Mendelsohn Testimony, *supra* note 286, at 434-35 (explaining that particularly for U.S. domestic flights beyond U.S. territorial waters, such as flight from Washington D.C. to Miami, families would be deprived of any remedy without DOHSA, unless some other body of law applied).

307. *Id.* at 435 (believing that interim solution is to "leave DOHSA as the basis for jurisdiction, but to make provision for pain and suffering and comparable damages, and, when the Warsaw limits are not applicable, to call for application of the law of the victim's domicile to determine the measure and scope of compensation").

308. *See* Pounian, *supra* note 301, (stating that Steven Pounian, partner at Kriendler & Kriendler, served as member of plaintiffs' committee in TWA 800 disaster case).

309. *See* Pounian, *supra* note 301, at 3 (referring to DOHSA as "one of the last vestiges of the arbitrary geographically oriented lex loci rule").

310. *See id.* (stating that there is no longer any need for DOHSA due to broad changes in law such as erosion of strict application of lex loci rule in 1960s, use of U.S. state wrongful death statutes, *Moragne* Court's recognition of federal common law wrongful death action).

311. *See id.* (stating that happenstance of accident at sea can severely limit recovery for death at sea).

312. S. 943, 105th Cong. (1997) (introduced on June 20, 1997).

accidents.[313] The U.S. Senate bill, like the U.S. House of Representatives bill, was met with much criticism.[314]

a. Summary of S. 943

U.S. Senator Arlen Specter of Pennsylvania introduced the U.S. Senate counterpart, S. 943, to the House of Representatives bill and proposed to clarify the application of DOHSA to aviation accidents by stating that DOHSA does not affect any remedy under U.S. common law or U.S. state law.[315] Much like the House bill, the Senate counterpart provided that DOHSA not apply to aviation disasters.[316] U.S. Senate Bill S. 943 only applied to an aviation disaster occurring on or after January 1, 1995.[317]

b. Critique of Senate 943

U.S. Senate bill S. 943 left a gap where the Warsaw Convention required a domestic law for determining compensation.[318]

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313. *Damage Limits For TWA Flight 800 Lawsuits, Testimony Before the Senate Commerce, Science, and Transportation Committee*, 105th Cong.(1997) (statement of Senator Arlen Specter) (stating bill is directed toward inequitable treatment by giving families of those killed on TWA 800 same remedies they would obtain had crash occurred on land).

314. *Accident Compensation in International Transportation, Testimony Before United States Senate Committee on Commerce, Science, and Transportation*, 105th Cong. 428 (1997) (Statement of Andreas Lowenfeld) (stating that he sympathizes with proponents of amendment, however, he believes it to be deficient).

315. S. 943, 105th Cong. (1997) (leaving unaffected any remedy under U.S. common law and U.S. state law).

316. *See id.* (stating that DOHSA does not affect remedies provided for by common law or state law). S. 943 provides:

> Nothing in this part or the Act entitled 'An Act relating to the maintenance of actions for death on the high seas and other navigable waters' approved March 30, 1920 (46 U.S.C. app. § 761 et seq.), popularly known as the 'Death on the High Seas Act' shall, with respect to any injury or death arising out of any covered aviation incident, affect any remedy —
> (A) under common law; or
> (B) under State law."

Id.

317. *Id.* (clarifying that bill would be applied retroactively).

318. *See* Lowenfeld Testimony, *supra* note 8, at 428-29 (maintaining that DOHSA does serve function and without DOHSA it is unclear what law would apply to aviation accidents over high seas. Lowenfeld states that:

> [T]he void may be deeper than anyone realizes. The problem arises because DOHSA as it presently reads has two functions: (1)it creates a cause of action where it was thought none existed previously; and (2)it specifies the elements of compensation, in ways that most of us consider inadequate. If DOHSA is now made inapplicable to aviation accidents, it is not clear what law would be applicable to support a cause of action for wrongful death.

Andreas Lowenfeld argued before the U.S. Senate Commerce Committee that without DOHSA there would be no certain source of law to provide relief to the families of victims of aviation incidents.[319] Lowenfeld pointed out that general maritime law does not apply under *Zicherman*.[320]

Mr. Andrew Harakas[321] has criticized S. 943.[322] He stated that S. 943 creates a special class of aviation claimants that create other problems.[323] He maintained that under S. 943, claimants would be able to choose among provisions of U.S. state law, U.S. federal common law, and DOHSA to create the most favorable outcome.[324] This situation would lead to significant choice of law problems, excessive damage awards, make pretrial settlement exceptionally difficult, and completely eradicate uniformity.[325] Mr. Harakas believed that DOHSA balances certainty with the need for compensation, while S. 943 would only create years of litigation.[326]

3. Senate 535

In 1999, the U.S. Senate introduced Section 535, which was

Id.

319. *See id.* (maintaining that saying DOHSA does not apply and does not give any guidance as to what law applies). U.S. Congress should give more guidance to avoid unnecessary litigation. *Id.*

320. *See id.* at 428-29 (believing that even if general maritime law is applicable, problems sought to be cured by H.R. 2005 and S. 943 may not be cured).

321. *Damage Limits for TWA Flight 800 Lawsuits, Hearing of the Senate Commerce, Science and Transportation Committee*, 105th Cong. (1997) (Statement of Andrew Harakas). Mr. Harakas is an attorney who practiced aviation law for over 10 years, was involved with cases applying Warsaw Convention and DOHSA, and drafted the defendant's brief in *Zicherman*. *Id.*

322. *See id.* (stating that while S. 943 avoids H.R. 2005 problem of leaving plaintiff without remedy if U.S. state wrongful death statute does not extent to high seas, S. 943 creates other problems).

323. *See id.* at 7(claiming that such expensive remedy is unprecedented under U.S. law).

324. *See id.* at 8 (reminding Committee that primary focus should be on compensation and not punishment). If a problem with DOHSA is its prohibition of pre-death pain and suffering, DOHSA should be amended accordingly rather than prohibited from being used in aviation cases. *Id.*

325. *See id.* (claiming that S. 943 is contrary to U.S. federal policy set forth in U.S. federal statutes of permitting compensation, but not providing opportunity for uncontrolled economic damages).

326. *See id.* (stating that because noneconomic damages are difficult to assess and juries are given little to no guidance, awards may be excessive). Also, if DOHSA is inapplicable to aviation accidents, years of precedent and uniformity will be discarded. *Id.*

part of the larger bill which dealt with numerous aspects of aviation reform.[327] Section 535 amended DOHSA by stating not that it was inapplicable, but rather by providing for remedies in addition to those provided under DOHSA.[328] This bill alleviated the concern that families would have no recourse in Warsaw cases, however, it was not passed.[329]

a. Summary of 535

A revised U.S. Senate bill, which was part of a larger bill commonly referred to as the Wendell H. Ford National Air Transportation System Improvement Act of 1999[330] ("Ford Bill"), included Section 535.[331] The Ford Bill provided for an inflation adjustment and defined nonpecuniary damages as damages for the loss of care, comfort, and companionship.[332] Other nonpecuniary forms of relief such as loss of society, survivor's pain and anguish, and pain and suffering of the victim, would be unavailable.[333] The effective date of the Ford Bill was intended to be July 16, 1996.[334] The most recent draft of Section 535 provided for nonpecuniary damages while still allowing the application of DOHSA to Warsaw cases.[335]

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327. *See* Wendell H. Ford Nat'l Air Transp. Sys. Improvement Act of 1999 ("Ford Bill"), S. 536, 106th Cong. (1999) (introduced in Senate of March 4, 1999, and referred to U.S. Committee on Commerce, Science and Transportation)

328. *See id.* § 535 (b)(3)(providing for recovery of loss of care, comfort and companionship).

329. *See id.* §. 535(b)(1) (alleviating concerns because DOHSA provided substantive law in Warsaw Cases and allowing for recovery of nonpecuniary damages up to limitation of greater of amount recovered for pecuniary loss or US$750,000).

330. *See id.*

331. *See id.* Section 535(b)(1) provides that:

> Commercial Aviation.—
> In general. – If the death was caused during commercial aviation, additional compensation for nonpecuniary damages for wrongful death of a decedent is recoverable in a total amount, for all beneficiaries of that decedent, that shall not exceed the greater of the pecuniary loss sustained or a sum total of $750,000 from all defendants for all claims. Punitive damages are not recoverable.

Id.

332. *See id.* § 535(b)(2)-(3).

333. *See id.* § 535(b)(1), (3) (defining nonpecuniary damages as damages for loss of care, comfort, and companionship and prohibiting punitive damages).

334. *See id.* § 535(c) (applying amendments retroactively).

335. *Id. cf.*, H.R. 603, 106th Cong. (Mar. 3, 1999); *see also* 145 CONG. REC. H. 913 (1999) (passing bill by vote of 412 to 2, House of Representatives proposed, in same

b. Critique of 535

Section 535 differed from both S. 943 and H.R. 2005 by retaining DOHSA as the domestic law to be used in cases governed by the Warsaw Convention, and, in what appears to be a move toward reform, specifically providing for nonpecuniary damages.[336] If willful misconduct is shown and the Warsaw Convention's limit does not apply, Section 535 would amend DOHSA to impose a US$750,000 limit on per-victim recoveries.[337] US$750,000 is a substantially greater sum than that afforded by the Warsaw Convention and the Montreal Protocol of 1999,[338] however, it is much less than the families of passengers killed in aviation crashes would obtain for an incident in U.S. territorial waters.[339] DOHSA as revised by Section 535, would not permit punitive damages, which would further limit a plaintiff's award.[340]

B. *Wendell H. Ford Aviation Investment and Reform Act for the 21st Century*

On April 5, 2000, the Ford Act, a US$40,000,000,000 aviation reform measure became law.[341] The Ford Act, besides providing for a range of measure to improve safety,[342] also amends

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year to amend DOHSA by excluding from its coverage aviation crashes). Senate did not pass H.R. in that term. H.R. 603, read:

> SECTION 1. CLARIFICATION OF AMENDMENT. Section 40120(a) of title 49, United States Code, is amended by inserting "(including the Act entitled 'An Act relating to the maintenance of actions for death on the high seas and other navigable waters', approved March 30, 1920, commonly known as the Death on the High Seas Act (46 U.S.C. app. §§ 761-767))" after "United States."

336. *See* Ford Bill, S. 536, 106th Cong., §535(a)(2), (b)(3).

337. *See id.* § 535(b)(1)(imposing US$75,000 limit). *But see id.* § 535(b)(2) (allowing for adjustment due to inflation beginning in year 2000 according to increase, if any, in Consumer Price Index for all urban consumers).

338. *See* Warsaw Convention art. 22 (limiting liability to US$8300); *see also* Montreal Protocol No. 4 (adopting 1955 Hague Protocol limit of liability of US$16,600).

339. *See, e.g., Aid to Families of Air Crash Victims, Hearing of Senate Commerce, Science, and Transportation Comm.*, 104th Cong. (1996) (Statement of Andrew Harakas) (stating that in New York damages are frequently awarded in hundreds of thousands of U.S. dollars for death of minors and nonwage-earners).

340. *See* Ford Bill, S. 536 § 535(b)(1) (providing for additional compensation for nonpecuniary losses, although punitive damages are expressly prohibited).

341. *See* Ford Act, Pub. L. No. 106-181, 114 Stat. 61 (2000) (providing for increases in government spending on airports by more than US$10,000,000,000 over three years).

342. *See id.* (including provisions for airport improvements and developments).

DOHSA so that DOHSA is inapplicable to aviation accidents occurring in territorial waters.[343] The Act's proponents hailed the Act as good news for the families of victims of the TWA 800 disaster.[344]

1. Summary of The Ford Act

The most recent and successful push for reform occurred on April 5, 2000, when U.S. President Clinton signed the Ford Act.[345] The Ford Act aims to improve aviation safety.[346] The Ford Act increases government spending on airports and air traffic control systems by US$10,000,000,000 over a period of three years.[347] It also increases airline competition and improves safety standards for traveling pets and other animals.[348] The Ford Act, furthermore, amends DOHSA to provide more equitable relief for the families of air crash victims.[349] The Ford Act applies to any death occurring after July 16, 1996.[350]

Although the Ford Act does not completely abolish the ap-

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343. *See id* (stating DOHSA is inapplicable in U.S. territorial waters, however, DOHSA is still applicable on high seas). The amendment, however, does not prohibit recovery of nonpecuniary damages for accidents beyond 12 nautical miles. *Id.*

344. *See* Matthew L. Wald, *Senate Votes to Revise Law That Limits Payments in Air Crashes*, N.Y. TIMES, Mar. 9, 2000, at B9 (referring to bill which was enacted less than month later). Frank Carven, director of TWA Flight 800 Association stated that Ford Act is good news for families of TWA victims. *Id.*

345. *See* Ford Act, Pub. L. No. 106-181, Title IV, § 404(a), 114 Stat. 131 (2000). This amends DOHSA to read in relevant part:

> (b)(1) If the death resulted from a commercial aviation accident occurring on the high seas beyond 12 nautical miles from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, additional compensation for nonpecuniary damages for wrongful death of a decedent is recoverable. Punitive damages are not recoverable.

Id.

346. *See New Aviation Bill Passed in U.S.*, AIRLINE INDUSTRY INFORMATION, Apr. 6, 2000 (stating that safety improvements include lighting and tougher penalties for trafficking bogus aviation parts).

347. *See id.* (aiming to accommodate increase in air travel over next decade from 600,000,000 passengers to more than 1,000,000,000).

348. *See id.* (including mandatory improvements in training in animal care and safe transport techniques). Also, the Ford Act provides for public access to reports on incidents of loss, injury, or death of animals while in airline's control. *Id.*

349. *See* Ford Act, 106 P.L. 181, § 404 (2000) (clarifying that DOHSA is not applicable to accidents within 12 nautical miles of shore and that for accidents beyond 12 nautical miles, nonpecuniary damages are available).

350. *See id.*, § 404(c) (setting effective dates of amendments pertaining to rights of action in commercial aviation accidents and compensation in commercial aviation accidents).

plicability of DOHSA beyond twelve nautical miles, it does allow for nonpecuniary damages.[351] The Ford Act defines nonpecuniary damages as damages for loss of care, comfort, and companionship.[352] It also prohibits punitive damages.[353]

2. Critique of the Ford Act

U.S. Senator John McCain, the Chairman of the Commerce Committee, which had jurisdiction over the Senate bill,[354] expressed his views that the families of aviation accident victims deserve the same respect that those who suffer loss over land receive.[355] Senator McCain remarked that the U.S. Congress has waited too long to address the discrepancy of available remedies for accidents over water as opposed to those over land.[356] According to Senator McCain, the recent aviation disasters highlighted the need for prompt action.[357]

III. *THE FAILURE OF THE CURRENT SYSTEM OF RELIEF AND A PROPOSAL TO PROVIDE LONG AWAITED EQUITABLE RELIEF TO THE FAMILIES OF ACCIDENT VICTIMS*

The current scheme to provide relief has proven itself to be inadequate.[358] U.S. legislation regarding TWA 800 and the recently enacted Ford Act have brought to the forefront the need for reform and change in this area of aviation law.[359] Legislators, consequently, should strive to create a uniformly applied U.S.

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351. *See id.*, 106 P.L. 181, § 404.

352. *Id.*

353. *Id.*

354. S. 2035, 106th Cong. (2000) (stating that DOHSA will not affect any remedy provided by U.S. state law or U.S. common law).

355. *Limits for TWA Flight 800 Lawsuits, Hearings on S.2035 Before the Senate Comm. On Commerce, Science, and Transportation Committee*, 106th Cong. (1997) (statement by U.S. Sen. John McCain) (holding forum where families of victims who died in aviation accidents over water can air their concerns to U.S. Senate Committee in effort to devise system that would provide equitable relief).

356. *See id.* (stating that because of uncertain remedies, it is important that law be amended to treat accident victims and their families more fairly).

357. *Id.* (stating that inequities are obvious, however, appropriate remedies are less certain).

358. *See supra* note 357 and accompanying text (remarking that inadequacies are result of uncertain remedies).

359. *See supra* note 295 and accompanying text (stating how DOHSA has been applied in way not intended by drafters, but has not been changed because it has not been focus of attention until TWA 800 litigation).

federal statute that would provide both pecuniary and nonpecuniary relief.[360]

A. *The Current Legal Scheme To Provide Relief*

From *The Harrisburg* in 1920 to the Ford Act of 2000, aviation law has undergone substantial changes. Generally, these changes have provided victim's families with more just results.[361] The families of victims, however, still face varied outcomes depending upon the situs of the accident[362] and uniformity has proven itself to be an evasive goal.

Reagan's Proclamation appears to have created a gap in the law in the zone between the three nautical mile state boundary and twelve nautical mile U.S. territorial boundary.[363] Prior to Reagan's Proclamation, the state boundary and territorial boundary were one in the same.[364] Until April 5, 2000, DOHSA was the applicable law beyond the twelve nautical mile U.S. territorial boundary.[365] Since DOHSA basically no longer applies to aviation accidents within twelve nautical miles from shore, it appears that all aviation accidents in U.S. territorial waters are governed by general maritime law.[366]

Although the Ford Act, by essentially eliminating DOHSA, is a good first step, uniformity is elusive. Within the three nautical mile zone closest to shore, the courts may apply U.S. state law that is consistent with U.S. federal law, and are faced with the usual conflict of law issues regarding what U.S. state law to ap-

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360. *See supra* note 286 and accompanying text (recommending U.S. federal cause of action and U.S. federal law of damages).

361. *See supra* note 246 and accompanying text (noting how it is better to give remedy than to withhold it).

362. *See supra* notes 10, 11, and 13 and accompanying text (mentioning inequity for victims of aviation disasters over land versus high seas).

363. *See supra* note 8 and accompanying text (referring to area between three and 12 nautical miles as "in between" because of gap created by Reagan's Proclamation).

364. *See supra* note 52 and accompanying text (stating that Submerged Lands Act established three-mile limit as territorial waters of U.S. states).

365. *See supra* note 111 and accompanying text (remarking that DOHSA applies beyond 12 nautical miles as result of Reagan's Proclamation).

366. *See supra* notes 61 and 349 and accompanying text (noting that DOHSA permits personal representatives to maintain action for death caused by wrongful act, neglect or default occurring on high seas beyond marine league). The Ford Act provides that DOHSA does not apply to accidents occurring 12 nautical miles or closer to shore and allows additional compensation for nonpecuniary damages for wrongful death of decedent. *Id.* The Ford Act, however, prohibits punitive damages beyond 12 nautical miles. *Id.*

ply.[367] Between three and twelve nautical miles from the U.S. coast, U.S. general maritime law seems to apply, and where the Congress has not provided for a remedy, courts may also apply state law.[368] Furthermore, the Warsaw Convention is still applicable to international flights and could produce a different result even for victims on each of two colliding planes where one is a domestic flight and the other is an international flight.[369]

U.S. courts deciding cases pertaining to aviation disasters are faced with a difficult task that has been compounded by recent changes in the law. At the present time, the U.S. courts must struggle to interpret both the U.S. Second Circuit TWA decisions[370] and the Ford Act.[371] In the case of an international flight, the courts must overlay the remedies provided by state law, if applicable, and federal maritime law, with the limitations of the Warsaw Convention and, soon, the new Montreal Convention.[372]

B. *Proposal to Create A More Equitable Scheme*

Although no monetary amount can compensate for the loss of a loved one, a victim's family must be provided with some remedy. Monetary compensation is the legally recognized means to accomplish this.[373] Within this flawed system, it is par-

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367. *See supra* note 217 and accompanying text (stating that *Yamaha* preserved application of state statutes to deaths within territorial waters).

368. *See supra* note 209 and accompanying text (concluding that DOHSA should not preclude availability of remedy for wrongful death under general maritime law for crashes in territorial waters).

369. *See supra* notes 146 and 146 and accompanying text (stating that Warsaw Convention governs litigation of aviation accidents involving international transportation). Rodriguez, *supra* note 147 also explains how low liability limits of original 1929 Convention were at complete odds with U.S. tort system.

370. *See supra* note 111 and accompanying text (according to TWA District Court, it appears that *Moragne* controls and U.S. federal maritime law governs for accidents that occur within this gap); *supra* notes 108, 109, and 137 and accompanying text (stating that suits involving TWA Flight 800 are first to involve crash brought within this gap). The U.S. District Court held that courts may not apply DOHSA in deciding suits brought as result of TWA 800, and the Court of Appeals affirmed. *Id.* The District Court, however, has not yet determined what law would actually apply and, consequently, what remedies would be available to plaintiffs. *Id.*

371. *See supra* note 345 and accompanying text (stating that DOHSA does not apply to aviation accidents in U.S. territorial waters and allowing for recovery of nonpecuniary damages for accidents over high seas).

372. *See supra* notes 6 and 180 and accompanying text (explaining nature of Warsaw Convention and 1999 Montreal Convention).

373. *See supra* note 199 and accompanying text (quoting Lord Atkin's statement

ticularly preposterous to base the value of life upon where a plane arbitrarily crashes.[374] While it is true that legal regimes around the world are dependent on geography, three different bodies of law should not govern airplane accidents over water. This distinction seems even more capricious considering the nature of air travel which is unhindered by geographical boundaries and exempt from the navigational rules of maritime travel.[375] A plane, furthermore, travels so quickly over these arbitrary boundaries that they are rendered essentially meaningless, and on the same flight re-cross the territorial limits several times.[376]

A fairer way to administer justice to the families of passengers killed in aviation disasters would be to formulate a comprehensive federal statute.[377] The federal statute would allow for both pecuniary and nonpecuniary damages and specifically define these terms. This federal statute should apply equally to all U.S. carriers, whether or not the particular flight is domestic or international.[378]

CONCLUSION

Over the years, a system of recovery has evolved that has proven itself to be largely inadequate. Strides have been made, especially recently, to provide more uniformity and equitable relief, however, more needs to be done. Although DOHSA is no longer applicable, and maritime law applies in all U.S. territorial waters, state law, with the usual conflict of law issues, applies in U.S. territorial waters when it does not conflict with U.S. federal maritime law. The Warsaw Convention, with its numerous protocols, amendments, and related agreements, also governs disas-

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that monetary system, although inadequate, is best feasible system to provide remedies).

374. *See supra* note 35 and accompanying text (stating that occurrence of accident at sea, as opposed to on land, can sharply limit recovery available to families of disaster victims).

375. *See supra* note 276 and accompanying text (explaining how airplanes operate in totally different element than other forms of transportation).

376. *See supra* note 276 and accompanying text (stating that because of nature of air travel, place where aircraft goes down may not be enough to confer jurisdiction).

377. *See supra* note 286 and accompanying text (stating that Congress should create comprehensive Interstate and International Transport Accident Act).

378. *See supra* note 286 and accompanying text (stating that Congress should create uniform law that applies to interstate and international accidents).

ters involving international flights. This system of relief often provides family members of the decedents with such limited relief, that they are made to feel that the judicial system has deemed the lives of those killed in aviation crashes to be worthless. Families should not be made to feel this way, especially in the wake of a disaster such as a plane crash. Legislation should be created to remedy this situation and to show the families that however inadequate monetary compensation may be, their loved ones lives had value in the eyes of the law.