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**DOHSA'S COMMERCIAL AVIATION EXCEPTION: HOW  
MASS AIRLINE DISASTERS INFLUENCED CONGRESS  
ON COMPENSATION FOR DEATHS ON  
THE HIGH SEAS**

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**I. INTRODUCTION**

**E**IGHTEEN YEARS BEFORE 9/11, there was 9/1—a Cold War event so tragic and catastrophic that, like the attacks on the World Trade Center and the Pentagon by Arab fanatics in the new millennium, it seared itself into the consciousness of three nations.<sup>1</sup> On August 31, 1983, a Boeing 747 aircraft, operated by Korean Air Lines (KAL) and carrying 269 passengers, departed New York City at approximately 11:50 p.m.<sup>2</sup> After a

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<sup>1</sup> Both South Korea and Japan have national memorials for the victims of Korean Air Flight 007, and for many years in the United States, the event was memorialized annually by the families of the American passengers who perished in the attack.

<sup>2</sup> REPORT OF THE COMPLETION OF THE FACT FINDING INVESTIGATION REGARDING THE SHOOTING DOWN OF KOREAN AIR LINES BOEING 747 (FLIGHT KE007) ON AUGUST 31, 1983 4–6 (1993) [hereinafter ICAO FLIGHT 007 REPORT]. See *In re Ko-*

fuel stop in Anchorage, Alaska, the flight would proceed to its final destination, Seoul, Korea, where it would land on September 1, 1983.<sup>3</sup> The pilots, however, inadvertently failed to program the aircraft's inertial navigation system properly.<sup>4</sup> Flying in the dark over the North Pacific at 35,000 feet, the aircraft slowly drifted off course, until it entered Soviet airspace near Sakhalin Island.<sup>5</sup> With the belief that a spy plane was approaching, the Soviet air force scrambled three fighter jets to intercept the wayward aircraft.<sup>6</sup> Within minutes, and without warning, the Soviet jets fired heat-seeking missiles at the aircraft.<sup>7</sup> The exploding missiles damaged the aircraft's hydraulic systems, and shrapnel penetrated the cabin, causing a rapid decompression.<sup>8</sup> The crippled aircraft entered a long, spiraling descent before it slammed into the Sea of Japan and was destroyed.<sup>9</sup> All 269 passengers and crew on board the aircraft perished, including 105 Koreans, 28 Japanese, and 62 Americans.<sup>10</sup>

Although it was impossible to foresee at the time, the KAL Flight 007 disaster would permanently change the body of jurisprudence under the federal maritime wrongful death statute, The Death on the High Seas Act (DOHSA).<sup>11</sup> Not only did the disaster have a significant impact on Cold War relations between the United States and the Soviet Union,<sup>12</sup> it spawned two deci-

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rean Air Lines Disaster of Sept. 1, 1983, 932 F.2d 1475, 1476–77 (D.C. Cir. 1991); *Wylar v. Korean Air Lines Co.*, 928 F.2d 1167, 1169–70 (D.C. 1991).

<sup>3</sup> ICAO FLIGHT 007 REPORT, *supra* note 2, at 4.

<sup>4</sup> *In re Korean Air Lines Disaster*, 932 F.2d at 1476–1477. ICAO FLIGHT 007 REPORT, *supra* note 2, at 59. In 1983, the Global Positioning System was used solely by the military. As a result of the attack on Flight 007, President Ronald Reagan issued an order making GPS available for civilian use. See Wikipedia, *Korean Air Lines Flight 007*, [http://en.wikipedia.org/wiki/Korean\\_Air\\_Lines\\_Flight\\_007](http://en.wikipedia.org/wiki/Korean_Air_Lines_Flight_007) (last visited Feb. 15, 2010).

<sup>5</sup> ICAO FLIGHT 007 REPORT, *supra* note 2, at 59.

<sup>6</sup> See Michael R. Gordon, *Ex-Soviet Pilot Still Insists KAL 007 Was Spying*, N.Y. TIMES, Dec. 9, 1996, at A12, available at <http://www.nytimes.com/1996/12/09/world/ex-soviet-pilot-still-insists-kal-007-was-spying.html?pagewanted=all>; ICAO FLIGHT 007 REPORT, *supra* note 2, at 51.

<sup>7</sup> ICAO FLIGHT 007 REPORT, *supra* note 2, at 33, 35.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1476 (D.C. Cir. 1991).

<sup>11</sup> 46 U.S.C. §§ 30301–30308 (2006) (formerly codified at 46 U.S.C. §§ 761–768 (1926)).

<sup>12</sup> President Ronald Reagan condemned the shootdown as the “Korean airline massacre,” a “crime against humanity [that] must never be forgotten” and an “act of barbarism” and “inhuman brutality.” President Ronald Reagan, Address to the Nation on the Soviet Attack on a Korean Civilian Airliner (Sept. 5, 1983), *availa-*

sions by the U.S. Supreme Court that swept away recovery of non-pecuniary damages in DOHSA cases.<sup>13</sup> Those decisions were handed down in the mid-1990s against the backdrop of another noteworthy mass airline disaster: TWA Flight 800.<sup>14</sup> In response to an outpouring of sympathy for the families of the victims of TWA Flight 800, Congress took up the question of compensation for non-pecuniary damages in cases governed by DOHSA.<sup>15</sup> The result was an amendment to DOHSA known as the "Commercial Aviation Exception," which allows recovery of

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ble at <http://www.reagan.utexas.edu/archives/speeches/1983/90583a.htm>. The incident disrupted a high-level summit in Madrid between Secretary of State George Schultz and Russian Foreign Minister Andrei Gromyko, and the Soviet Union was forced to use its veto to block a United Nations resolution condemning it for shooting down the aircraft. Wikipedia, *Korean Air Lines Flight 007*, *supra* note 4. State legislatures in New York and New Jersey voted to deny landing rights to any Soviet aircraft in violation of international law. *Id.*

<sup>13</sup> *Dooley v. Korean Air Lines Co.*, 524 U.S. 116 (1998); *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217 (1996). Both of these cases were skillfully argued before the U.S. Supreme Court on behalf of KAL by Andrew J. Harakas. *Dooley*, 524 U.S. at 117; *Zicherman*, 516 U.S. at 217. Mr. Harakas is presently a partner in the New York office of Clyde & Co. A third decision by the Supreme Court arising from the KAL Flight 007 disaster involved the effect of the ten-point ticket type requirement contained in the inter-carrier agreement known as the Montreal Agreement. *See Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 123 (1989).

<sup>14</sup> *See generally* NATIONAL TRANSPORTATION SAFETY BOARD, AIRCRAFT ACCIDENT REPORT: IN-FLIGHT BREAKUP OVER THE ATLANTIC OCEAN, TRANS WORLD AIRLINES FLIGHT 800, BOEING 747-131, N93119, NEAR EAST MORICHES, N.Y., JULY 17, 1996 (2000) [hereinafter NTSB FLIGHT 800 REPORT], available at <http://www.nts.gov/Publictn/2000/AAR0003.pdf>.

<sup>15</sup> Three other major air disasters helped to bring issues of wrongful death compensation and assistance to families to the forefront in Congress in the 1990's: (1) Valujet Flight 592, which crashed in the Florida Everglades on May 11, 1996, in which 105 passengers were killed, *see* NATIONAL TRANSPORTATION SAFETY BOARD, AIRCRAFT ACCIDENT REPORT, IN-FLIGHT FIRE AND IMPACT WITH TERRAIN, VALUJET AIRLINES FLIGHT 592, DC-9-32, N904VJ, EVERGLADES, NEAR MIAMI, FLORIDA, MAY 11, 1996 x (1997), available at <http://www.nts.gov/Publictn/1997/AAR9706.pdf>; (2) Swissair Flight 111, which crashed near Peggy's Cove, Nova Scotia on September 2, 1998, in which 215 passengers were killed, *see* TRANSPORTATION SAFETY BOARD OF CANADA, AVIATION INVESTIGATION REPORT, IN-FLIGHT FIRE LEADING TO COLLISION WITH WATER, SWISSAIR FLIGHT 111, A98H0003, available at <http://www.tsb.gc.ca/eng/rapports-reports/aviation/1998/a98h0003/a98h0003.asp>; and (3) Egyptair Flight 990, which crashed near Nantucket Island on October 31, 1999, in which 203 passengers were killed, *see* NATIONAL TRANSPORTATION SAFETY BOARD, AIRCRAFT ACCIDENT BRIEF, EGYPTAIR FLIGHT 990, BOEING 767-366ER, SU-GAP, 60 MILES SOUTH OF NANTUCKET, MASSACHUSETTS, OCTOBER 31, 1999 1-4 (2002), available at <http://www.nts.gov/Publictn/2002/AAB0201.pdf>. *See* H.R. REP. NO. 105-201, at 1-2, 4 (1997); H.R. REP. NO. 106-32, at 1-4 (1999); *In re Air Crash Disaster Near Peggy's Cove*, 210 F. Supp. 2d 570, 583, n.12 (2002).

loss of society damages in actions arising from a "commercial aviation accident."<sup>16</sup>

The purpose of this article is to show how mass airline disasters, beginning with the Soviet shootdown of KAL Flight 007, constituted *the* major influence on Congress in its enactment of the Commercial Aviation Exception, and that the Commercial Aviation Exception was never intended to apply to general aviation cases. The article will provide a brief history of DOHSA, and an analysis of how attempts to circumvent DOHSA's limitations on recoverable damages in the KAL Flight 007 litigation led to two landmark U.S. Supreme Court rulings on non-pecuniary damages.<sup>17</sup> The article will next describe how the explosion of TWA Flight 800 over the waters near Long Island motivated Congress to create a limited exception to the rule against non-pecuniary damages in DOHSA. Finally, the article will address the only two federal district court cases that have, to date, interpreted the Commercial Aviation Exception in the context of general aviation accidents.<sup>18</sup> The article concludes that the only reasonable construction of the Commercial Aviation Exception is that it has no application in wrongful death actions arising from general aviation accidents, but, to the contrary, applies solely to actions arising from commercial airline accidents on the high seas.

## II. A BRIEF HISTORY OF DOHSA

Like the Commercial Aviation Exception, DOHSA itself was a legislative response by Congress to a tragic accident on the high seas.<sup>19</sup> On May 16, 1877, the steamer *Harrisburg* was cruising in the waters of the Nantucket Sound between Massachusetts and the islands of Martha's Vineyard and Nantucket, when it collided with the schooner *Marietta Tilton*.<sup>20</sup> As a result of the collision, the first officer of the *Marietta Tilton*, Silas T. Rickards, drowned at sea.<sup>21</sup> At the time of the accident, the *Harrisburg* was

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<sup>16</sup> 46 U.S.C. § 30307 (2006).

<sup>17</sup> *Dooley*, 524 U.S. 116; *Zicherman*, 516 U.S. 217.

<sup>18</sup> *Eberli v. Cirrus Design Corp.*, 615 F. Supp. 2d 1369 (S.D. Fla. 2009); *Brown v. Eurocopters S.A.*, 111 F. Supp. 2d 859 (S.D. Tex. 2000).

<sup>19</sup> *See generally*, Robert Hughes, *Death Actions in Admiralty*, 31 YALE L.J. 115 (1921).

<sup>20</sup> *The Harrisburg*, 119 U.S. 199, 199 (1886).

<sup>21</sup> *Id.* at 199–201.

engaged in the domestic coasting trade, and was owned by the Port of Philadelphia.<sup>22</sup>

Rickards's widow filed suit in the U.S. District Court for the Eastern District of Pennsylvania on February 25, 1882, nearly five years after the accident.<sup>23</sup> Both Pennsylvania law and Massachusetts law allowed an action for wrongful death, but the statute of limitations under each law was one year.<sup>24</sup> The district court found that the action sounded in admiralty law, that general maritime law applied, that the one year statute of limitations did not bar the action, and that the *Harrisburg* was negligent: "The drowning complained of was caused by the improper navigation, negligence, and fault of the said steamer, producing the collision aforesaid, and the libellants are entitled to recover."<sup>25</sup> Accordingly, the district court issued a judgment against the *Harrisburg* in the amount of \$5,100.<sup>26</sup>

On appeal to the U.S. Supreme Court, the judgment was reversed.<sup>27</sup> In an opinion by Chief Justice Morrison Waite, the Court held that under both the common law<sup>28</sup> and admiralty law "no civil action lies for an injury which results in death."<sup>29</sup> Chief Justice Waite canvassed not only U.S. law, but also the law of foreign nations on this issue:

[W]e know of no country that has adopted a different rule on this subject for the sea[s] from that which it maintains on the land; and the maritime law, as accepted and received by maritime nations generally, leave the matter untouched. It is not mentioned in the laws of Oleron, of Wisbuy, or of the Hanse Towns, (1 Pet. Adm. Dec. Appx.;) nor in the Marine Ordinance of Louis XIV., (2 Pet. Adm. Dec. Appx.;) and the understanding of the leading text writers in this country has been that no such action will lie in the absence of a statute giving a remedy at law for the wrong. Ben. Adm. (2d Ed.) § 309; 2 Pars. Shipp. & Adm. 350; Henry, Adm. Jur. 74.<sup>30</sup>

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<sup>22</sup> *Id.* at 199.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 200.

<sup>25</sup> *Id.* at 204.

<sup>26</sup> *Id.* at 200. This would be approximately \$102,000 today.

<sup>27</sup> *Harrisburg*, 119 U.S. at 214.

<sup>28</sup> For this proposition, the *Harrisburg* court relied on its own decision in *Insurance Co. v. Brame*, 95 U.S. 754 (1877). See *Harrisburg*, 119 U.S. at 204, 213–14.

<sup>29</sup> *Harrisburg*, 119 U.S. at 204–05. This rule was premised on the notion that since a right of action was personal to the victim, the right expired when the victim died. *Id.* at 213.

<sup>30</sup> *Id.* at 213.

On this basis, the *Harrisburg* court concluded that no wrongful death action “will lie in the courts of the United States under the general maritime law,”<sup>31</sup> and the judgment was reversed.<sup>32</sup>

In the years after *The Harrisburg* was decided, several attempts were made by the Maritime Law Association to draft and submit to Congress proposed legislation for a maritime death remedy.<sup>33</sup> During this time, it appears that many maritime law experts were hostile to the holding of *The Harrisburg*.<sup>34</sup> One court noted that “[c]ritics of *The Harrisburg* maintained that the rule of that case had been rejected by ‘[e]very country of western Europe,’ and was a ‘disgrace to a civilized people.’”<sup>35</sup> Although the early efforts to pass a maritime death statute were unsuccessful, renewed efforts started to gain traction in the aftermath of the *Titanic* disaster on April 14–15, 1912, in which 1,517 passengers and crew perished.<sup>36</sup> Ultimately, in 1920, Congress passed the DOHSA legislation, which created an exclusively federal wrongful death action and a comprehensive statutory scheme for compensation in actions arising from deaths on the high seas.<sup>37</sup> The statute was patterned after Lord Campbell’s Act,<sup>38</sup> and it created

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 214. The *Harrisburg* court went on to ask the question whether the lawsuit could be maintained under the laws of Pennsylvania or Massachusetts, but did not reach an answer. “About this we express no opinion, as we are entirely satisfied that this suit was begun too late.” *Id.* at 214.

<sup>33</sup> Hughes, *supra* note 19, at 116–17. See also, *In re Air Crash Off Long Island*, N.Y. on July 17, 1996, 209 F.3d 200, 204 (2d Cir. 2000) and *In re Air Crash Disaster Near Peggy’s Cove*, N.S. on Sept. 2, 1998, 210 F. Supp. 2d 570, 576–78 (E.D. Pa. 2002).

<sup>34</sup> *Long Island*, 209 F.3d at 204.

<sup>35</sup> *Id.*

<sup>36</sup> Hughes, *supra* note 19, at 117; *Long Island*, 209 F.3d at 204; Wikipedia, *RMS Titanic*, <http://en.wikipedia.org/wiki/Titanic> (last visited Feb. 15, 2010).

<sup>37</sup> As one court put it,

[o]riginally, the admiralty, as did the common law Courts, denied a right of action for damages for death on the high seas. However, in 1920, Congress passed the DOHSA permitting the personal representatives of a decedent to institute an action for wrongful death on the high seas. *Since Libellants had nothing before Section One of the DOHSA was passed, Section One gives them all they now have.*

Noel v. United Aircraft Corp., 204 F. Supp. 929, 931 (D. Del. 1962) (emphasis added) (citation omitted).

<sup>38</sup> See Calvert Magruder & Marshall Grout, *Wrongful Death Within The Admiralty Jurisdiction*, 35 YALE L. J. 395, 402 (1926) (quoting Lord Campbell’s Act (1846) 9 & 10 Vict. c. 93). At the time of Lord Campbell’s Act, the common law was in transition from notions of “trespass” to the concept of “negligence.” W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 30 (5th ed. 1984). Certainly product liability theories, such as strict liability, would not emerge for another 100

a maritime negligence action for deaths on the high seas "caused by wrongful act, neglect, or default."<sup>39</sup>

The DOHSA legislation enacted by Congress in 1920 provided, *inter alia*, that: (1) a cause of action exists for the death of a person caused by the wrongful act, neglect, or default, occurring on the high seas;<sup>40</sup> (2) the action may be maintained by the personal representative of the decedent's estate for the exclusive benefit of the decedent's beneficiaries;<sup>41</sup> (3) in situations where the plaintiff is injured, but dies prior to the completion of his lawsuit, the personal representative of the estate may be substituted in and the action may proceed as a DOHSA action;<sup>42</sup> (4) a two year statute of limitations period;<sup>43</sup> (5) provisions governing foreign causes of action;<sup>44</sup> and (6) a bar to contributory negligence as a complete defense.<sup>45</sup> In its original formulation,

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years. *Id.* at 694, (discussing *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (1963) (stating "[t]he first case to apply a tort theory of strict liability generally was *Greenman v. Yuba Power Products, Inc.* in California in 1963")). By 1920, the year DOHSA was enacted, the only cause of action available for recovery of damages arising from a defective product was a common law action for negligence. *Id.* at 682–84 (discussing *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (1916)). Accordingly, it follows that when Congress created DOHSA, it created what was then available under the common law—a cause of action for negligence. See, e.g., *Magruder & Grout*, *supra* note 38, at 423 (stating "it is apparent that the 'wrongful act, neglect or default' referred to in Section 1 of the Federal Act must sometimes be taken to apply to the initial act of *negligence* and sometimes to its result in bringing the fatal force in contact with the victim.") (emphasis added).

<sup>39</sup> 46 U.S.C. § 761 (1926), *recodified* at 46 U.S.C. § 30302 (2006).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* § 765, *recodified* at 46 U.S.C. § 30305.

<sup>43</sup> *Id.* § 763, *repealed* by Pub. L. 96-382, § 2, 94 Stat. 1525 (1980). The two year statute of limitations contained in Section 763 was repealed by Congress on October 6, 1980, at which time a three year statute of limitations went into effect, 46 U.S.C. § 763a, *recodified* at 46 U.S.C. § 30106. See *Friel v. Cessna Aircraft Co.*, 751 F.2d 1037, 1038 (9th Cir. 1985); *Williams v. United States*, 711 F.2d 893, 897, n.5 (9th Cir. 1983).

<sup>44</sup> 46 U.S.C. § 764, *recodified* at 46 U.S.C. § 30306.

<sup>45</sup> *Id.* § 766, *recodified* as 46 U.S.C. § 30304. One court has observed that that "the word 'negligence' appears repeatedly throughout the Committee Reports without mention of theories other than negligence." *Noel v. United Aircraft Corp.*, 204 F. Supp. 929, 933 (1962). Moreover, in Section 766 of DOHSA, Congress specifically provided that "*contributory negligence* of the decedent is not a bar to recovery. The court shall consider the degree of *negligence* of the decedent and reduce the recovery accordingly." 46 U.S.C. § 30304 (emphasis added). It is clear, therefore, from the legislative history of DOHSA, and the terms Congress chose to create the DOHSA cause of action, that it was creating a maritime *negligence* cause of action. Those courts which have concluded that DOHSA allows a theory of liability based on strict liability and breach of warranty are simply



DOHSA limited damages to "fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought,"<sup>46</sup> and punitive damages were—and still are—expressly prohibited.<sup>47</sup> In its deliberations, Congress expressly rejected trial by jury for a DOHSA cause of action, and accordingly all cases governed by DOHSA must be tried to the court sitting without a jury.<sup>48</sup>

As will be seen below, even though the original intent of Congress in enacting DOHSA was to limit recovery to pecuniary damages, attempts to circumvent this limitation in the litigation arising from the KAL Flight 007 shootdown led to two landmark Supreme Court rulings on non-pecuniary damages, *Zicherman* and *Dooley*.<sup>49</sup>

### III. ZICHERMAN AND DOOLEY

In the aftermath of the Flight 007 attack, numerous wrongful death lawsuits were filed across the United States against KAL, Boeing, Litton, Jeppesen, and the United States.<sup>50</sup> The cases, which ultimately grew from 42 filed initially to 190, were consolidated in multi-district proceedings in the U.S. District Court for the District of Columbia.<sup>51</sup> In a series of pre-trial rulings, the district court dismissed plaintiffs' actions against Boeing and Lit-

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wrong, and have impermissibly altered the statutory scheme established by Congress. See, e.g., *Gray v. Lockheed Aeronautical Sys., Co.*, 125 F.3d 1371, 1379–86 (11th Cir. 1997); *Pavrides v. Galveston Yacht Basin, Inc.*, 727 F.2d 330, 338 (5th Cir. 1984); *Lindsay v. McDonnell Douglas Aircraft Corp.*, 460 F.2d 631, 636 (8th Cir. 1972); *Pan-Alaska Fisheries, Inc. v. Marine Const. & Design Co.*, 565 F.2d 1129, 1134–36 (9th Cir. 1977); *Best v. Honeywell, Inc.*, 491 F. Supp. 269, 271 (D. Conn. 1980); *Soileau v. Nicklos Drilling Co.*, 302 F. Supp. 119, 124–27 (D. La. 1969).

<sup>46</sup> 46 U.S.C. § 762, *recodified* at 46 U.S.C. § 30303.

<sup>47</sup> *Id.* at § 762(b)(1), *recodified* at 46 U.S.C. § 30307(b).

<sup>48</sup> *Romero v. Int'l Terminal Op. Co.*, 358 U.S. 354, 371 n.28 (1959); *Tallentire v. Offshore Logistics, Inc.*, 800 F.2d 1390, 1391 (5th Cir. 1986), *rev'd on other grounds*, 477 U.S. 207 (1986). But see text accompanying footnote 36 *infra*.

<sup>49</sup> *Dooley v. Korean Air Lines Co.*, 524 U.S. 116 (1998); *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217 (1996). See generally *Oldahm v. Korean Air Lines Co.*, 127 F.3d 43 (D.C. Cir. 1997); *Bickel v. Korean Air Lines Co.*, 96 F.3d 151 (6th Cir. 1996); *Forman v. Korean Air Lines Co.*, 84 F.3d 446 (D.C. Cir. 1996); *Saavedra v. Korean Air Lines Co.*, 93 F.3d 547 (9th Cir. 1996); *Kole v. Korean Air Lines Co.*, 92 F.3d 1192, 1196 (9th Cir. 1996) (unpublished disposition); *Hollie v. Korean Air Lines Co., Ltd.*, 60 F.3d 90 (2d Cir. 1995); *Alcabasa v. Korean Air Lines Co.*, 62 F.3d 314 (D.C. Cir. 1995).

<sup>50</sup> See *In re Korean Air Lines Disaster of Sept. 1, 1983*, 575 F. Supp. 342, 343 (J.P.M.L. 1983).

<sup>51</sup> *Id.* at 343–44.

ton,<sup>52</sup> Jeppesen,<sup>53</sup> and the United States,<sup>54</sup> and denied KAL's motion for summary judgment on the grounds that there were material issues of fact that required a trial.<sup>55</sup> The parties agreed to a bifurcated proceeding in which liability was tried first, and plaintiffs' case against KAL went to trial before a jury in the District of Columbia on the issue whether KAL had committed "willful misconduct" within the meaning of Article 25 of the Warsaw Convention.<sup>56</sup> On August 2, 1989, the jury rendered a verdict in plaintiffs' favor on the issue of liability, finding that the destruction of KAL Flight 007 was proximately caused by the willful misconduct of the flight crew in allowing the aircraft to stray over Soviet airspace.<sup>57</sup> The jury also awarded \$50 million dollars in punitive damages against KAL.<sup>58</sup> On appeal, the D.C. Circuit Court of Appeals ruled that there was sufficient evidence to uphold the jury's verdict on willful misconduct, but reversed the award of punitive damages.<sup>59</sup> A petition for certiorari to the

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<sup>52</sup> *In re Korean Air Lines Disaster of Sept. 1, 1983*, Misc. No. 83-0345 1985 WL 9447, at \*8 (D.D.C. Aug. 2, 1985).

<sup>53</sup> *In re Korean Air Lines Disaster of Sept. 1, 1983*, 597 F. Supp. 619, 621 (D.D.C. 1984).

<sup>54</sup> *In re Korean Air Lines Disaster of Sept. 1, 1983*, 646 F. Supp. 30, 36 (D.D.C. 1986).

<sup>55</sup> *In re Korean Air Lines Disaster of Sept. 1, 1983*, 704 F. Supp. 1135, 1158 (D.D.C. 1988). The Court also denied KAL's motion to strike plaintiff's jury demand, on the grounds that jury trials are available in Warsaw Convention cases. *Id.* at 1151–58. As discussed *infra* at notes 69–72 and accompanying text, this ruling was probably error under the Supreme Court's analysis in *Zicherman*.

<sup>56</sup> *Dooley v. Korean Air Lines Co.*, 524 U.S. 116, 118 (1998). The formal title of the treaty known as the "Warsaw Convention" is the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *note following* 49 U.S.C. § 40105 (2006) [hereinafter Warsaw Convention]. Under Warsaw Convention Article 25, as supplemented by the inter-carrier agreement known as the Montreal Agreement, Agreement CAB 18900, 31 Fed. Reg. 7302 (1966), KAL's liability was limited to the sum of \$75,000, unless plaintiffs could prove that KAL committed "willful misconduct" within the meaning of Article 25.

<sup>57</sup> *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1476 (D.C. Cir. 1991).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 1475, 1479–1481, 1484–1490. Even though Russian divers had recovered Flight 007's flight data recorder and cockpit voice recorder almost immediately after the crash, both of these were withheld from the official ICAO investigation into the cause of the tragedy. Wikipedia, *Korean Air Lines Flight 007*, *supra* note 4. Accordingly, these crucial pieces of evidence were never admitted into evidence at the liability trial. Subsequently, after the break-up of the Soviet Union, the President of the Russian Federation, Boris Yeltsin, delivered the Flight 007 cockpit voice recorder and flight data recorder to the President of South Korea as a peace offering in October 1992. *Id.* These devices were analyzed by

Supreme Court was denied,<sup>60</sup> and the individual cases were remanded by the Judicial Panel on Multidistrict Litigation to the original transferor courts for trial on damages.<sup>61</sup>

One of the cases that proceeded to a damages trial involved passenger Muriel Kole.<sup>62</sup> Ms. Kole's mother, Marjorie Zicherman, and her sister, Muriel Mahalek, filed their wrongful death action in the U.S. District Court for the Southern District of New York.<sup>63</sup> Plaintiffs argued that, under the Warsaw Convention, KAL was liable for "damage sustained,"<sup>64</sup> that accordingly all damages were recoverable, including loss of society, mental anguish and grief, and the decedent's pre-death pain and suffering.<sup>65</sup> The district court agreed, and allowed plaintiffs to introduce evidence of non-pecuniary damages at trial.<sup>66</sup> The jury returned a verdict for the decedent's sister in the amount of \$251,000, and for decedent's mother in the amount of \$124,000.<sup>67</sup> Included in these verdicts were compensation for loss of society in the amount of \$70,000 to decedent's sister and \$28,000 for decedent's mother.<sup>68</sup>

On appeal, the U.S. Supreme Court reversed.<sup>69</sup> The *Zicherman* court conducted a lengthy analysis of the meaning of Article 17, and held that Article 17 merely established carrier liability under the Warsaw Convention, but left the question of compensable damages to the applicable domestic law of the treaty's contracting States.<sup>70</sup> Under a traditional choice of law analysis, the applicable law in *Zicherman* would be the law of the United States, and there was "little doubt" that the U.S. law gov-

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the ICAO investigators and a report entitled "Report on the Completion of the ICAO Fact-Finding Investigation" was released in June 1993. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 156 F.R.D. 18, 20 (D.D.C. 1994). KAL's subsequent Rule 60(b) motion for relief from the liability judgment based on the ICAO's June 1993 report was denied by the district court. *Id.* at 20, 23.

<sup>60</sup> *Dooley v. Korean Air Lines, Ltd.*, 502 U.S. 994 (1991).

<sup>61</sup> *In re Korean Air Lines Disaster of Sept. 1, 1983*, 156 F.R.D. at 20.

<sup>62</sup> *Zicherman v. Korean Air Lines Co.*, 43 F.3d 18, 20 (2d Cir. 1994).

<sup>63</sup> *Id.*

<sup>64</sup> Article 17 of the Warsaw Convention provides, in pertinent part, that "[t]he carrier shall be liable for *damage sustained* in the event of the death or wounding of a passenger. . . ." Warsaw Convention, *supra* note 56, art. 17 (emphasis added).

<sup>65</sup> *Zicherman*, 43 F.3d at 20.

<sup>66</sup> *Id.* at 20-21.

<sup>67</sup> *Id.* at 20.

<sup>68</sup> *Id.* at 21.

<sup>69</sup> *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 231 (1996).

<sup>70</sup> *Id.* at 223-27.

erning deaths on the high seas was DOHSA.<sup>71</sup> The Court had no difficulty concluding that since DOHSA limited recovery to pecuniary damages, plaintiff was precluded from recovering loss of society damages.<sup>72</sup>

After the Supreme Court handed down *Zicherman*, KAL filed a motion to dismiss all claims for non-pecuniary damages in the multidistrict litigation.<sup>73</sup> Having been foreclosed from recovery of loss of society damages under Warsaw Convention Article 17, plaintiffs resorted to two alternative theories in opposing KAL's motion.<sup>74</sup> First, plaintiffs argued that they should be able to recover survivor's mental anguish and grief under Korean law<sup>75</sup> pursuant to § 764 of DOHSA, which provides that "[w]henever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect or default, occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States."<sup>76</sup> First, Plaintiffs argued that the remedies contained in §§ 761 and 764 were cumulative, and that plaintiffs "are entitled to recover all pecuniary damages allowed by virtue of [§ 761] and in addition any damages allowed by Korean law pursuant to [§ 764]."<sup>77</sup> Second, plaintiffs argued that they should be allowed to supplement a DOHSA cause of action with a general maritime survival action for pre-death pain and suffering.<sup>78</sup> Plaintiffs contended that "their survival claims are distinct from wrongful death claims and are available under general maritime law."<sup>79</sup>

The district court rejected both of these arguments.<sup>80</sup> The court observed that under its choice of law analysis, U.S. law governed damages issues in the litigation and that accordingly, plaintiffs' argument that mental anguish and grief damages were available under Korean law was "irrelevant."<sup>81</sup> Similarly, the district court rejected plaintiffs' argument that the remedies

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<sup>71</sup> *Id.* at 225–26, 229–30.

<sup>72</sup> *Id.* at 230–31.

<sup>73</sup> *In re Korean Air Lines Disaster* of Sept. 1, 1983, 935 F. Supp. 10, 11 (D.D.C. 1996).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> 46 U.S.C. § 764 (1926).

<sup>77</sup> *In re Korean Air Lines Disaster*, 935 F. Supp. at 14 n.2.

<sup>78</sup> *Id.* at 15.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 14–15.

<sup>81</sup> *Id.* at 14 n.2.

in §§ 761 and 764 were “cumulative.” “The court finds that [§ 761] and [§ 764] are mutually exclusive rather than cumulative.”<sup>82</sup> Finally, the district court concluded that a survival cause of action for pre-death pain and suffering under general maritime law was not permitted because “it appears to this Court that with *Zicherman*, the Supreme Court has held that DOHSA provides the exclusive remedy for damages which cannot be supplemented with general maritime principles.”<sup>83</sup> The district court certified its ruling for an interlocutory appeal by plaintiffs, and the D.C. Circuit Court of Appeals unanimously affirmed the district court’s ruling in *Dooley v. Korean Air Lines, Co.*<sup>84</sup>

Plaintiffs successfully petitioned for certiorari to the Supreme Court, where they contended that “because DOHSA is a wrongful-death statute—giving surviving relatives a cause of action for losses *they* suffered as a result of the decedent’s death—it has no bearing on the availability of a survival action.”<sup>85</sup> The *Dooley* court soundly rejected this contention:

We disagree. DOHSA expresses Congress’ judgment that there should be no such cause of action in cases of death on the high seas. By authorizing only certain surviving relatives to recover damages, and by limiting damages to the pecuniary losses sustained by those relatives, Congress provided the exclusive recovery for deaths that occur on the high seas.<sup>86</sup>

Taken together, *Zicherman* and *Dooley* eliminated recovery of any non-pecuniary damages in cases governed by DOHSA. This set the stage for a death compensation dilemma confronting Congress in the aftermath of the TWA Flight 800 catastrophe.

#### IV. TWA FLIGHT 800, THE ZICHERMAN DILEMMA, AND THE COMMERCIAL AVIATION SOLUTION

On July 17, 1996, at approximately 8:30 p.m., a Boeing 747-131 aircraft, operated by Trans World Airlines as TWA Flight 800, departed from John F. Kennedy Airport in New York City for Rome, Italy, with a planned intermediate stop in Paris, France.<sup>87</sup> As the aircraft climbed up over the ocean near Long

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 15.

<sup>84</sup> 117 F.3d 1477, 1478, 1485 (D.C. Cir. 1997).

<sup>85</sup> *Dooley v. Korean Air Lines Co.*, 524 U.S. 116, 121–23 (1998).

<sup>86</sup> *Id.* at 123.

<sup>87</sup> NTSB FLIGHT 800 REPORT, *supra* note 14, at 1. See *Lahr v. NTSB*, 569 F.3d 964, 969 (9th Cir. 2009); *In re Air Crash Off Long Island, New York*, on July 17, 1996, 209 F.3d 200, 201 (2d Cir. 2000).

Island, all radio communications abruptly ceased, and the flight data recorder stopped recording data.<sup>88</sup> The pilot of an Eastwind Airlines Boeing 737 reported seeing TWA Flight 800 suddenly explode, break apart in mid-flight, and crash into the sea.<sup>89</sup> Other witnesses reported that the loud explosion was accompanied by a large fireball over the ocean.<sup>90</sup> All 230 passengers and crew onboard the aircraft perished.<sup>91</sup>

The spectacular destruction of TWA Flight 800 generated intense public interest and speculation.<sup>92</sup> One initial theory was that the crash was caused by a terrorist missile attack.<sup>93</sup> Another theory was that TWA Flight 800 had been brought down by an inadvertent missile strike, possibly from a Navy vessel in the area.<sup>94</sup> Still another theory was that the aircraft was destroyed by a bomb on board the aircraft.<sup>95</sup> In the days that followed the calamity, no one knew what had caused the aircraft to blow-up. Any one of these initial, uncorroborated theories could ultimately prove to be the cause. Accordingly, in addition to the accident investigation conducted by the National Transportation Safety Board (NTSB), the crash precipitated a parallel investigation by the Federal Bureau of Investigation (FBI).<sup>96</sup>

The FBI interviewed more than 700 witnesses in its investigation.<sup>97</sup> The wreckage was carefully analyzed by both NTSB and FBI investigators to determine the sequence of events leading to the catastrophe. After the longest and most extensive accident investigation in aviation history, lasting more than four years, the NTSB dismissed all theories that the aircraft had been attacked, and concluded that the probable cause of the crash was

[a]n explosion of the center wing fuel tank (CWT), resulting from ignition of the flammable fuel/air mixture in the tank. The source of ignition energy for the explosion could not be determined with certainty, but, of the sources evaluated by the investigation, the most likely was a short circuit outside of the CWT

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<sup>88</sup> NTSB FLIGHT 800 REPORT, *supra* note 14, at 2–3.

<sup>89</sup> *Id.* at 243.

<sup>90</sup> *Id.* at 231–32.

<sup>91</sup> *In re Air Crash Off Long Island*, 209 F.3d at 201.

<sup>92</sup> See Wikipedia, TWA Flight 800, [http://en.wikipedia.org/wiki/TWA\\_Flight\\_800](http://en.wikipedia.org/wiki/TWA_Flight_800) (last visited Feb. 15, 2010).

<sup>93</sup> *Lahr v. NTSB*, 569 F.3d 964, 969 (9th Cir. 2009).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> NTSB FLIGHT 800 REPORT, *supra* note 14, at 229–30.

<sup>97</sup> *Id.* at 230.

that allowed excessive voltage to enter it through electrical wiring associated with the fuel quantity indication system.<sup>98</sup>

The TWA Flight 800 tragedy galvanized congressional interest in increased compensation for the families of airline accidents on the high seas.<sup>99</sup> Earlier that year, on January 16, 1996, the Supreme Court had issued its *Zicherman* decision, which, as discussed above, held that in a wrongful death action arising from an international commercial aviation crash on the high seas, no loss of society damages were recoverable.<sup>100</sup> The problem created by the *Zicherman* decision for the families of the TWA Flight 800 passengers was described by Congressman William Shuster of Pennsylvania, who authored the House Report entitled *Non-applicability of Death on the High Seas Act to Aviation Incidents*:

One issue that has arisen, affecting the families of the TWA 800 crash and also an earlier crash, involving Korean Airlines 007, involves the Death on the High Seas Act, 46 U.S.C. 761 et seq. The issue arises because the Supreme Court recently decided, in the case of *Zicherman v. Korean Airlines*, 116 S. Ct. 629 (1996), that the Death on the High Seas Act (DOHSA) applies to lawsuits that arise out of an aircraft crash in the ocean more than a marine league (about 3 miles) from land.

In the *Zicherman* case, the court concluded that Articles 17 and 24(2) of the Warsaw Convention governing international air transportation, Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934) (reprinted in note following 49 U.S.C. App 1502 (1988 ed.)), permit compensation only for a legally recognized harm, but leave the determination of what harm is legally recognizable to the applicable domestic law. The court further concluded that when a plane crashes into the high seas, the applicable domestic law is DOHSA. Under DOHSA, only pecuniary losses are recognized. Therefore, the family of a deceased passenger could recover damages for the wages that the person would have received but not for the pain and suffering of that person or the loss of companionship of their loved one.

The effect of this decision is to treat families differently depending on whether their relative died in an aircraft that crashed

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<sup>98</sup> *Id.* at xvi.

<sup>99</sup> See *In re Air Crash Disaster Near Peggy's Cove*, 210 F. Supp. 2d 570, 583 n.12 (E.D. Pa. 2002) (stating "the impetus to legislate stemmed not from the *TWA Flight 800* [court] decision but from the tragedy itself, as evidenced by the fact that Congressional resolutions on the issue of amending DOHSA were debated as early as 1997, three years before the case was decided." (citations omitted)).

<sup>100</sup> *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 230-31 (1996).

into the ocean or one that crashed into land. If the plane crashes into the ocean, DOHSA applies and the family is entitled only to pecuniary damages. However, if a plane crashes into the land or within 3 miles of land, the applicable State tort law would apply. These generally permit the award of non-pecuniary damages such as loss of companionship.

Given the nature and speed of air travel, it is often a matter of happenstance as to where an aircraft crashes. The result is that a family's rights under the law depend on pure chance. At the Subcommittee's hearing on this issue, parents noted that where DOHSA applied, the life of their child was made to appear practically worthless in the eyes of the law.

The Supreme Court recognized the inequity of this result and stated that "Congress may chose to enact special provisions applicable to Warsaw Convention cases, as some countries have done." The reported bill (H.R. 2005) would do this and in such a way as to ensure that all families would be treated the same regardless of where a plane happened to crash.<sup>101</sup>

In these initial hearings and discussions, Congress's approach to the problem was to make DOHSA inapplicable to airline accidents on the high seas. As Congressman Shuster explained,

[t]he reported bill amends the aviation laws in Title 49 to make clear that DOHSA does not apply in the case of aviation accidents. This change would apply to all pending cases if the court of original jurisdiction had not yet rendered a final decision. It would apply even if the court had rendered a decision on preliminary matters in the case, including the applicability of DOHSA, as long as the court had not rendered a final decision in the case. This change to Title 49 would effectively prevent others similarly situated to the family in the *Zicherman* case from being adversely affected by the decision in that case.<sup>102</sup>

However, this approach was ultimately rejected by Congress in favor of the Commercial Aviation Exception.<sup>103</sup> Congress feared that if it made DOHSA inapplicable to commercial airline accidents on the high seas, courts would be left with "a dizzying array of State, Federal, foreign, or perhaps, no law about which

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<sup>101</sup> H.R. REP. NO. 105-201, at 2-3 (1997); see also *Peggy's Cove*, 210 F. Supp. 2d at 583.

<sup>102</sup> H.R. REP. NO. 105-201, at 3.

<sup>103</sup> See *Peggy's Cove*, 210 F. Supp. 2d at 584 n.13 ("The court notes that the House Resolution for which this report was submitted, to eliminate DOHSA's application to aviation incidents entirely, was ultimately rejected.").



lawyers can fight endlessly, further postponing recovery.”<sup>104</sup> Nevertheless, it is clear from H.R. Rep. 105-201, and from a subsequent House Report entitled *To Clarify the Application of the Act Popularly Known As the “Death on the High Seas Act” to Aviation Incidents* that Congress’s focus was on the families of *commercial airline passengers*: “In the Committee’s view, the reported bill will help to ensure that *families of airline accident victims* will receive fair treatment under the law.”<sup>105</sup> Finally, as if to leave no doubt about its intentions, Congress made the Commercial Aviation Exception retroactive to July 16, 1996, the day before TWA Flight 800 exploded and crashed into the waters off Long Island.<sup>106</sup>

In the legislative history discussed above, there is no mention of any concern by Congress for accidents involving purely private, general aviation aircraft.<sup>107</sup> Indeed, there was no reason for such flights to even be on Congress’s radar screen, since in the 1996–2000 time period (as well as the present time) transoceanic flights by general aviation aircraft were virtually unheard of, unless it was a ferry flight to deliver an aircraft on another continent. Due to the technological limitations of general aviation aircraft, general aviation pilots do not fly passengers from New York to London on demand, because the distances

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<sup>104</sup> 146 CONG. REC. S124—07 (daily ed. Mar. 8, 2000) (statement of Sen. Gorton).

<sup>105</sup> H.R. REP. NO. 105-201, at 3 (1997); H.R. REP. NO. 105-201, at 2 (1999) (emphasis added).

<sup>106</sup> Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181, 114 Stat. 61 (codified as amended in scattered sections of 49 U.S.C.), cited in *In re Air Crash Near Nantucket Island, Mass.* on Oct. 31, 1999, Nos. 00-MD-1344, 01-CV-173, 01-CV-174, 01-CV-176 FB ASC, 2002 WL 32302598, at \*1 (E.D.N.Y. May 23, 2002); *Peggy’s Cove*, 210 F. Supp. 2d at 573–74.

<sup>107</sup> The terms “commercial aviation” and “general aviation” appear to be so widely understood to refer to the domestic and international airline industry that there has never been a need to define them in any statute, as a Westlaw computer search of the United States Code reveals. For example, in one aeronautical dictionary “commercial aviation” is defined as “(i) Aircraft operated by a commercial concern for profit, as distinguished from military or private aviation (ICAO). (ii) The business and activities connected with employing commercial aircraft.” AN ILLUSTRATED DICTIONARY OF AVIATION 162 (2005). “General Aviation” is defined as

[a] term used to describe the total field of aviation operation other than the military and the airlines. General aviation includes business flying (corporate, or executive), agricultural aviation, personal flying for sport or pleasure, flight schools, and flying clubs. The manufacturers of the aircraft and the maintenance facilities that service them are also a part of general aviation.

See DICTIONARY OF AERONAUTICAL TERMS 283 (4th ed. 2006).

are too great and because of the availability of scheduled commercial airline flights on modern jet aircraft. Even for flights undertaken for the purpose of delivering aircraft to another continent, ferry fuel tanks must be installed to carry enough fuel to fly over the vast distances involved in trans-oceanic aviation.

On the contrary, Congress's sole focus in enacting the Commercial Aviation Exception was fair treatment for families of passengers killed in airline crashes on the high seas.<sup>108</sup> As noted by one court,

[i]t is clear from this report [H.R. Rep. 106-32], which distinguishes only "land" and "close to land" from "ocean," that Congress was not concerned with any problem arising from aviation accidents occurring in foreign territorial waters. Instead, Congress was intent on fashioning a uniform remedy "regardless of where a plane happened to crash," focusing upon remedying the disparity between DOHSA actions, which did not allow non-pecuniary damages, and actions under state and maritime law, which did.<sup>109</sup>

## V. DIVERGING INTERPRETATIONS IN THE FEDERAL COURTS

Surprisingly, only two reported federal court decisions have considered the meaning of the term "commercial aviation" since Congress enacted the Commercial Aviation Exception in 2000.<sup>110</sup> *Brown v. Eurocopter S.A.*, decided in 2000, was the first

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<sup>108</sup> H.R. REP. NO. 105-201, at 3.

<sup>109</sup> *Peggy's Cove*, 210 F. Supp. 2d at 583-84.

<sup>110</sup> See *Brown v. Eurocopter S.A.*, 111 F. Supp. 2d 859, 862-63 (S.D. Tex. 2000); see also *Eberli v. Cirrus Design Corp.*, 615 F. Supp. 2d 1369, 1373 (S.D. Fl. 2009). Interestingly, in *Helman v. Alcoa Global Fasteners Inc.*, when addressing what distance from shore DOHSA becomes applicable, the district court refers to 46 U.S.C. § 30307 as the "commercial airlines amendment." *Helman v. Alcoa Global Fasteners*, No. CV 09-1353 SVW, 2009 WL 2058541, at \*3 (C.D. Cal. June 16, 2009). But see *Rowan Co. v. Hudson Helicopters, Inc.*, Nos. 06-10755, 07-3350, 07-3351, 2007 WL 3046207, at \*4 (E.D. La. Oct. 16, 2007).

While [plaintiffs] were involved in a commercial aviation accident that occurred on the high seas [an accident involving a helicopter transporting eight employees], neither man died as a result of the accident. The plain language of the DOHSA amendment illustrates that Congress intended to allow recovery of nonpecuniary damages only where death resulted from a commercial aviation accident. By permitting plaintiffs to recover nonpecuniary damages as a result of being injured in a commercial aviation accident, the Court would be sanctioning a more expansive remedy in a general maritime claim than that remedy granted by Congress in DOHSA.

*Rowan*, 2007 WL 3046207, at \*4.

reported decision to address the meaning of the term “commercial aviation” after the enactment of the Commercial Aviation Exception.<sup>111</sup> The district court held that “commercial aviation” means any flight by anyone in an airplane that has a trade or commercial purpose.<sup>112</sup> Nine years later, the district court in *Eberli v. Cirrus Design Corp.* specifically disagreed with the analysis in *Brown* and declined to follow it.<sup>113</sup> Instead, the *Eberli* court held that the “commercial aviation” exception should apply only in cases involving the types of aviation disasters, such as the crash of TWA flight 800, which motivated Congress to enact the Commercial Aviation Exception.<sup>114</sup>

*Brown* involved the crash of a Eurocopter AS350B2 helicopter during an emergency landing at the High Island A20 platform in the Gulf of Mexico located approximately twenty-five to thirty miles southeast of Galveston, Texas.<sup>115</sup> David Nathan Brown, a commercial helicopter pilot for Petroleum Helicopters, Inc., was flying two platform workers from one fixed platform to another.<sup>116</sup> The flight originated from High Island 446 platform at 3:04 p.m. and was *en route* to its destination of High Island 105 platform.<sup>117</sup> At 3:26 p.m., Mr. Brown reported that the “tail [rotor] gear box chip light [had] illuminated,” and he was experiencing a “very high vibration,” which “settled down a little bit at a slower airspeed.”<sup>118</sup> One minute later, Mr. Brown reported that he was heading towards a platform about 3 miles to his north.<sup>119</sup> At 3:31 p.m., he reported that on his first attempt to land on the High Island A20 platform that he was “not able to control the tail rotor” and that he would try to land one more time.<sup>120</sup> There were no further communications with Mr. Brown.<sup>121</sup>

The helicopter wreckage was located approximately thirty-five feet from the High Island A20 platform in about fifty feet of

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<sup>111</sup> See *Brown*, 111 F. Supp. 2d at 862–64.

<sup>112</sup> *Id.*

<sup>113</sup> *Eberli*, 615 F. Supp. 2d at 1373.

<sup>114</sup> See *id.* at 1374.

<sup>115</sup> *Brown*, 111 F. Supp. 2d at 860.

<sup>116</sup> *Id.*

<sup>117</sup> Factual Report Aviation, National Transportation Safety Board 1 (Nov. 28, 1996), available at <http://www.nts.gov/ntsb/GenPDF.asp?id=FTW97FA051&rpt=fa>.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

water.<sup>122</sup> An examination of the platform revealed no evidence that the helicopter contacted the heliport.<sup>123</sup> However, there was damage to the roof of the platform control shed, located one level below the heliport.<sup>124</sup>

The families of the decedents filed a wrongful death action against the manufacturer of the helicopter in the U.S. District Court for the Southern District of Texas.<sup>125</sup> Plaintiffs' complaint asserted product liability causes of action under Texas state law.<sup>126</sup> When the district court ruled that the action would be governed by DOHSA, plaintiffs argued that the Commercial Aviation Exception should apply and that they should be permitted to recover damages for loss of care, comfort, and companionship.<sup>127</sup> Defendants argued that the Commercial Aviation Exception was inapplicable because Congress did not intend for the phrase "commercial aviation accident" to apply to aviation disasters such as Mr. Brown's fatal helicopter crash.<sup>128</sup> The district court held that the "inescapable conclusion is that Brown's flight falls within the plain meaning of 'commercial aviation accident,' and thus the amended DOHSA provisions are applicable."<sup>129</sup> The district court relied in part on definitions of "commercial," "commercial activity," and "aviation" in reaching its conclusion.<sup>130</sup> Defendants argued for the district court to in-

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<sup>122</sup> *Id.* at 1a.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Brown v. Eurocopters S.A.*, 111 F. Supp. 2d 859, 860 (S.D. Tex. 2000).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 861.

<sup>128</sup> Defendants cited 46 U.S.C. § 30307, which provides that

(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. (2) In this subsection, the term "nonpecuniary damages" means damages for loss of care, comfort, and companionship.

46 U.S.C. § 30307(a)-(c) (2006).

<sup>129</sup> *Brown*, 111 F. Supp. 2d at 862.

<sup>130</sup> *Id.* (stating "[t]he legal dictionary definition of 'commercial' is that which 'relates to or is connected with trade and traffic or commerce in general; is occupied with business or commerce.' BLACK'S LAW DICTIONARY 270 (9th ed. 2004). 'Commercial activities' are defined as 'any type of business or activity which is carried on for a profit.' *Id.* at 38. The term 'aviation' is defined as 'the operation of heavier-than-air aircraft.' WEBSTER'S ELEVENTH NEW COLLEGIATE DICTIONARY 119 (2003).").

interpret “commercial aviation” to mean “regularly scheduled, international jumbo-jet airline service involving tickets and fare paying customers.”<sup>131</sup> The district court rejected defendants’ interpretation holding that:

Defendants can point to nothing in the language or structure of [Commercial Aviation Exception] which reveals a Congressional intent to *restrict* the meaning of “commercial aviation” to this sort of flight. Nor can Defendants point to any aspect of the legislative history which suggests a legislative intent to adopt a more narrow definition of “commercial aviation.” The legislative history clearly reveals an intention to include within the definition accidents involving regularly scheduled, international flights (such as TWA 800), but there is nothing to suggest a desire to restrict the definition beyond what is already implied by the adjectives “commercial” and “aviation.” The Court rejects Defendants’ artificially narrow definition.<sup>132</sup>

The decision in *Brown* is, to say the least, puzzling. Instead of thoroughly analyzing the legislative history of the Commercial Aviation Exception, the district court gave no indication that it even understood it, much less gave it serious consideration. The district court supported its decision with the definitions “commercial” and “commercial activity” from Black’s Law Dictionary, and the definition of “aviation” from Webster’s Dictionary, and relied on language contained in several obscure federal aviation regulations never considered by Congress when enacting the Commercial Aviation Exception.<sup>133</sup> The *Brown* court’s failure to analyze the legislative history of the Commercial Aviation Exception—which as set forth above, tells a compelling story about the origins of the amendment—is inexplicable.<sup>134</sup>

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<sup>131</sup> *Brown*, 111 F. Supp. 2d at 862.

<sup>132</sup> *Id.* at 862–63.

<sup>133</sup> The district court referred to various definitions from the Federal Aviation Regulations (“commercial operator,” “air commerce,” and “on-demand operation”), the Department of the Navy’s definition of “commercial aviation”, and the Internal Revenue Code’s definition of “noncommercial aviation.” *Id.* at 863–64.

<sup>134</sup> The *Brown* decision was authored by Judge Samuel B. Kent, United States District Judge, Southern District of Texas, and was issued in August 2000. Its anomalous nature could possibly be traced to personal difficulties that Judge Kent was experiencing at the time. In an article published in the Wall Street Journal, Judge Kent acknowledged “that after the death of his first wife in 2000, he ‘had a drinking problem’ and sometimes drank during work days. . . .” Peter Lattman, *Embattled Federal Judge Breaks Silence to Houston Chron*, WALL ST. J. L. BLOG (Jan. 14, 2008, 9:05 AM), <http://blogs.wsj.com/law/2008/01/14/embattled-federal-judge-breaks-silence/>; see also H.R. REP. NO. 111-159, at 19–20 (2009). Judge Kent subsequently pled guilty to obstruction of justice and was sentenced

Since the *Brown* decision in 2000, *Eberli* is the only other decision to address the meaning of the terms "commercial aviation."<sup>135</sup> *Eberli* involved the crash of a single-engine, Cirrus SR20 aircraft into the Labrador Sea off the coast of Greenland.<sup>136</sup> Fritz Ernest Schoder, a licensed commercial pilot, was ferrying the aircraft for delivery to Royal Airport Services Co., Ltd. in Thailand.<sup>137</sup> Mr. Schoder's aircraft was accompanied by two other Cirrus SR20 aircraft as part of a three aircraft ferry mission.<sup>138</sup> On February 2, 2007, at 2:05 p.m., the three aircraft departed Goose Bay Airport in Labrador, Canada with a planned stop in Reykjavik, Iceland.<sup>139</sup> Due to deteriorating weather conditions, the pilots decided to divert to Narsaruaq, Greenland. Approximately eighty nautical miles from Simiutaq, Greenland, Mr. Schoder reported to the other two pilots that there was an indication of fluctuating oil pressure, but the oil temperature was not increasing, and the engine sounded normal.<sup>140</sup>

The three aircraft continued towards Simiutaq.<sup>141</sup> A short while later, Mr. Schoder reported to the other pilots that the oil temperature suddenly increased and then returned to normal.<sup>142</sup> At 5:29 p.m., Mr. Schoder advised Sondrestrom FIC that he might have to declare an emergency due to low oil pressure.<sup>143</sup> About twenty minutes later, Mr. Schoder declared an

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to 33 months in prison for lying to investigators about sexually abusing two female employees. *Impeach Judge Kent*, WASH. POST, June 9, 2009, at A18. Judge Kent's lawyer, Dick DeGuerin, said in connection with the sentencing that his client deserved some mercy: "The truth is he's been a walking basket case for several years. He's not the same man since his first wife died in 2000." *Id.* Because Judge Kent did not immediately resign upon his conviction, the House of Representatives voted unanimously to impeach him. Subsequently, Judge Kent submitted his resignation and is now serving his sentence. See generally James C. McKinley, *Judge Sentenced to Prison for Lying About Harassment*, N.Y. TIMES, May 12, 2009, at A15; Chris Paschenko, *Congress Wrapping Up Business on Kent*, GALVESTON COUNTY DAILY NEWS, July 22, 2009, <http://galvestondailynews.com/story.lasso?ewkd=37381edd02c65112>.

<sup>135</sup> See *Eberli v. Cirrus Design Corp.*, 615 F. Supp. 2d 1369, 1372–73 (S.D. Tex. 2000).

<sup>136</sup> See *id.* at 1372–73.

<sup>137</sup> *Id.*

<sup>138</sup> Final Report, Accident Investigation Board Denmark, HCLJ510-000330 Accident 1 (Feb. 2, 2000), available at <http://www.hd.dk/graphics/SynkronLibrary/hd/dokumenter/Redegorelsar/2007/510-000330.pdf>.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 2.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

emergency and reported his position as approximately fifty nautical miles from Simiutaq.<sup>144</sup> At 6:00 p.m., Mr. Schoder reported that he was getting ready to ditch and was putting on his survival suit. He successfully ditched the aircraft at approximately 6:11 p.m.; however, due to the lack of an adequate survival suit providing insulation and flotation, Mr. Schoder perished in the frigid waters of the Labrador Sea.<sup>145</sup> A rescue helicopter dispatched from Niaqornaq, Greenland, located the ditched aircraft. Mr. Schoder's body was found floating near the open cabin door.<sup>146</sup> By the time Mr. Schoder's body was recovered several hours later, the aircraft had sunk and was never recovered.<sup>147</sup>

Mr. Schoder's widow filed a wrongful death action against the aircraft manufacturer, Cirrus Design Corporation, and the aircraft engine manufacturer, Teledyne Continental Motors, in the U.S. District Court for the Southern District of Florida alleging product liability causes of action under Florida state law.<sup>148</sup> The district court held, however, that plaintiff's action was governed by DOHSA.<sup>149</sup> As a result, plaintiff argued that because Mr. Schoder was ferrying an aircraft as part of a commercial activity carried out for profit and related to commerce, the accident qualified as "commercial aviation accident" under DOHSA's Commercial Aviation Exception.<sup>150</sup> Defendants argued that the Commercial Aviation Exception had no application to an accident involving the ferrying of a general aviation aircraft.<sup>151</sup>

The district court began its analysis by noting that the phrase "commercial aviation accident" was ambiguous because it gave rise to at least two different interpretations.<sup>152</sup> The phrase could either be (1) an accident that occurs during the course of aviation involving commerce (as plaintiff argued relying on the

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 3.

<sup>146</sup> *Id.* at 10.

<sup>147</sup> *Id.* at 1.

<sup>148</sup> *See Eberli v. Cirrus Design Corp.*, 615 F. Supp. 2d 1369, 1369 (S.D. Tex. 2000).

<sup>149</sup> *See id.*

<sup>150</sup> *Id.* at 1372 (stating "[s]ection 30307(b) states: In an action under this chapter, if the death resulted from a commercial aviation accident occurring on the high seas beyond 12 nautical miles from the shore of the United States, additional compensation is recoverable for nonpecuniary damages, but punitive damages are not recoverable." 46 U.S.C. § 30307(b) (2006)).

<sup>151</sup> *See id.* at 1372.

<sup>152</sup> *Id.* at 1372-73.

*Brown* decision) or (2) an accident that occurs during the transportation of passengers or cargo for commercial purposes (as defendants argued).<sup>153</sup> Based on the Operating Limitations of the Certificate of Airworthiness for the aircraft<sup>154</sup> and the legislative history of the amendment to DOHSA, the district court held that Mr. Schoder's death during the ferrying of the subject aircraft fell outside the scope of "commercial aviation accident" and therefore the Commercial Aviation Exception was inapplicable.<sup>155</sup>

Unlike the district court in *Brown*, the *Eberli* court specifically considered the legislative history of the Commercial Aviation Exception:

Finally, a review of the legislative history of the statute supports the Court's interpretation of the statute. There appears to be general agreement that the [Commercial Aviation Exception] was enacted in the aftermath of a number of international air disasters and the lawsuits arising out of such air disasters, in which the families of the victims were denied loss of society damages under DOHSA. Recognizing the unfairness of allowing or denying the families of airline passengers nonpecuniary damages solely on the basis of where the crash occurred, Congress acted to "ensure that all families would be treated the same regardless of where a plane happened to crash."<sup>156</sup>

Relying on language in the House Reports, plaintiff attempted to argue that the impetus behind the enactment of the Commercial Aviation Exception was to establish similar treat-

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<sup>153</sup> *Id.* at 1373.

<sup>154</sup> The district court noted that the section of the transportation code that delineates when an aircraft is engaged in commercial or public flight operations defines "commercial purposes" as "the transportation of person or property for compensation or hire." *Id.* at 1373 (citing 49 U.S.C. § 40125). The subject aircraft Certificate of Airworthiness specified that "no person may operate this aircraft for carrying passengers or property for compensation or hire." *See id.* Likewise, the court rejected plaintiff's argument that Mr. Schoder was a "commercial operator" as defined under the FAR because "Mr. Schoder was carrying property—the aircraft itself—for compensation as part of his ferrying business, and that he, therefore, was a commercial operator engaged in commercial aviation." *Id.* The court stated that it "does not see how the subject aircraft could qualify as 'property' for purpose of the FAR, considering that the Operating Limitations, which were written with Mr. Schoder's ferrying operation in mind, specifically state that the aircraft cannot be operated to carry property." *Id.*

<sup>155</sup> *See id.*

<sup>156</sup> *Id.* at 1373–74 (quoting H.R. REP. NO. 105-201, at 2).



ment of the families of *all* air crash victims.<sup>157</sup> The district court dismissed this argument, stating that

[p]laintiff seizes upon the language in the House Reports that laments how families of air crash victims were treated differently prior to the enactment of section 30307 based on the location of the crash. However, were it true that this concern—that the families of all air crash victims should be treated the same—was the driving force behind section 30307, the statute would have made nonpecuniary damages recoverable under DOHSA for all aviation-related accidents. The fact that Congress limited the scope of section 30307 to “commercial aviation accidents” leads this Court to believe that Congress wanted the statute to apply only in cases involving the types of aviation disasters, such as the crash of TWA flight 800, that motivated Congress to enact section 30307.”<sup>158</sup>

The *Eberli* court concluded that in enacting the Commercial Aviation Exception, Congress had no intention that the statute should be applied to accidents involving the ferrying of general aviation aircraft.<sup>159</sup>

## VI. CONCLUSION

The Commercial Aviation Exception was enacted by Congress in response to a series of commercial airline accidents, and it allows recovery of loss of society damages in actions arising from a “commercial aviation accident.” The legislative history of this amendment to DOHSA makes it clear that the only reasonable construction of the Commercial Aviation Exception is that the provision applies solely to actions arising from commercial airline accidents on the high seas and has no application whatsoever in wrongful death actions arising from general aviation accidents on the high seas. The decision in *Eberli v. Cirrus Design Corp.* correctly concluded that the Commercial Aviation Exception should only apply to commercial aviation disasters, such as the crash of TWA flight 800, which motivated Congress to enact the Commercial Aviation Exception.

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<sup>157</sup> *Id.* at 1374.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 1369.