Journal of Air Law and Commerce

Volume 68 | Issue 2 Article 5

2003

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FLYING AND CRASHING ON THE WINGS OF FORTUOSITY: THE CASE FOR APPLYING ADMIRALTY JURISDICTION TO AVIATION ACCIDENTS OVER NAVIGABLE WATERS

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SUMMARY

FOR ALMOST AS long as airplanes have existed, federal courts have been challenged by the question of whether torts involving airplane crashes over navigable waters are cognizable in maritime law. A cause of action for wrongful death did not exist under general maritime law until the Supreme Court allowed recovery for loss of support, funeral expenses, conscious pain and suffering, and loss of services in *Moragne v. State Marine Lines, Inc.*,[1] overruling the previous law of *The Harrisburg*.[2] Beginning with *Executive Jet*,[3] courts have attempted to define aviation torts within a maritime law context. Locality and substantial relationship tests developed to evaluate maritime law claims. However, even if maritime law is applied, damages recoverable may differ if the death occurs on the high seas, in state territorial waters, or somewhere in between. Damages available under substantive maritime law are not uniform or consistent. Both the status of the claimant and the location of the occurrence make the only certainty a need to examine each case closely to determine the extent of damages recoverable. This paper addresses the need to establish uniformity and equity by applying general maritime law to commercial aviation accidents over navigable waters.

I. INTRODUCTION

It was the worst news a wounded nation could hear–an airplane destined for Santa Domingo crashed shortly after taking off from New York's John F. Kennedy International Airport.[4] On November 12, 2001, American Airlines Flight 587, with 246 passengers and nine crew members aboard, went down in the Rockaway section of New York City. The wreckage was scattered over half a mile, including parts of the plane splashing down in Jamaica Bay.

The horror of aircraft accidents continues to haunt the modern world. The pictures of such tragedies remain vivid in our consciousness, reminding us of our vulnerability to random trag-

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[1] *Moragne v. State Marine Lines, Inc*, 398 U.S. 475 (1970).

[2] The Harrisburg v. Richards, 119 U.S. 199 (1886).

[3] Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249 (1972).

[4] *See* David Johnston & James Risen, *The Crash of Flight 587: The Investigation; Officials Find No Clear Signs of Terrorism in Crash, But No Firm Answers Either*, N.Y. TIMES, Nov. 15, 2001, at A1; Karen Freifeld, *Who They Were–The Victims of American Flight 587*, NEWSDAY, Nov. 28, 2001, at B6; Sibylla Brodzinsky, *Dominican Celebration Somber*, USA TODAY, Nov. 5, 2001, at 9D.

edy. "The speed, mobility, and range of modern aircraft. . .and the resulting multi-state or multi-nation contacts with aircraft supply, operations, and accident or incident,"[5] means that in any one aviation case, it is likely that several legal systems may appear applicable.[6] From the time of the first airplane crashes, courts have struggled with both the appropriate choice of law to be applied, and the range of remedies available to compensate victims and their families. Grief-stricken families mourn the loss of the victims. Unfortunately, they soon learn that the legal remedies for their loss may be just as turbulent as the crash that took the lives of their loved ones.

December 17, 1903 marked the beginning of the aerospace industry, with the world's first powered, sustained, and controlled flight by Orville and Wilbur Wright at Kitty Hawk.[7] The "Flyer" was assembled with a variety of rudimentary components, including loose bicycle parts. Following the success of the Wrights, airplane manufacturing grew rapidly.[8] The need for aviation law would quickly follow. More than 100 years later, the jurisprudence of aviation accidents is just as unsettled as it was in the beginning. The law to be applied and the damages awarded depend upon where the plane crashes. However, if the crash occurs in, on, or over water, the remedy may depend upon where you started, where you were going, and where the flight ended. To this day no clear legal framework exists for asserting federal jurisdiction over aviation torts.[9] Typically, aviation torts, especially commercial airline, land in federal courts through diversity, federal question, or admiralty jurisdiction. Admiralty jurisdiction may be applied by virtue of the Death on the High Seas Act (DOHSA).[10] The assertion by a plaintiff of admiralty jurisdiction may provide procedural and substantive advantages not available in federal or state courts when other grounds are claimed. DOHSA provides a statutory basis for the admiralty jurisdiction determination.

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[5] *See* Stuart M. Speiser & Charles F. Krause, 1 AVIATION TORT LAW 60 (1978).

[6] *Id.*

[7] THE ENCYCLOPEDIA OF CIVIL AIRCRAFT 7 (David Donald ed., 1999).

[8] *Id.* The first regular passenger service operated in Florida in 1914. Following World War I, several countries used converted military aircraft to transport cargo, mail, and passengers. By the late 1920s, commercial aircraft was coming of age with the emergence of new technology and design. *See id.* at 7-8.

[9] *See* Vance E. Ellefson, Here There Be Dragons, 33rd Annual SMU Air Law Symposium (1999) (discussing remedies that courts have used to handle aviation and maritime disasters).

[10] *Id.*

Jurisdiction becomes clouded when the accident occurs within territorial waters. Here, in the absence of specific laws, the federal courts have relied on a number of tests to determine when admiralty law should control the case. It is in the context of this myriad of legal resources for aviation accidents occurring over navigable waters that this paper addresses the need for application of maritime law to aircraft-related litigation.

In many instances, maritime law affords the best remedy for airline crashes because it promotes legal process efficiency, the fair and universal treatment of claims, and uniform legal analysis. Further, plaintiffs are frequently afforded a more fair and more complete recovery. The long history of admiralty law suggests that all damage remedies are available–including punitive damages, if not otherwise supplanted by the Warsaw Convention, DOHSA, or other treaty and federal law. Part II discusses the early history of admiralty law, and the statutory and constitutional application of admiralty to early jurisprudence in the United States. In Part III, the discussion of the modern era of aviation litigation begins with *Executive Jet*, and proceeds through the "Trilogy" cases that form the foundation for later Supreme Court decisions regarding maritime jurisdiction. Part IV discusses implications of the Warsaw Convention on damage awards. Part V explains provisions of the Death on the High Seas Act, including its interaction with admiralty jurisdiction. The consequences of the application of maritime law to aviation litigation are examined in Part VI, beginning with the recognition of wrongful death actions following the Supreme Court's decision in *Moragne*. The panoply of available damages is compared, including pecuniary, non-pecuniary, punitive, and survival actions. Finally, Part VII concludes with the contention that all aircraft litigation over navigable waters should be heard under the auspices of admiralty law. This is the best remedy for universal treatment and fairness of claims, and serves to expedite recovery for plaintiffs through a more efficient legal process.

II. HISTORICAL BACKGROUND OF ADMIRALTY JURISDICTION

A. Early Precedent

Commerce and maritime law share a centuries-old history. Evidence of maritime commerce in the Persian Gulf, the Arabian Sea, and the Mediterranean Sea has been found through the translation of hieroglyphic writings in ancient tombs as early

as 2000 B.C.[11] The writings indicate that rules existed to govern commerce.[12] Modern maritime law is based upon the Rhodian Sea Codes.[13] This set of codes identified and governed the rights and responsibilities of ship owners and seamen. The Rhodian Sea Codes also dealt with the relationship between ship owners and the parties for which they transported cargo.[14]

Although maritime laws and issues have existed for centuries, the foundation for American maritime law can be found in the rules of England.[15] Separate sets of rules and laws governing the unique aspects of maritime commerce developed to govern transportation in navigable waters.[16] Beginning in the fourteenth century, England established a Court of Admiralty to decide maritime cases.[17] By 1611, Sir Edward Coke succeeded in restricting the jurisdiction of the Admiralty Courts to cases involving vessels on the high seas or within the ebb and flow of the tide on rivers.[18] This served to severely limit the jurisdiction of the English Admiralty Courts.[19]

With the colonization of the New World, admiralty courts were established in each of the Colonies.[20] Each of the courts acted independently of the other colonial courts, and the colonial admiralty courts were much more expansive than their English counterparts.[21] The courts in the Colonies assumed jurisdiction over every case that had some connection to a maritime matter.[22] In addition, the colonial admiralty courts were expected to enforce the collection of duties and taxes for the English Crown through the English Navigational Act.[23] Needless to say, this aspect of the colonial admiralty courts was ex-

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[11] *See* 1 BENEDICT ON ADMIRALTY § 2 (Stephen F. Friedell et. al. eds., 7th ed. 2000).

[12] *See id.* § 2. *See also* 1 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 3 (2d ed. 1994).

[13] See BENEDICT ON ADMIRALTY, *supra* note 11, at § 3.

[14] *See id.* § 2.

[15] *See* SCHOENBAUM, *supra* note 12, §§ 1-6, at 16-18.

[16] *Id.*

[17] BENEDICT ON ADMIRALTY, *supra* note 11, at § 21.

[18] *See id.* § 43.

[19] *Id.*

[20] *See* SCHOENBAUM, *supra* note 12, §§ 1-6, at 16-18.

[21] *See id.*

[22] *See id.* at 17. Issues included seamen's rights, piracy cases, captured cargo cases, and general maritime cases. *Id.*

[23] *Id.*

tremely unpopular, and it was quickly dropped with the advent of the Revolutionary War.[24]

B. Federal Authority–Constitutional and Statutory Provisions for Admiralty and Maritime Jurisdiction

Maritime cases were given a unique and significant place in the laws of the United States. Article III, Section 2 of the Constitution states: "The judicial power [of the United States] shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . ."[25] No other classification received this type of specific legal treatment.[26] Historical records indicate that the Founding Fathers were interested in having a uniform judicial system for admiralty cases to improve international trade and commerce.[27] Alexander Hamilton emphasized the necessity for maritime laws with a national uniformity. Thirteen independent courts of final jurisdiction over the same causes, arising from the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.[28] According to Hamilton, even the most adamant states' rights advocates had not denied the need for a national legal forum for maritime issues. These issues generally depend on the laws of nations, and commonly affect the rights of foreigners, thus they fall within the considerations which are relative to the public peace. The most important part of them is by the present confederation submitted to federal jurisdiction.[29]

The admiralty and maritime jurisdiction granted in the Constitution was implemented by Congress with the enactment of the Judiciary Act of 1789.[30] Following passage of the Judiciary

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[24] See generally David R. Owen & Michael C. Tolley, Courts of Admiralty in Colonial America (1995), for a detailed account of the courts.

[25] U.S. Const. art. III, § 2, cl. 1.

[26] *See generally* U.S. Const.; *See also* Benedict on Admiralty, *supra* note 11, § 105.

[27] *See id.*

[28] The Federalist No. 80, at 535 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

[29] *See id.* at 536.

[30] "The district courts shall have original jurisdiction, exclusive of the courts of the States, of (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it." Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 76-77. The current statutory language is substantially the same except it changes the last phrase to "in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333 (2001). 28 U.S.C. § 1292(a)(3)(2001).

Act, admiralty cases were segregated by the federal district courts from other areas of jurisdiction, and were processed on their own "admiralty docket."[31] In 1966, the admiralty and non-admiralty dockets merged pursuant to the general provisions of the Federal Rules of Civil Procedure.[32] The assertion of admiralty jurisdiction follows procedural rules, and the claim for admiralty is either a claim in which the grounds for admiralty jurisdiction is the only claim for the suit, or it can be the product of a special pleading even when other jurisdictional options are available.[33] In the event the court finds no basis for admiralty jurisdiction, and no other grounds for federal jurisdiction exist, the suit will be dismissed.[34]

C. Aviation Law and Early Treatment by the Courts

Technological advancements out-pace the law. It should come as no surprise that courts grappled with how to handle early aviation incidents. In the context of maritime activities, the Supreme Court settled on two distinct requirements for finding a case within the provisions of admiralty.

1. Locality of the Tort

The federal courts struggled for many years with the restricted English maritime jurisdictional rules. In *Thomas v. Lane*,[35] Justice Storey stated the principle previously adopted by English courts:

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[31] *See generally* GRANT GILMORE & CHARLES L. BLACK, THE LAW OF ADMIRALTY, 19 (2d ed. 1975); *see also* WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2301-2322 (1999).

[32] *See* GILMORE & BLACK, *supra* note 31; WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2301-2322 (1999).

[33] The Federal Rules of Civil Procedure provide specific rules regarding admiralty and maritime claims. Rule 14(c) proscribes the treatment for third party impleader. Rule 38(e) states that the right to a trial by jury is not created in admiralty. Foulk v. Donjon Marine Co., Inc., 144 F.3d 252 (3d Cir. 1998); Debellefeuille v. Vastar Offshore, Inc., 139 F. Supp. 2d 821 (S.D. Tex 2001) (not specifically forbidding a jury trial for admiralty claims). *See* Palischak v. Allied Signal Aerospace Co., 893 F. Supp. 341, 351 (D. N.J. 1995); FED. R. CIV. P. 82 (jurisdiction and venue of admiralty unaffected by rules and not treated as a civil action). FRCP SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS RULES A-F (amend. 2000).

[34] FED R. CIV. P. 9(h). "If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for purposes whether so identified or not." *Id.* It is to the plaintiff's advantage to plead admiralty jurisdiction so that the admiralty claim may be asserted later.

[35] 23 F. Cas. 957, 960 (C.C.D. Me. 1813) (No. 13, 902).

> In regards to torts I have always understood, that the jurisdiction of the admiralty is exclusively dependent upon the locality of the act. The admiralty has not, and never [I believe] deliberately claimed to have any jurisdiction over torts, except such as are maritime torts, that is such as are committed on the high seas, or on waters within the ebb and flow of the tide.[36]

However, the Court later settled on a broader construction for purposes of defining maritime jurisdiction.[37] In 1851, Chief Justice Taney rejected the English tidewater, ebb and flow limitation, declaring in *The Propeller Genesee Chief v. Fitzhugh*,[38] that all waters that could be used in interstate or foreign commerce were navigable waters within the maritime jurisdiction of the United States.[39]

2. *Navigable Waters*

Once the locality of the wrong was established, the courts again had to determine whether they would follow the doctrine of the English courts, or define navigable waters more expansively. The Court answered the issue in the negative. The locality test was expanded in *The Plymouth*,[40] to include not only tidewaters (the ebb and flow doctrine of English law), but also any navigable waters, including lakes and rivers:

> [T]he wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, or, at least, the substance and consummation of the same must have taken place upon these waters to be within the admiralty jurisdiction . . . The jurisdiction of the admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel, but upon its having been committed on the high seas or other navigable waters . . . Every species of tort, however occurring, and whether on board a vessel or not, if upon high seas or navigable waters, is of admiralty cognizance.[41]

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[36] *Id.*

[37] DeLovio v. Boit, 7 F. Cas. 418, 441 (C.C.D. Mass. 1815) (No. 3, 776). "[W]hatever may in England be the binding authority of the common law decisions upon this subject, in the United States we are at liberty to re-examine the doctrines, and to construe the jurisdiction of the admiralty upon enlarged and liberal principles." *Id.*

[38] 53 U.S. (12 How.) 443 (1851) (involving a collision on Lake Erie).

[39] *Id.*

[40] 70 U.S. (3 Wall.) 20, 35-36 (1866). In *The Plymouth*, embers from a river steamboat flew off and set a dock and warehouse on fire. The wrong occurred on navigable water, but the damage occurred on land. *Id.*

[41] *Id.*

The requirement that the tort must have been committed "wholly upon the high seas or navigable waters" would be heavily challenged, and later overruled. The locality test remains an integral part of any admiralty jurisdiction discussion.

3. Admiralty Extension Act and Other Maritime Issues

The locality test created difficulties in the application of admiralty law to certain situations. Generally, personal injuries occurring on land could not be heard under admiralty jurisdiction. But maritime law has allowed recovery to seamen (maintenance and crew) who were injured in the course of their connection to service to their vessel.[42] The doctrine of unseaworthiness also allows recovery to a seaman injured when the cause of the injury stems from defects in the vessel or its equipment.[43]

Congress also extended admiralty jurisdiction through the Admiralty Extension Act[44] to specifically overrule cases that previously did not provide a remedy for damage inflicted to land structures by ships on navigable waters: "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury to be done or consummated on land."[45] The Extension of Admiralty Jurisdiction Act of 1948 overruled the specific holding in *The Plymouth.* It was thought the *Plymouth* analysis had advantaged vessels over landowners. A wrong committed on land to a vessel could be brought in admiralty, but the wrong committed by the vessel on land could not. Often, a landowner could not find a basis to gain jurisdiction of any form over a vessel. The Extension Act erased this line between land and water, investing admiralty jurisdiction over 'all cases' where the injury was caused by a ship or other vessel on navigable water, even if such injury occurred on land.[46]

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[42] *See* Miles v. Apex Marine Corp., 498 U.S. 19 (1990); Jones Act, 46 U.S.C. § 688, 41 Stat. 1007 (2002).

[43] *See* Guitierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963).

[44] 46 U.S.C. § 740 (2001).

[45] Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249, 260 (1972). *See* Lawrence D. Bradley, Jr., *The Supreme Court and Maritime Jurisdiction*, 25 MAR. LAW. 207, 220 (2000).

[46] Grubart v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 532 (1995) (referencing Gutierrez v. Waterman S.S. Corp., 373 U.S. 206, 209-10 (1963); *Executive Jet*, 409 U.S. at 249).

4. Early Aviation Case Law–How Airplanes Became Involved in Maritime Law

Maritime law developed to handle legal matters involving vessels that traded in commerce.[47] The locality test presented an interesting dilemma to courts in aviation decisions. A district court declined admiralty jurisdiction to an airplane that crashed into Puget Sound because it was not a maritime vessel.[48] If a vessel was not involved, then there was no maritime jurisdiction.[49] A dry dock, fixed in place, but floating on navigable waters did not obtain maritime jurisdiction.[50] A partially constructed vessel floating in navigable waters was not within maritime jurisdiction.[51] Thus, by 1920, the Supreme Court had determined that only a vessel on navigable water would obtain admiralty jurisdiction.[52]

The first Supreme Court case to analyze an airplane crash on navigable water was *Reinhardt v. Newport Flying Service Corporation.*[53] In *Reinhardt,* a man was injured when he attempted to prevent a hydro-plane, moored in navigable waters, from drifting ashore.[54] Justice Cordoza, issued a ruling for the New York Court of Appeals stating the hydro-plane was a vessel within the meaning of maritime jurisdiction only when it was operating on the water.[55]

> We think the craft, though new, is subject, while afloat, to the tribunals of the sea. Vessels in navigable waters are within the jurisdiction of admiralty. Any structure used, or capable of being used, for transportation upon water, is a vessel . . . A hydroaeroplane, while in the air, is not subject to admiralty . . . or so at least we may assume, because it is not then in navigable waters, and navigability is the test of admiralty jurisdiction . . . we think the jurisdiction of admiralty is not less where the structure found afloat is seaplane and aeroplane combined. It is true that the

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[47] *See* SCHOENBAUM, *supra* note 12, §§ 1-2, at 3.

[48] *See* Foss v. Crawford Bros. No. 2, 215 F. 269, 271 (W.D. Wash. 1914)(No. 1564) (airplane damaged in the crash and brought ashore for repairs).

[49] *Id.*

[50] *See* Cope v. Vallette Dry Dock Co., 119 U.S. 625 (1887). "The fact that it floats on the water does not make it a ship or vessel. . ." *Id.* at 627.

[51] *See* Francis McDonald Thames Towboat Co. v. Francis McDonald, 254 U.S. 242 (1920).

[52] See 2 BENEDICT ON ADMIRALTY § 2, 1-6 n. 7 (Steven F. Freetail et. al., eds., 7th ed. 1986) for an in-depth survey of cases following the strict locality rule.

[53] 133 N.E. 371 (N.Y. 1921).

[54] *Id.*

[55] *Id.* at 372.

> primary function is then movement in the air, and that the function of movement of water is auxiliary and secondary. That is, indeed, a reason why the jurisdiction of the admiralty should be excluded when the activities proper to the primary function are the occasion of the mischief. It is no reason for the exclusion of jurisdiction when the mischief is traceable to the function that is auxiliary and secondary. Collision does not cease to be collision and peril of the sea because the structure is amphibious.[56]

Justice Cardozo thus excluded any aircraft not operating on navigable waters from maritime jurisdiction.[57] In 1935, the Ninth Circuit followed Justice Cardoza's opinion, and found that a seaplane was within admiralty jurisdiction while afloat on navigable waters.[58] In 1939, an aircraft crashed in navigable waters while flying from New York to Bermuda and was found not to be a vessel for purposes of maritime jurisdiction.[59] The Second Circuit, however, decided a seaplane that had run out of fuel, forced to land on shore, and later picked up by a passenger ship, was to be treated as a vessel and given maritime jurisdiction in 1954.

III. MODERN ERA–EXECUTIVE JET AND BEYOND

Justice Cardoza's view of excluding aviation accidents from maritime jurisdiction was gradually discarded.[60] Accidents in state territorial waters were found to fall within maritime jurisdiction. Prior to 1972, the test for admiralty jurisdiction was essentially the locality test developed in *The Plymouth*.[61] The strict locality rule was highly criticized, however, because cases reached the federal courts based solely upon the fortuitous circumstances of the aviation occurrence.[62]

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[56] *Id.*

[57] *Id.*

[58] *See* United States v. Northwest Air Serv., 80 F.2d 804, 805 (9th Cir. 1935).

[59] *See* Noakes v. Imperial Airways, 29 F. Supp. 412, 413-14 (S.D.N.Y. 1939). The plane was equipped to land and take off on water, but presumably since the crash occurred on descent from the air it did not qualify.

[60] *See* Lawrence D. Bradley, Jr., *The Supreme Court and Maritime Jurisdiction*, 25 MAR. LAW. 207, 227 (Winter 2000).

[61] *See supra* note 42.

[62] For discussions and criticisms of the locality test, see Carolyn Daigle Wiggins, *Admiralty Jurisdiction Related to Maritime Aviation Accidents*, 48 J. AIR L. & COM. 179 (1982); Birdwell & Whitten, *Admiralty Jurisdiciton: The Outlook for the Doctrine of Executive Jet*, 1974 DUKE L.J. 757 (1974); James F. Mosely, *Did That Airplane Affect Admiralty: Executive Jet and its Aftermath*, 25 FED. INS. COUNS. Q. 319 (1975); *Admiralty Jurisdiction: Executive Jet in Historical Perspective*, 34 OHIO L.J. 355 (1973).

A. The Executive Jet Standard

The modern era of aviation tort law commenced with the benchmark decision in *Executive Jet Aviation v. City of Cleveland.*[63] This case concerned an aircraft that struck and ingested a flock of seagulls into one of its jet engines as it was taking off from Burke Lakefront Airport in Cleveland, Ohio.[64] The airplane was en route to pick up passengers for a charter flight in Portland, Maine with the ultimate destination of White Plains, New York.[65] The airplane crashed into Lake Erie, and although no injuries occurred, the plane sank and became a total loss.[66] The owners of the aircraft invoked admiralty jurisdiction in their suit against the City of Cleveland for negligence in failing to keep the airport free of birds.[67] The Sixth Circuit affirmed the District Court for the Northern District of Ohio's dismissal of the suit for lack of subject matter jurisdiction.[68] On certiorari, the Supreme Court upheld the dismissal of the case by deciding that no admiralty jurisdiction existed in the case.[69] In the Supreme Court's view, jurisdiction could not be based upon an accident that was "only fortuitously . . . connected to navigable waters" and bore "no relationship to traditional maritime activity."[70] Further, the Court observed that the voyage was land-based and would not have duplicated a voyage that could have been taken on navigable waters by a vessel.[71]

Instead of deciding which party had the strongest locality argument, the Court focused on the nature of the wrong.[72] Most

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[63] 409 U.S. 249 (1972).

[64] *Id.* at 250.

[65] *Id.*

[66] *Id.*

[67] *Id.* at 250-51. Assertion of federal admiralty jurisdiction enabled the aircraft owners to circumvent the statue of limitations imposed by Ohio statute. *See also* Jonathan M. Gutoff, *Admiralty Jurisdiction Over Asbestos Torts: Unknotting the Tangled Fibers*, 54 U. Chi. L. Rev. 312, 316 (1987).

[68] *Executive Jet*, 409 U.S. at 450-51.

[69] *Id.* at 261.

[70] *Id.* at 273.

[71] *Id.*

[72] *Id.* at 268. In describing the difficulties of properly applying the locality test, the Court explained:

> The case before us provides a good example of these difficulties. The petitioners contend that since the aircraft crashed into the navigable waters of Lake Erie and was totally destroyed when it sank in those waters, the locality of the tort, or place where the alleged negligence took effect, was there. The fact that the major damage to their plane would not have occurred if it had not landed in the

instructional, however, was the Court's discussion of the history of admiralty law, and the Court's concern that a "purely mechanical application" of the locality test created special problems in aviation torts.[73] Criticizing the exclusivity of the locality test, the Court added a new emphasis in aviation torts, by requiring that the "wrong bear a significant relationship to traditional maritime activity."[74]

With this new standard, plaintiffs in aviation tort cases could no longer be certain of asserting admiralty jurisdiction—even if the tort occurred in navigable waters.[75] The *Executive Jet* ruling presented a new, but obvious problem: What constitutes a traditional maritime activity?[76] The Court provided some guidance with the example of an event that would not meet the requisite maritime relationship–a land-based plane that crashed during a flight from one point in the continental United States to another point.[77] At the same time, the Court did not foreclose the possibility that an airplane duplicating the function traditionally performed by waterborne vessels might come within admiralty jurisdiction.[78] The Court stated that a flight that crashed in the ocean between New York and London would be encompassed

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> lake indicates, they say, that the substance and consummation of the wrong took place in navigable waters. The respondents, on the other hand, argue that the alleged negligence took effect when the plane collided with the birds–over land.

Id. at 266-67.

[73] *Id.* at 261.

[74] *Id.* at 268.

> We conclude that the mere fact that the alleged wrong 'occurs' or 'is located' on or over navigable waters–whatever that means in the aviation context–is not of itself sufficient to turn an airplane negligence case into a 'maritime tort.' It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity.

Id.

[75] In making the distinction between the two theories of the parties, the Court concluded that "[t]hese are hardly the types of distinctions with which admiralty law was designed to deal." *Id.* If the locality was determined by the location of the crash, then crashing in Lake Erie would allow admiralty jurisdiction, but crashing on the runway would not. On the other hand, if the activity of the plane striking the birds is the determining factor, then if the plane struck the birds as it passed over the shore, admiralty jurisdiction would be present, even if the plane returned to land and crashed there. If the birds were struck while still over the airport, admiralty would not be present. *Id.* at 267-68.

[76] *See* Carolyn Daigle Wiggins, *Admiralty Jurisdiction Related to Maritime Aviation Accidents*, 48 J. AIR L. & COM. 179, 192 (1982).

[77] *Executive Jet*, 409 U.S. at 271.

[78] *Id.*

by admiralty jurisdiction since "[a]n aircraft in that situation might be thought to bear a significant relationship to traditional maritime activity because it would be performing a function traditionally performed by waterborne vessels."[79] The Court hinted that legislative action would be necessary for a claim in this context to survive a jurisdictional challenge.[80]

The Court emphasized that to make decisions based upon where the plane crashed, or where the act of negligence occurred, would find admiralty tort jurisdiction depending upon circumstances "that could be wholly fortuitous and completely unrelated to the tort itself."[81] Torts that have involved technology not traditionally viewed as related to maritime posed a problem that could find federal courts extending maritime jurisdiction into "factual and conceptual inquiries unfamiliar to the law of admiralty."[82]

The only issue specifically resolved in *Executive Jet* was that there was no federal admiralty jurisdiction in aviation cases that arise from land-based flights between points within the continental United States.[83] Ultimately, the Court's failure to define "traditional maritime activity" forced courts to struggle with the application of the *Executive Jet* standard.[84]

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[79] *Id.* (citing Hornsby v. Fish Meal Co., 431 F.2d 865 (5th Cir. 1970)). *Hornsby* involved a collision of two aircraft used to spot schools of fish. Both planes crashed into the Gulf of Mexico within one marine league of the shore of Louisiana. The basis for allowing maritime jurisdiction in Hornsby was that the aircraft were performing a function traditionally performed by vessels in navigable waters. *Hornsby*, 431 F.2d at 866-67.

[80] *Executive Jet*, 409 U.S. at 268. "It may be as the petitioners argue, that aviation tort cases should be governed by uniform substantive and procedural laws and that such actions should be heard in the federal courts . . . But for this Court to uphold federal admiralty jurisdiction in a few wholly fortuitous aircraft cases would be a most quixotic way of approaching that goal." *Id.* at 274.

[81] *Id.* at 267.

[82] Courts are historically forced to apply common law principles to new concepts due to technological advances. For a unique case dealing with advanced technology and the application of maritime jurisdiction, see *T.J. Falgout Boats, Inc. v. United States*, 508 F.2d 855 (9th Cir. 1974). Here, a land-based naval jet released a Sidewinder missile (a short-range air-to-air missile) prior to crashing. The missile struck and damaged a fishing boat. Owners of the boat brought a claim against the government under the Federal Tort Claims Act. The Ninth Circuit dismissed the FTCA claim, but held that admiralty jurisdiction applied. The Ninth Circuit observed that "it [could] not be said that the navy plane's activity over water in the instant case was entirely 'fortuitous' as was the plane involved in Executive Jet." *Id.* at 857.

[83] *Executive Jet*, 489 U.S. at 271.

[84] *See generally Federal Courts–Admiralty Jurisdiction–Maritime Locality Plus Maritime Nexus Required to Establish Admiralty Jurisdiction in Aviation Negligence Cases–Executive*

B. Applying the Executive Jet Standard to Aviation Accidents

Following *Executive Jet*, district courts initially resolved the traditional maritime activity standard in several ways. Focusing on the definition of "significant maritime relationship," most courts would structure their decisions into classifications and language that included a functional approach, employing a "locality plus" test, or an activity-based test.[85] While the analysis would differ, the fulfillment of both the locality test and the nexus requirement would be scrutinized, often with different results.

1. The Navigable Waters Locality Prerequisite

In *Brown v. Eurocopter, S.A.*,[86] the locality test was challenged. A helicopter pilot was killed when the helicopter developed mechanical difficulties and crashed into an oil platform, then plunged into the sea.[87] The pilot's widow claimed that maritime law and DOHSA did not apply because the crash occurred over the oil rig. The court disagreed, stating that the "[l]ocality inquiry is relatively simple. Contrary to the argument made by Plaintiff, the precise point of a plaintiff's death is not the lynchpin for determining whether the locality requirement is satisfied. Instead, the Court looked to whether the alleged negligence 'became operative while the aircraft was on or over navigable waters.'"[88] The court determined that since the helicopter began experiencing problems over the Gulf of Mexico, the occurrence forming the basis of the claim clearly satisfied the locality element.[89]

Similar results occurred in *Morgan v. United Air Lines, Inc.*[90] The *Morgan* plaintiffs were surviving passengers who sued the airline for emotional distress following the aircraft's sudden de-

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Jet Aviation, Inc., v. City of Cleveland, B.C. Ind. & Com. L. Rev. 1071 (1973); *Hops, Skips, and Jumps Into Admiralty Revisited*, 39 J. Air L. & Com. 625 (1973).

[85] *See* Roberts v. United States, 498 F.2d 520, 523 n.3 (5th Cir. 1974). "The Supreme Court in Executive Jet . . . discussed the difficulties inherent in determining tort locus in the aviation context, but the Court did not propose another test." *Id.* (citing *Executive Jet*, 409 U.S. at 266-68).

[86] 38 F. Supp. 2d 515 (S.D. Tex. 1999).

[87] *Id.* at 516.

[88] *Id.*

[89] *Id.*

[90] 750 F. Supp. 1046 (D. Colo. 1990).

compression on a flight between Hawaii and New Zealand.[91] The Colorado district court adopted recommendations of a United States magistrate, who concluded that the maritime law requirements to show that the tort occurred "on or over navigable waters . . . [was] clearly met here," even though the aircraft and its passengers did not "hit" the water.[92] Further, the court determined that general maritime law did not allow emotional distress damages, and more importantly, held that general maritime law did not preempt Colorado law in this Warsaw case.[93]

In re Air Disaster Near Honolulu, Hawaii,[94] was a case that arose out of the same decompression event as *Morgan*. In this case, the plaintiff passengers sought to avoid admiralty jurisdiction by claiming that although the incident occurred over navigable waters, the aircraft did not crash, but instead was able to return to Honolulu.[95] The court agreed it was "fortuitous" that the cargo door blew off while the plane was over water rather than land, but found that the degree of "fortuosity" was no different than if a mechanical failure occurred on land but caused the aircraft to crash into the high seas.[96] In applying maritime jurisdictional law, the court said plaintiffs were unsuccessful in dispelling "settled precedent that air accidents occurring over the sea and involving transoceanic flights . . . are maritime in nature."[97]

2. *The Maritime Nexus—The Significant Relationship to Maritime Activity Test*

The Supreme Court case that most directly deals with aviation as a maritime activity is *Executive Jet*. Although *Executive Jet* held that admiralty jurisdiction is not appropriate when a land-based aircraft flies from one point to another within the continental United States, the Court suggested there could be circumstances

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[91] *Id.* at 1048. While the plane was over the high seas, a cargo door blew off the aircraft. Many passengers were injured and several were killed. *Id.*

[92] *Id.* at 1053.

[93] *Id. See also* Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986); Williams v. United States, 711 F.2d 893 (9th Cir. 1983); Owens-Illinois, Inc. v. United States Dist. Ct., 698 F.2d 967 (9th Cir. 1983) (meeting the location requirement because exposure to asbestos occurred while on navigable waters).

[94] 792 F. Supp. 1541 (N.D. Cal. 1990).

[95] *Id.* at 1543-44.

[96] *Id.* The "fortuosity" analogy springs directly from *Executive Jet*, 409 U.S. at 261.

[97] *In re Air Disaster Near Honolulu, Hawaii*, 750 F. Supp. at 1544.

in which an aviation tort could come within admiralty jurisdiction.[98]

It is the area between *Executive Jet* and the obvious application of admiralty law in a plane crashing over the high seas that continues to challenge the courts. After *Executive Jet*, lower courts generally applied admiralty jurisdiction to aviation torts if they occurred over navigable waters. Some courts decided that a transoceanic flight, by definition, would meet the traditional maritime nexus requirement.[99] Other courts looked to the functionality of the aircraft to find the required nexus.[100]

In *Hark v. Antilles Airboats, Inc.*,[101] the court delivered two reasons for supporting the similarities between maritime and aviation activity:

> Generally speaking, both aviation and marine law deal with complex mechanisms, and the legal terminology for analyzing this machinery is sufficiently similar that the two bodies of law may be compared with profit. For example, "airworthiness" and "seawor-

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[98] *Executive Jet*, 409 U.S. at 271.

[99] A transoceanic flight meets the function traditionally performed by waterborne vessels. *See* Ledoux v. Petroleum Helicopters, Inc., 609 F.2d 824 (5th Cir. 1980); Kelly v. Smith, 485 F.2d 520, 524 (5th Cir. 1973) *cert. denied sub. nom.*; Chicot Land Co. v. Kelly, 416 U.S. 969 (1974); Williams v. United States, 711 F.2d 893 (9th Cir. 1983); Roberts v. United States, 498 F.2d 520 (9th Cir. 1974); T.J. Falgout Boats, Inc. v. United States, 508 F.2d 855 (9th Cir. 1974), *cert. denied*, 421 U.S. 1000 (1975); Miller v. Lewis, 18 Av. Cas. (CCH) 17,912 (11th Cir. 1984); Stoddard v. Ling-Temco-Vought Inc., 513 F. Supp. 314 (C.D. Cal. 1980); Hammill v. Olympic Airways, S.A., 398 F. Supp. 829, 832 (D.D.C. 1973); Higginbotham v. Mobil Oil Corp., 357 F. Supp. 1164 (W.D. La. 1973), *aff'd. in part*, 545 F.2d 422 (5th Cir. 1977), *rev'd on other grounds*, 436 U.S. 618 (1978); Hubschman v. Antilles Airboats, Inc., 440 F. Supp. 828, 841 (D.V.I. 1977).

[100] For examples of cases where the courts found maritime jurisdiction, see Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 219 (1986) (A helicopter ferrying passengers from an offshore drilling platform to the shore was engaged in a maritime function using the rationale a helicopter could replace what once was done only by ship); Kelly v. United States, 531 F.2d 1144, 1147 (2d Cir. 1976) (maritime jurisdiction extends to Coast Guard aircraft performing rescue operations); Icelandic Coast Guard v. United Tech. Corp., 722 F. Supp. 942 (D. Conn. 1989) (If a maritime nexus was required, it existed here where the aircraft was manufactured for use in marine rescue and other maritime operation); Comind, Companhia de Seguros v. Sikorsky Aircraft Div. of United Tech. Corp., 116 F.R.D. 397 (D. Conn. 1987) (The crash of a helicopter used to ferry passengers and supplies to off shore drilling structures satisfied nexus requirements); Hark v. Antilles Airboats, Inc., 355 F. Supp. 683 (D.V.I. 1973) (Maritime nexus exists in the takeoff of a float plane similar to water vessels). *But see* New York City v. Waterfront Airways, 620 F. Supp. 411 (S.D.N.Y. 1985) (The crash of a float plane over land does not meet the *Executive Jet* maritime nexus test, and court did not find maritime jurisdiction).

[101] 355 F. Supp. 683 (D.V.I. 1973).

> thiness" are not dissimilar; and the Rules of the Road and the doctrine of the "last clear chance" are also akin in the two contexts. The second reason is more narrow . . . aviation torts ought to have the benefit of the relatively flexible doctrine of laches, and ought not to be confined within a brief and unyielding statute of limitations. An aircraft crash is far more complicated than the ordinary tort and it is more like a marine accident in that it is followed by a lengthy official inquiry. A litigant may wish to await the results of this investigation and should . . . be permitted to do so.[102]

Hark involved a sea plane that crashed into the St. Thomas harbor, when one of its engines lost power.[103] The plaintiff passenger sued under admiralty jurisdiction for his injuries caused by the accident.[104] The court found that the admiralty jurisdiction was proper and described the two ends of a continuum regarding the application. Admiralty jurisdiction is properly applied when a "seaplane is floating on the water [because] it is . . . then subject to the ordinary rules of navigation."[105] At the other end of the continuum, was the *Executive Jet* scenario.[106] The court concluded that even a seaplane incident might not invoke admiralty jurisdiction if the cause of the incident is too attenuated from its role as a "marine vehicle."[107]

Teachey v. United States,[108] is illustrative of the importance of case-specific facts in determining whether admiralty jurisdiction can be applied. A Florida district court utilized a functional approach to hear the case of a Coast Guard helicopter that crashed on land, after rescuing a fisherman from his sinking boat in the Gulf of Mexico.[109] Teachey argued that the helicopter had been acting in a capacity traditionally reserved for sea vessels, and thus warranted admiralty jurisdiction.[110] The court

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[102] *Id.* at 688.

[103] *Id.* at 684. All passengers were rescued with no loss of life.

[104] *Id.* at 685. The court noted that the statute of limitations for state action had tolled, hinting that this might be the reason for seeking admiralty jurisdiction. *Id.*

[105] *Id.* "[A]n amphibious airplane crash can support an action for a maritime tort, at least where the plane has not fully completed the takeoff phase of its flight and been brought under control as an airborne vehicle." *Id.*

[106] Admiralty jurisdiction is not proper when "a land-based plane is disabled during a primarily overland flight" even of it fortuitously crashes into navigable waters. *Id.*

[107] *Id.* (citing United States v. Northwest Air Serv., 80 F.2d 804 (9th Cir. 1935)).

[108] 363 F. Supp. 1197 (M.D. Fla. 1973).

[109] *Id.*

[110] *Id.* at 1198.

agreed he was operating as a sea vessel, but disagreed that it justified admiralty jurisdiction.[111] Instead, the court focused on the fact that the crash had occurred after a refueling stop and the completion of the rescue operation.[112] Thus, the court determined that the relationship to maritime activity had ceased.[113] This limited application requires the vessel seeking admiralty jurisdiction to be performing the functional equivalent to a sea vessel at the time of the incident.[114]

The Fifth Circuit adopted this posture in *LeDoux v. Petroleum Helicopters.*[115] The court determined that a helicopter being "used in place of a vessel to ferry personnel to and from offshore drilling structures, bears the type of significant relationship to traditional maritime activity" required for admiralty jurisdiction.[116] Due, in part, to both the type of cases heard by the Fifth Circuit and implied in the decisions, is the sense that claims arising from helicopter accidents have a better chance for success in seeking maritime jurisdiction than do passenger planes.[117] Under the functional approach, a helicopter crash may result in maritime jurisdiction application, but a single-engine plane performing a similar function might not.[118]

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[111] *Id.* at 1198-99.

[112] *Id.* at 1199. Following the rescue, the helicopter landed at Key West. No one disembarked. The helicopter then departed for St. Petersburg, Florida, and crashed just off the coast of St. Petersburg. All of the passengers were killed-including Teachey. *Id.*

[113] *Id.* "The mere transportation of the decedent from one Coast Guard base to another does not constitute a sufficient act of performing a function traditionally performed by waterborne vessels so as to bring it within the dictum statement enunciated in *Executive Jet.*" *Id.* The court contended that the flight from Key West to St. Petersburg was merely a land-based flight made between two destinations in the continental United States. *Id.* (relying on what it deemed the dictum of *Executive Jet,* 409 U.S. at 274). Neither the fact that a plane goes down on navigable waters nor the fact that the negligence "occurs" while a plane is flying over such water is enough to create such relationship to traditional maritime activity as to justify the invocation of admiralty jurisdiction. *Id.* at 1198-99.

[114] *Id.* at 1199.

[115] 609 F.2d 825 (5th Cir. 1980) (per curium).

[116] *See* Higginbotham v. Mobil Oil Corp., 357 F. Supp. 1164 (W.D. La. 1973), *aff'd in part,* 545 F.2d 422 (5th Cir. 1977), *rev'd on other grounds,* 436 U.S. 618 (1978) (holding that a helicopter fulfilled the maritime relationship requirement because it was ferrying passengers to an offshore rig, which is a duty that was typically performed by a sea vessel).

[117] *Id.*; *Teachey,* 363 F. Supp. at 1199.

[118] *See* Kelly v. Smith, 485 F.2d 520, 525 (5th Cir. 1973), *cert. denied,* 416 U.S. 969 (1974), in which the Court held that the functions and roles of the parties are determinative factors in deciding whether admiralty rules would apply. *See also* Mancuso v. Kimex, 484 F. Supp. 453, 454 (S.D. Fla. 1980) (admiralty jurisdic-

Most significant is the implementation of the Fifth Circuit's four-prong analysis to determine the significant relationship to maritime activity in *Kelly v. Smith.*[119] According to this test, the court must examine the facts by looking at: "the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and the type of the injury; and the traditional concepts of the role of admiralty law."[120] It should be noted that the dissent agreed with both the threshold factors and the four-prong standard to determine whether the significant relationship had been met.[121] However, the dissent did not agree that admiralty jurisdiction was appropriate and believed the federal interest should not pre-empt the application of Mississippi law.[122]

In *Roberts v. United States,*[123] the Ninth Circuit chose a different two-prong approach to determine admiralty jurisdiction.[124] Of course, it is reasonable to assume the significant relationship to maritime activity may be more readily applied when the United

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tion allowed because the plane was being used to carry cargo from the United states to Jamaica); Hayden v. Krusling, 531 F. Supp. 468 (N.D. Fla. 1982) (land-based plane disappeared while flying from New Orleans to Pensacola, and was deemed not to have a significant relationship to maritime activity even though it was carrying passengers and its last known location was fifty miles from the Gulf of Mexico shoreline).

[119] *Kelly*, 485 F.2d at 525. The plaintiffs in *Kelly* were deer poachers hunting on a private hunting preserve located on an island in the Mississippi River. As they were departing the island in a small boat, they were hit by gunfire originating from shore. Defendants in the case were the individuals who fired the shots, the manager of the hunting preserve, and the island's owner. Jurisdiction was based upon diversity and admiralty. *Id.* at 521. Admiralty jurisdiction was important because the remaining issues would be barred by the Mississippi statute of limitations if based upon diversity. The Fifth Circuit decided that to be maritime, a tort must occur on navigable waters and bear a significant relationship to traditional maritime activity. *Id.* at 524 (relying on *Executive Jet* and Peytavin v. Gov't Employees Ins. Co., 453 F.2d 1121 (5th Cir. 1972)). To determine if the action had the necessary relationship, the court created the four part test. In applying the criteria, the Fifth Circuit determined that the party most severely injured was the boat's pilot. This status was established by his responsibility to safely navigate the boat. *Id.* at 525-26. "Policy militates toward admiralty jurisdiction in this case. The admiralty jurisdiction of federal courts stems from the important national interest in uniformity of law and remedies for those facing the hazards of waterborne transportation." *Id.* at 526.

[120] *Id.* at 525.

[121] *Id.* at 527.

[122] *Id.* at 527-28. This conclusion is important because it highlights the tension between state interests and federal law.

[123] 498 F.2d 520 (9th Cir. 1974), *cert. denied*, 419 U.S. 1070 (1975).

[124] *Id.* at 523.

States Navy is a party.[125] In *Roberts*, a cargo plane crashed into navigable waters 2000 feet from the runway at the United States Air Base in Okinawa.[126] The Ninth Circuit could have chosen the functionality test, but instead imposed additional requirements to the functional characteristics of the activity, by looking at "the types of vehicles and instrumentalities involved; the causation and the type of the injury; and the traditional concepts of the role of admiralty."[127] Thus, in *Roberts*, the Ninth Circuit found admiralty jurisdiction by combining what they called the "geographic realities" of the locality of the incident,[128] with the characteristics of the cargo planes purpose of the transoceanic transportation of cargo.[129] When it decided that *Executive Jet* did not preclude a maritime action on the facts presented, the appellate court also noted that "before the advent of aviation, such shipping could only be performed by waterborne vessels."[130] In actuality, the Ninth Circuit applied the functionality test.

Admiralty jurisdiction was also found through the locality plus standard in a series of incidents involving seaplanes in the Virgin Islands.[131] Takeoff and landing problems experienced by the seaplanes were held to be sufficiently related to maritime activity to impose admiralty law.[132]

3. Narrow Construction–A Plane Is Not a Vessel

In the most restrictive construction of the traditional maritime activity definition, some courts restricted application, not to the functional equivalent, but rather to an absolute or obvious maritime connection. For example, a Pennsylvania district court did not find admiralty jurisdiction in the crash of a plane that carried passengers from Atlantic City, New Jersey to Block Island, New York.[133] The court interpreted the *Executive Jet* hold-

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[125] In contrast to a case involving a private aircraft, a Navy aircraft is by "its very nature maritime." T.J. Flagout Boats, Inc. v. United States, 508 F.2d 855, 857 (9th Cir. 1974).

[126] Roberts v. United States, 498 F.2d 520 (9th Cir. 1974).

[127] *Id.* at 523 (citing *Kelly*, 485 F.2d at 525).

[128] *Id.* at 524. The cargo plane's contact with navigable waters was not entirely "fortuitous." *Id.*

[129] *Id.*

[130] *Id.*

[131] *See* Hark v. Antilles Airboats, 355 F. Supp. 683, 684 (D.V.I. 1973); Hubschman v. Antilles, 440 F. Supp. 828 (D.V.I. 1977).

[132] *Hark*, 355 F. Supp. at 685.

[133] *See* Am. Home Assurance Co. v. United States, 389 F. Supp. 657 (M.D. Pa. 1975).

ing very narrowly, and questioned whether an aviation accident, under any facts or circumstances, should be the subject of admiralty suits.[134]

The district court in *Fosen v. United Technologies Corp.*,[135] applied the activity based test to find admiralty jurisdiction when a helicopter transporting passengers to an oil rig crashed thirty miles from the coast of Norway.[136] The court found that the accident was "probably related closely enough to extensive offshore operations to fall within the Court's admiralty jurisdiction."[137]

4. *Merging Analysis and Inconsistent Decisions*

By the early 1980s, the various tests continued to produce inconsistent results.[138] Judges seemed willing to find admiralty jurisdiction in aviation tort claims, even though some courts preferred to limit maritime jurisdiction to only those cases that fell within specific statutory provisions.[139] In 1982, the Fifth Circuit reviewed maritime law and aviation issues in *Smith v. Pan Air Corp.*[140] Two suits were combined into one decision. Claim one involved the death of a pilot, who was killed when the seaplane he was piloting crashed into Louisiana soil as he returned from ferrying passengers engaged in mineral exploration.[141] The second claim arose from the death of a helicopter pilot who transported oil rig workers to and from platforms in the Gulf of Mexico.[142] As the pilot took off from the platform, the helicopter was struck by a crane ball and crashed into the Gulf, killing

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134 *Id.* at 658. The fact that Block Island could only be reached by air or water could have easily garnered admiralty jurisdiction under the functionality test, and so the decision could have been very different in another court.

135 484 F. Supp. 490 (S.D.N.Y. 1980).

136 *Id.*

137 *Id.* at 496.

138 *See* JOHN J. KENNELLY, THE EVALUATION OF AN AVIATION CASE FOR THE STANDPOINT OF THE PLAINTIFF 3-4 (Juanita M. Mayetiola ed., 1987). *See also* Kyle Brackin, *Salvaging the Wreckage: Multi-District Litigation and Aviation*, 57 J. AIR L. & COM. 655, 702-07 (1992).

139 *See* JOHN J. KENNELLY, THE EVALUATION OF AN AVIATION CASE FOR THE STANDPOINT OF THE PLAINTIFF 3-4 (Juanita M. Mayetiola ed., 1987); Kyle Brackin, *Salvaging the Wreckage: Multi-District Litigation and Aviation*, 57 J. AIR L. & COM. 655, 702-07 (1992).

140 684 F.2d 1102 (1982).

141 *Id.* at 1104.

142 *Id.* at 1105.

the pilot.[143] In both cases, the district courts dismissed the claims for lack of admiralty jurisdiction.[144]

In the first claim regarding the seaplane, the Fifth Circuit upheld the dismissal of the suit.[145] The determinative factor was that the seaplane had crashed into an inland marsh rather than navigable waters.[146] In the second claim, utilizing reasoning similar to its earlier decisions, the Fifth Circuit found admiralty jurisdiction in the helicopter accident claim.[147] Finding that the wrongful death could be heard in admiralty solely based upon DOHSA was sufficient to grant jurisdiction.[148] But the court took its reasoning one step further and allowed examination of the property claim as well, extending admiralty jurisdiction to non-death claims so long as the flight had an "essential maritime nexus."[149] The appellate court reasoned that even though the locality test must always be satisfied, "judicial economy" allowed litigation of both the wrongful death and the property claims in the same court.[150]

Smith v. Pan Air succeeded in establishing maritime locality as an absolute requirement for any aviation tort to achieve admiralty jurisdiction.[151] The Fifth Circuit's four-prong test gained favor, and was adopted by the Third, Fourth, Ninth and Eleventh Circuits.[152] The Supreme Court would later criticize the

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143 *Id.*

144 *Id.*

145 *Id.* at 1108.

146 *Id.* This meant that the appellate court disregarded both the function of the seaplane and the relationship of the wrong to the traditional maritime activity. The court held, however, that "[m]aritime locality is still an indispensable element of maritime jurisdiction." *Id.*

147 *Id.* at 1111. "[A]dmiralty jurisdiction has repeatedly been extended to cases in which death or injury occurred on navigable waters even though the wrongful act occurred on land. The place where the negligence or wrongful act occurs is not decisive. The place injury occurs and the function the injured person was performing at the time are more significant." *Id.*

148 Death on the High Seas Act, 46 U.S.C. §§ 761-67 (2002).

149 *Smith*, 684 F.2d at 1112.

150 *Id.*

151 *Id.* at 1108. The appellate court reasoned that the combination of the *Executive Jet* decision and the Supreme Court's reference to the Fifth Circuit's opinion in *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982), *aff'g* 641 F.2d 314 (5th Cir. 1981), led to the conclusion that "maritime locality is still an indispensable element of maritime jurisdiction . . ." *Smith*, 684 F.2d at 1108.

152 *See* Eagle-Picher Indus. v. United States, 846 F.2d 888 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 490 (1988); Oman v. Johns-Manville, 764 F.2d 224, 230 (4th Cir. 1985) ("a thorough analysis of the nexus requirement should include a consideration of at least the [*Kelly* factors]"); Bubla v. Bradshaw, 795 F.2d 349, 351 (4th

test(s) as unnecessary, and determine that a general analysis was preferential.[153]

C. The Trilogy–The Supreme Court Expands the Maritime Analysis of Executive Jet

1. *Foremost Insurance Co. v. Richardson*

In an effort to "resolve the confusion in the lower courts respecting the impact of Executive Jet Aviation," the Supreme Court granted *certiorari* to hear *Foremost Insurance Co. v. Richardson*.[154] The resulting decision expanded the *Executive Jet* "significant relationship to maritime activity" requirement from the aviation context to the general field of maritime torts.[155] In a five-four split decision, the Supreme Court allowed the imposition of admiralty jurisdiction in a pleasure boat collision on a small Louisiana river.[156] The district court found no admiralty jurisdiction because it reasoned that "traditional" meant "commercial," and thus the accident involving the pleasure boats could not and did not meet the guidelines for admiralty jurisdiction.[157] The Fifth Circuit[158] and the Supreme Court disagreed.

The Supreme Court found that the collision of the pleasure boats satisfied the locality test.[159] Further, the Court determined that the pleasure boat collision satisfied the substantial relation-

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Cir. 1986) (exclusively applying *Kelly* factors); Solano v. Beilby, 761 F.2d 1369 (9th Cir. 1985); Crotwell v. Hockman-Lewis Ltd., 734 F.2d 767, 768 (11th Cir. 1984). The test has been used to both uphold and deny admiralty jurisdiction. The Fifth Circuit, in *Molett v. Penrod Drilling Co.*, 826 F.2d 1419, 1426 (5th Cir. 1987) ("Molett I") added three factors to the *Kelly* factors. The appellate court looked at "the impact of the event on maritime shipping and commerce, the desirability of a uniform national rule to apply to such matters, and the need for admiralty 'expertise' in the trial and decision of the case." *Id.*

153 *See* Grubart v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995).

154 457 U.S. 668-69 (1982), *aff'g* 641 F.2d 314 (5th Cir. 1981).

155 *Id.* at 674.

156 *Id.* at 677.

157 *Id.* at 671.

158 *Foremost Ins. Co. v. Richardson*, 641 F.2d 314 (5th Cir. 1981).

159 The Court stated:

> The express holding of Executive Jet is carefully limited to the particular facts of that case. However, the thorough discussion of the theoretical and practical problems inherent in broadly applying the traditional locality rule haws prompted several courts and commentators to construe Executive Jet as applying to determinations of federal admiralty jurisdiction outside the context of aviation torts . . . . We believe that this is a fair construction. Although Executive Jet addressed only the unique problems associated with extending admiralty jurisdiction to aviation torts, much of the Court's

ship to traditional maritime activity test because the pleasure boats should be required to navigate according to the same rules as commercial vessels, and pleasure boat collisions on navigable waters have the potential to disrupt maritime commerce.[160]

In a strongly worded dissent, Justice Powell was concerned with the Court's "erosion of federalism."[161] The dissent maintained that pleasure boating was too new to be "traditional" for the purposes of the "significant relationship to maritime activity" test.[162] He suggested that an airplane resting in Lake Erie had a far greater potential to disrupt maritime commerce than a "toy boat" collision on a tiny Louisiana river.[163] For the dissent, the bottom line was that "[f]ederal courts should not displace state responsibility and choke the federal judicial docket on the basis of federal concerns that in truth are only 'imaginary.'"[164] The dissenting justices would have required a direct connection between the pleasure boats and maritime commerce.[165]

2. *Sisson v. Ruby*

Eight years after *Foremost,* the Supreme Court took its next maritime jurisdiction case. In *Sisson v. Ruby,*[166] a fire erupted on a yacht that docked at a marina on Lake Michigan.[167] The fire destroyed the yacht and damaged several other vessels in the marina.[168] The yacht owner invoked the Limited Liability Act provision, which limits a vessel owner's liability for any damage done without the owner's knowledge, and sought federal jurisdiction.[169] The district court and Seventh Circuit found an in-

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rationale in rejecting strict locality rule also applies to the maritime context.

Foremost Ins. Co., 457 U.S. at 673 (citations omitted).

160 *Id.* at 677.

161 *Id.* at 678.

162 *Id.* at 680-81.

163 *Id.* at 689.

164 *Id.* at 685-86 (quoting Stolz, *Pleasure Boating and Admiralty: Erie at Sea,* 51 CAL. L. REV. 661, 709 (1963)).

165 *Id.* at 677-86 (Powell, J., dissenting).

166 497 U.S. 358 (1990).

167 *Id.* at 360.

168 *Id.*

169 *Id.* If applicable, the provision would have limited the owner's maximum liability to the salvage value of the yacht, which was $800. Claims by the marina and owners of the other damaged yachts totaled over $275,000.

sufficient relationship to "traditional maritime activity," and dismissed the claim for lack of jurisdiction.[170]

The Supreme Court reversed on the grounds that all of the requirements for maritime jurisdiction were met.[171] The locality test was easily satisfied since the incident had occurred on Lake Michigan, a navigable waterway.[172] The first half of the test, requiring proof that there was a potential hazard to disruption of maritime commerce was met, since the fire could have spread from the noncommercial vessels to commercial vessels and could have interfered with travel on the navigable waters.[173]

To meet the second half of the test, the Court found that the storage and maintenance of a vessel in a marina was a relevant activity to successfully reach the "substantial relationship to traditional maritime activity" requirement.[174] The Court enunciated a generalized approach by stating that "our case ha[s] made clear that the relevant 'activity' is defined not by the particular circumstances of the incident, but by the general conduct from which the incident arose."[175]

In a concurring opinion, Justice Scalia agreed there was maritime jurisdiction, but suggested that the Court return to the simple reasoning of *Executive Jet*.[176]

> The sensible rule to be drawn from our cases, including Executive Jet and Foremost, is that a tort occurring on a vessel conducting normal maritime activities in navigable waters-that is, as a practical matter, every tort occurring on a vessel in navigable waters-falls within the admiralty jurisdiction of the federal courts.[177]

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[170] *In re* Sisson, 663 F. Supp. 858, 860 (N.D. Ill. 1987), *aff'd*, 867 F.2d 341 (7th Cir. 1989), *rev'd, sub nom.*, Sisson v. Ruby, 497 U.S. 358 (1990).

[171] *Sisson*, 497 U.S. at 363.

[172] *Id.* at 362.

[173] *Id.*

[174] *Id.* at 365.

[175] *Id.* at 364.

[176] *Id.* at 388 (Scalia, J., concurring).

[177] *Id.* at 368 (Scalia, J., concurring). Justice Scalia stated in *Executive Jet*, the Court had devised the "significant relationship to traditional maritime activity" for torts involving aircraft, not vessels. *Id.* In his opinion, "that test does not add any new substantive requirement for vessel related torts, but merely explains why all vessel-related torts [which ipso facto have such a 'significant relationship'], but only some non-vessel-related torts, come with 1333(1)." *Id.*

3. *Analyzing the Trilogy–Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*

In *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*,[178] the Supreme Court delivered a lengthy opinion that reviewed its opinions in *Executive Jet, Foremost,* and *Sisson*–the trilogy of maritime jurisdiction cases.[179] The *Grubart* case concerned the underground flooding of basements of businesses located in the Chicago loop caused by a barge pile driver on the Chicago River. In the process of removing old piles and installing new ones, a tunnel was weakened, eventually collapsed, and caused the flooding.[180] The district court dismissed the suit for lack of maritime jurisdiction, but the Seventh Circuit reversed, and the Supreme Court affirmed the Seventh Circuit.[181]

The Court maintained that in spite of the various tests applied by the lower courts, it would apply the two-prong test developed in *Executive Jet.*[182] Following *Sisson,* "a party seeking to involve federal admiralty jurisdiction . . . must satisfy conditions both of location and of connection to maritime activity."[183] The court stated: "[a] court applying the location test must determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water."[184] In turn, "[t]he connection test raises two issues. A court, first, must 'assess the general features of the type of incident involved,' . . . to determine whether the incident has 'a potentially disruptive impact on maritime commerce,' . . . Second, a court must determine whether 'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.'"[185]

The locality test was easily met since the Chicago River is navigable.[186] The *Grubart* Court determined the "general features"

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[178] 513 U.S. 527 (1995).

[179] *Id.* at 532-33. The Court noted that Congress had modified the law with the Extension of Admiralty Jurisdiction Act to "gather the odd case into admiralty," but the trilogy decisions of the Court were "aimed at keeping a different class of odd cases out." *Id.*

[180] *Id.* at 530.

[181] *Id.* at 531.

[182] *Id.* at 534. In criticizing the factor tests applied by the lower courts, the Supreme Court said that the review of the "general features" of the incident was a more satisfactory method for applying the two-prong test. *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.* (quoting Sisson v. Ruby, 497 U.S. 358, 363-65 (1990)).

[186] *Sisson,* 497 U.S. at 365.

of the incident proved to be potentially disruptive to maritime commerce because the damage to the tunnel and underground structures could restrict the waterway from navigational use during any repairs.[187] As to the connection prong, the Supreme Court stated in *Grubart:* "[w]e held that 'claims arising from airplane accidents are not cognizable in admiralty' despite the location of the harm, unless 'the wrong bear[s] a significant relationship to traditional maritime activity.' "[188]

Justice Thomas delivered a concurring opinion stating that he "would restore the jurisdictional inquiry to the simple question whether the tort occurred on a vessel on the navigable waters of the United States. If so, then admiralty jurisdiction exists."[189] It was his view that revisiting maritime jurisdiction for the third time in ten years suggested problems with the Court's approach and was causing too many difficulties in the lower courts.[190] Justice Thomas explained that the Court's extension of the *Executive Jet* aircraft rule to vessels and the further agreement by *Sisson* "created ambiguity and uncertainty by creating levels of generality required to determine maritime jurisdiction."[191]

One addition to the maritime jurisdiction matrix was the Court's finding that in cases involving multiple tortfeasors, "as long as one of the putative tortfeasors was engaged in traditional maritime activity the allegedly wrongful activity will 'involve' such traditional maritime activity and will meet the second nexus prong" of the test.[192] Thus, admiralty jurisdiction could apply[193] and the non-maritime parties do not affect the jurisdictional inquiry of the maritime party.[194]

Some have said that the reiteration of the admiralty jurisdictional test established in the trilogy cases, and re-enforced by the *Grubart* Court, has "prompted uniformity in the circuits, and

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[187] Grubert v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 539 (1995).

[188] *Id.* at 533.

[189] *Id.* at 549 (Thomas, J., concurring).

[190] *Id.* Similar to Justice Scalia's opinion in *Foremost,* Justice Thomas would return to the simple reasoning of *Executive Jet.*

[191] *Id.* at 551-54 (Thomas, J., concurring).

[192] *Id.* at 541.

[193] *Id.* Justice O'Connor, in her concurrence, wished to clarify that the admiralty jurisdiction once found over a particular party or claim did not require that the court exercise admiralty jurisdiction over all claims and all parties involved in the case. *Id.* at 548 (O'Connor, J., concurring).

[194] *Id.*

there does not appear to be any particular problem in applying the *Grubart* test."[195]

Land-based torts do not necessarily eliminate admiralty jurisdiction. If the nexus to traditional maritime activity can be demonstrated in conjunction with the tort's operative effect on navigable waters, jurisdiction may be possible.[196] Contrast this concept with an aviation tort falling within admiralty jurisdiction where the accident occurred in airspace over high sea, but the plane did not crash into the waters.

Thus, negligence, which may have occurred on land, does not necessarily preclude admiralty jurisdiction. This is so because the negligent act (or negligent failure to act) is only part of the total picture. In determining where the "tort occurred," one must also consider the *effects* of the negligence and where those effects occurred. Indeed, in *Executive Jet*, the Supreme Court stated, "[u]nder the locality test, the tort 'occurs' where the alleged negligence took effect . . ."[197] Similarly, a district court found admiralty jurisdiction in a case where a boat was stolen from a marina and later set ablaze in the bay.[198] The court found both the locality test and the substantial relationship test were met. Thus, the court found admiralty jurisdiction, finding the case similar to other cases in which product liability claims were asserted against land-bound defendants who allegedly supplied defective products that were installed in vessels and which caused injury or damage while the vessels were on the high seas.[199]

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[195] *See* Dale Van Demark, *Grubart v. Great Lakes Dredge & Dock Company: A Reasonable Conclusion to the Debate on Admiralty Tort Jurisdiction*, 17 PACE L. REV. 553, 586 (1997); Major B. Harding, *Judicial Decision-Making Analysis of Federalism Issues in Modern United States Supreme Court Maritime Cases*, 75 TUL. L. REV. 1517, 1547 (2001).

[196] *See* Third Corp. v. Puritan Marine Ins. Underwriters Corp., 519 F.2d 171, 174 (5th Cir. 1975) ("The maritime nature of the tort is not necessarily adversely affected by the fact that negligent construction or defective design . . . may have occurred ashore."); Hibschman v. Antilles Airboats, Inc., 440 F. Supp. 828, 841 (D.V.I. 1977) (The operating condition of the aircraft and the application of strict liability were issues raised).

[197] Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 266 (1972).

[198] Onebeacon Ins. Group v. Great Lakes Inn Mgmt., Inc., No. 01-C0969, 2002 U.S. Dist. LEXIS 23077 (E.D. Wisc. 2002).

[199] *See* Mink v. Genmar Indus., Inc., 29 F.3d 1543, 1546-47 (11th Cir. 1994) (involving an injured passenger who claimed vessel was defectively designed for not providing adequate handholds or seats); Hassinger v. Tideland Elec. Membership Corp., 781 F.2d 1022, 1024 (4th Cir. 1986) (defective mast); Sperry Rand Corp. v. Radio Corp., 618 F.2d 319, 320 (5th Cir. 1980) (defective steering gyro);

In assessing the substantial relationship test, the court stated:

> To reiterate, "[t]he connection test raises two issues. A court, first, must 'assess the general features of the type of incident involved,' . . . to determine whether the incident has 'a potentially disruptive impact on maritime commerce' . . . Second, a court must determine whether 'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.'"[200]

In addressing the first prong of the "maritime connection enquiries" a court is to ask "whether the incident could be seen within a class of incidents that posed more than a fanciful risk to commercial shipping . . . The first prong goes to the potential effects, not to the particular facts of the incident; that is to say, it goes to whether the general features of the incident were likely to disrupt commercial activity. The first *Sisson* test turns, then, on a description of the incident at an intermediate level of possible generality."[201]

IV. WARSAW CONVENTION IMPACT ON CLAIMS

For any aviation tort involving international air transportation,[202] the discussion must include the impact of the Warsaw Convention on claims, damages, and choice of law. The Warsaw Convention,[203] as modified by the Montreal Protocol No. 4,[204]

Jones v. Bender Welding & Mach. Works, 581 F.2d 1331, 1332 (9th Cir. 1978) (defective design caused damage to fishing vessel).

[200] *See Onebeacon*, 2002 U.S. Dist. Lexis 23077, at *10-11. (citing *Grubart*, 513 U.S. at 534) (quoting Sisson v. Ruby, 497 U.S. 358, 363-65 (1990)).

[201] *Id.* at *12 (quoting *Grubert*, 513 U.S. at 538-39) (citations omitted).

[202] International travel, for the purposes of the Warsaw Convention, is deemed to be travel from one signatory country to another. Even if one leg of the journey at issue is completed within the territorial jurisdiction of one country, as long as the beginning and end of the journey are in different signatory nations it will be deemed an international flight. *See* 49 U.S.C. § 40105 (1996). *See also* Haldimann v. Delta Airlines, Inc., 168 F.3d 1324, 1326 (D.C. Cir. 1999); *In re* Am. Airlines, Inc. Flight 869 Turbulence Incident of Jan. 17, 1996, 128 F. Supp. 2d 1367 (S.D. Fla. 2001).

[203] *See* Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.X. 11, *reprinted in* 49 U.S.C. § 40105 (West 2001) [hereinafter Warsaw Convention]. Article 17 of the Warsaw Convention governs the liability of international air carriers for accidents in which a passenger is wounded on an international flight. El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 162 (1999). Article 22 creates monetary liability limits on damage awards against an international airline. *Id.* at 163 n.7. Recognizing that the liability limits of the Warsaw Convention, signed in 1929 and amended in 1955, are now inadequate in most countries, a group of international airlines, including American Airlines,

provides the exclusive basis for filing personal injury suits against air carriers in international air transportation between High Contracting parties.[205] Airlines that are signatories to the International Air Transportation Authority (IATA) Intercarrier Agreement on Passenger Liability[206] assume liability for an injury caused by an accident within the meaning of the Warsaw Convention unless the airline can prove that it took all necessary measures to avoid the injury or accident.[207]

However, the Warsaw Convention does not allow all possible claims against an air carrier. Often at issue, is the Convention's prohibition against punitive damages and against emotional distress claims. Permissible claims under the Warsaw Convention are then evaluated by the provisions of applicable state and federal law. The Supreme Court has essentially closed the door on

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has taken action to waive the Convention's liability limits through a series of agreements. *See* Lloyd v. Am. Airlines, Inc., 291 F.3d 503, 506 n.2 (8th Cir. 2002). Among the agreements supplementing the Warsaw Convention is the International Air Transport Association Intercarrier Agreement on Passenger Liability (the IATA Intercarrier Agreement). With listed exceptions for certain routes, the measures implementing the IATA Intercarrier Agreement impose absolute liability on an international carrier to the extent of 100,000 Special Drawing Rights (SDRs—a type of international monetary reserve currency or accounting system created in 1968 by the International Monetary Fund, see International Monetary Fund, *at* http://www.encyclopedia.com/html/:/intlm1one.asp (last modified Jan. 28, 2003), which is a specialized agency of the United Nations that determines the value of SDRs relative to the currencies of the five largest exporting nations. Current conversion rates place this amount at approximately $134,453. For claims exceeding this amount, limited defenses are available to the airlines under the Warsaw Convention, but in all cases in which a passenger has been wounded in an accident, the IATA Intercarrier Agreement waives the Warsaw Convention's limitation of liability "on recoverable compensatory damages . . . so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger." The provisions are implemented in the carrier's tariffs and the contract of carriage between the carrier and its passenger.

204 The United States ratified Protocol No. 4 November 5, 1998 and it went into force March 4, 1999. *See* 144 CONG. REC. S11059-02 (Daily Ed. Sept. 28, 1998). A series of four protocols beginning with the Montreal Agreement in 1966 were the product of several delegate meetings. The United States has ratified only the fourth protocol. Instrumental to the ratification was the addition of the decedent's domicile as a venue to bring suit. *Id.*

205 El Al Israel Airlines, Ltd. v. Tseng, 525 U.S. 155, 170, 176 (1999) (finding that the Warsaw Convention is the passengers' exclusive remedy against an international carrier); Cortes v. Am. Airlines, Inc., 177 F.3d 1272, 1281 (11th Cir. 1999).

206 *El Al Israel Airlines*, 525 U.S. at 172.

207 *Cortes*, 177 F.3d at 1281-82 n.5; *In re* Air Crash Off Point Mugu, California, on Jan. 30, 2000, 145 F. Supp. 2d 1156, 1160 (N.D. Cal. 2001).

arguments against the exclusivity of the Warsaw Convention for international carriers under the provisions of Articles 17, 18, and 19,[208] and their application through Article 25.[209] However, Article 25 actions require showing that the air carrier did not take "all necessary measures" in order to break through the exclusivity of remedies that limit liability of the air carrier.[210] Finding that the air carrier did not take all necessary measures negates the due care exclusion from liability contained in the Convention.[211] The Ninth Circuit used this analysis to find an airline's employees were guilty of willful misconduct when an asthmatic passenger suffered complications when he was exposed to ambient second-hand smoke.[212] Evidence showed that the passenger and his wife had repeatedly requested assistance from the flight attendants with increasing urgency and were denied.[213]

The Supreme Court has said that the Warsaw Convention is "nothing more than a pass through, authorizing [a court] to apply the law that would govern in the absence of the Warsaw Convention."[214] However, most courts construe the pass-through language as applying only to remedies[215] and procedures[216]

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[208] Article 17 establishes liability for death or bodily injury to a passenger, Article 18 deals with liability of baggage and goods, and Article 19 deals with liability due to delay. Warsaw Convention, *supra* note 205, 49 Stat. at 3019.

[209] *El Al Israel Airlines*, 525 U.S. at 155. "Recourse to local law would undermine the uniform regulation of international air carrier liability that the Convention was designed to Foster." *Id.* at 169 (citing *Floyd*, 872 F.2d at 1483, *rev'd on other grounds*, 499 U.S. 530 (1991)). *See also* Zicherman v. Korean Airlines, 516 U.S. 217 (1996).

[210] "[A]lthough this issue has not been directly decided by the Supreme Court or the Ninth Circuit, 'every court that has addressed this issue has held that the liability and remedy contemplated by Article 17 of the Convention is compensatory in nature and not punitive'. . ." (quoting *In re* Air Crash Disaster Near Peggy's Cove, Nova Scotia on Sept. 2, 1998, 210 F. Supp. 2d 570, 572 (3d Cir. 2002)). For cases discussing willful misconduct, see *In re* Air Crash at Taipei, Taiwan, 219 F. Supp. 2d 1069 (C.D. Calif. 2002); Laor v. Air France, 31 F. Supp. 2d 347 (S.D.N.Y. 1998); Jack v. Trans World Airlines, 854 F. Supp. 654, 663 (N.D. Cal. 1994) (punitive damages not recoverable even if the air carrier engaged in willful misconduct).

[211] Montreal Protocol No. 4 revised the willful misconduct language to all necessary measures. Some say this has made Article 25 easier to penetrate in wrongful death claims.

[212] Husain v. Olympic Airways, No. 00-14509, 2002 WL 3170414 (9th Cir. Feb. 12, 2002).

[213] *Id.*

[214] *Zicherman*, 516 U.S. at 229.

[215] For a full discussion of the damages recoverable, particularly the unavailability of punitive damages, see In re Air Crash Off Point Mugu, California, on Jan.

available where not preempted by the Warsaw Convention. Thus, if a claim is permitted by the Convention, the analysis is governed by the law of the forum, including the forum's choice of law rules.[217] Note, as well, that the Warsaw Convention applies only to the air carrier. Thus, causes of action against a manufacturer or other entity are not precluded or addressed by the Warsaw Convention.

A. PUNITIVE DAMAGES

The district court in *In re Air Crash Off Point Mugu*,[218] held that the right to recover from the carrier, Alaska Airlines, fell under the Warsaw Convention and therefore limited the recovery to compensatory damages and excluded punitive damages. As another district court stated, "the case law denying punitive damages in Warsaw Convention claims remains fundamentally sound . . ."[219] These decisions are based on the Warsaw Convention's governance of claims between carriers and passengers. Actions against third party tortfeasors are a separate issue, and may allow non-aviation carriers to be sued for punitive damages.

Some have asserted that the *Zickerman* language establishing a "pass-through" to local damages law did not bar any type of dam-

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30, 2000, 45 F. Supp. 2d 1156 (2001). The district court in Point Mugu has articulated the most definitive position on this issue to date.

[216] For a procedural discussion, see *Hosaka v. United Airlines*, 305 F.3d 989 (9th Cir. 2002) (holding a forum non conveniens motion is unavailable under Warsaw).

[217] *See* Ins. Co. of N. Am. v. Fed. Express Corp., 189 F.3d 914, 919-20 (9th Cir. 1999).

[218] 45 F. Supp. at 1162 (citing *In re* Korean Airlines Disaster of Sept. 1, 1983, 932 F.2d 1475, 1485-90 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 994 (1991); *In re* Air Disaster at Lockerbie, Scotland on Dec. 21, 1988, 928 F.2d 1267, 1284 (2d Cir. 1991), *cert. denied*, 502 U.S. 920 (1991); Floyd v. E. Airlines, Inc., 872 F.2d 1462, 1483 (11th Cir. 1989), *rev'd on other grounds*, 499 U.S. 530, (1991); *In re* Air Crash Disaster at Gander, Newfoundland on Dec. 12, 1985, 684 F. Supp. 927, 931 (W.D. Ky. 1987); Pescatore v. Pan Am. World Airways, Inc., 97 F.3d 1, 14 (2d Cir. 1996); Laor v. Air France, 31 F. Supp. 2d 347, 350 (S.D.N.Y. 1998); Jack v. Trans World Airlines, 854 F. Supp. 654, 663 (N.D. Cal. 1994); Harpalani v. Air India, Inc., 634 F. Supp. 797, 799 (N.D. Ill. 1986); *In re* Air crash Disaster near Roselawn, Indiana on Oct. 13, 1994, 960 F. Supp. 150, 153 (N.D. Ill. 1997)).

[219] *See In re* Air Crash Disaster Near Roselawn, Indiana, 960 F. Supp. 150, 153 (N.D. Ill. 1997). "Far from rejecting the lower courts' conclusions that punitive damages are unavailable under the Warsaw Convention, *Zicherman* actually supports that conclusion by discussing damages in Convention claims purely in terms of compensatory damages." *Id.* at 152.

ages and therefore allowed punitive damages.[220] The courts have strongly rejected this argument.[221] As the *Point Mugu* Court held: "[T]he Supreme Court's 'pass through' language was discussing only those claims that were not otherwise barred by the Warsaw convention, and that the Court did not mean to overrule prohibitions established by the Convention."[222]

B. Is It An Accident?

For a claim to fall within the confines of the Warsaw Convention there must be an accident.[223] Pursuant to Article 17, for a carrier to be held liable to an injured passenger, the passenger must prove that an accident caused the injury.[224] The Supreme Court stated: "An air carrier cannot be liable under [the Warsaw Convention] when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of injury." The Supreme Court has defined an accident to be "an unexpected or unusual event or happening that is external to the passenger."[225] Determination of whether an accident has occurred within the parameters of the Supreme Court's definition is to be "flexibly applied after assessment of all the circumstances surrounding a passenger's injuries."[226] When there is contradictory evidence, the trier of fact decides, and if the passenger's injury "'indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft,' then it is not the result of an accident as envisioned by Article 17."[227] Currently, three areas of contested "injuries" appear to be getting the most attention: turbulence injuries, blood clot injuries, and emotional distress injuries.

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220 *See In re* Air Crash at Taipei, Tawain, on Oct. 31, 2000, 219 F. Supp. 2d 1069, 1071 (C.D. Cal. 2002).

221 *Id.* Read in its entirety, the Zicherman opinion clearly addresses the sole question of whether the substantive rule for awarding compensatory damages should be taken from French translations–the language in which the treaty was written and from which the meaning of the term "damages" ("dommage" in French) must be determined–or through application of local law, including the forum's choice of law principles. *Id. See also In Re Air Crash Off Point Mugu*, 145 F. Supp. 2d at 1162.

222 *In Re Air Crash Off Point Mugo*, 145 F. Supp. 2d at 1162. *See also In Re Air Crash Disaster Near Roselawn*, 960 F. Supp. 2d at 152.

223 *See* Air France v. Saks, 470 U.S. 392, 396 (1985).

224 *Id.* at 405.

225 *Id.*

226 *Id.*

227 *See* Husain v. Olympic Airways, No. 00-14509, 2002 WL 31770414, at *5 (9th Cir. Feb. 12, 2002) (quoting *Air France*, 470 U.S. at 406).

In *Blansett v. Continental Airlines, Inc.*, a Texas court allowed a claim by non-passengers to proceed for injuries to a passenger who allegedly sustained a debilitating cerebral stroke that was ostensibly caused by a blood clot that formed during a lengthy flight.[228] Turbulent injury claims have required a showing of more than normal flight bumping.[229] Turbulence encountered in flight is not considered an accident unless the passenger can establish it was "severe" or "extreme."[230]

C. EMOTIONAL DISTRESS

The Warsaw Convention also precludes claims for emotional distress.[231] Claims that arise from physical injury which stem from emotional distress are also prohibited by the Convention.[232] Recent attempts to secure emotional distress damages by some type of physical manifestation or injury to achieve recovery under Warsaw have garnered mixed results.[233] In *Weaver v. Delta Airlines*, the plaintiff successfully claimed post-traumatic

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[228] Blansett v. Continental Airlines, Inc., 204 F. Supp. 2d 999, 1000 (S.D. Tex. 2002). Blood clots in the lower extremities is a phenomenon typically referred to as "economy class syndrome" or "deep venous thrombosis syndrome." *Id.*

[229] *See* Bobian v. CSA Czech Airlines, No. 02-1627, 2002 U.S. Dist. LEXIS 22065 (D.C.N.J. 2002); Terrafranca v. Virgin Atlantic Airways Ltd., 151 F.3d 108 (3d Cir. 1999).

[230] *See* Magan v. Luftansa German Airlines, 181 F. Supp. 2d 396 (S.D.N.Y. 2002); Carey v. United Airlines, 255 F.3d 1044 (9th Cir. 2001).

[231] E. Airlines Inc. v. Floyd, 499 U.S. 530, 552 (1991). *See generally* Kathryn A. Meyers, *Does a Claim for Decedents' Pre-Death Pain and Suffering in Actions Arising Out of Aviation Disasters Governed by the Warsaw Convention and the Death on the High Seas Act?: The Need for Legislative Reform*, 75 WASH. U.L.Q. 1335 (1997).

[232] *See* El Al Israel Airlines, Ltd. v. Tseng, 525 U.S. 155, 172 (1999).

[233] *See* Jack v. Trans World Airlines, 854 F. Supp. 654, 667 (N.D. Cal. 1994) (holding that emotional distress is cognizable under the Warsaw Convention if the emotional distress arises out of a physical injury). *See also* Saks v. Air France, 470 U.S. 392 (1985). "The text of Article 17 refers to an accident which caused the passenger's injury, and not to an accident which is the passenger's injury." *Id. See also Bobian*, 2002 U.S. Dist. LEXIS 22065 (denying emotional distress claims for PTSD when airplane flew through turbulence); *Terrafranca*, 151 F.3d at 108 (physical manifestation of fear or anxiety not recoverable under Warsaw); Turturro v. Continental Airlines, 128 F. Supp. 2d 170 (S.D.N.Y. 2001) (Plaintiff discovered her anti-anxiety medicine was missing. Her fear of flying was such that she called 911 and had the police ask the pilot to return to the gate. Port Authority security boarded the plane and removed plaintiff from the plane as an "unruly" passenger. She was placed in a psychiatric emergency room against her will. Alleged injuries caused by her fear and subsequent removal from the plane was preempted by Warsaw, however the court said the plaintiff could proceed on claims regarding her treatment by security after she was removed from the plane because those claims were not subject to Warsaw.).

stress triggered by the "terror" of an emergency landing.[234] Expert witnesses presented evidence that the terror impacted her brain bio-chemically.[235] Note, however, the decision was later vacated.[236] Similarly, a plaintiff who received only minor injuries as she escaped from an airplane that crashed in a storm was allowed to recover all "damages sustained" at the district court level.[237] But upon review of the district court's award of $6.5 million, the Eighth Circuit followed what it termed the "more mainstream view" and ruled that the plaintiff was entitled to only emotional injury damages flowing from her personal injuries.[238] The Eighth Circuit held that emotional damages flowing directly from physical injuries caused by the accident should be compensated, but physical manifestations of mental or emotional injuries such as weight loss, inability to sleep, or physical changes in the brain resulting from chronic post-traumatic stress disorder were not compensable in a Warsaw claim.[239]

Most significantly, the Eighth Circuit stated that if the plaintiff opted for a new trial over the *remittur*, the trial court must hold a Daubert[240] hearing on the expert testimony to examine the reliability factors and analyze the expert's theories on the plaintiff's allegations that actual brain injury was suffered from chronic PTSD related to the air crash.

On the other hand, at least one court has been willing to grant family members of crash victims recovery for mental distress prior to death.[241]

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234 *See* Weaver v. Delta Airlines, Inc., 56 F. Supp. 2d 1190 (D. Mont. 1999). The district court distinguished this case from other emotional distress cases because the plaintiff's claim was presented as a physical injury, relying on recent scientific research explaining post-traumatic stress disorder causing trauma to brain cell structures. *Id.* at 1192.

235 *Id.* at 1190-92. The Montana jury awarded $1.25 million.

236 *Id.* (pursuant to stipulation by parties).

237 *See In re* Air Crash at Little Rock, Arkansas, on June 1, 1999, 118 F. Supp. 2d 916 (E.D. Ark. 2000). The airline opposed any recovery for emotional injuries not directly related to her physical injuries.

238 *See In re* Air Crash at Little Rock, Arkansas, On June 1, 1999, 291 F.3d 503 (8th Cir. 2002). In reviewing the evidence, the Eighth Circuit acknowledged that Plaintiff Anna Lloyd suffered injuries to her legs and some smoke inhalation in the crash that might have caused some of her emotional problems, but it determined that most of her mental injuries did not result directly from her physical injuries. *Id.* at 508.

239 *Id.* at 509-10.

240 *See* Daubert v. Merrell Dow Pharm. Inc., 509 U.S. 579 (1993).

241 *See In re* Air Crash Near Roselawn, Indiana, On Oct. 31, 1994, 954 F. Supp. 175, 178-79 (N.D. Ill. 1997).

V. DEATH ON THE HIGH SEAS

Enacted in 1920, the Death on the High Seas Act (DOHSA),[242] was intended to provide relief from the Supreme Court's very unpopular ruling in *The Harrisburg*.[243] The passage of DOHSA provided a cause of action to survivors of a decedent whose death was "caused by wrongful act, neglect or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States."[244]

A. WHAT CONSTITUTES HIGH SEAS?

The determination of high seas has changed since the statute was originally written. DOHSA first applied to deaths occurring beyond a marine league from shore.[245] A marine league is approximately three nautical miles. President Reagan extended the United States territorial waters in 1988 to twelve nautical miles.[246] The 2000 amendments to DOHSA conform to federal territorial waters, within twelve miles, DOHSA does not apply, beyond twelve miles, DOHSA applies.

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[242] 46 U.S.C. §§ 761- 67 (2001) [hereinafter DOHSA].

[243] The Harrisburg v. Richards, 119 U.S. 199 (1886). In the spring of 1877, the steamer, Harrisburg, collided with a schooner off the coast of Martha's Vineyard. The First Officer of the schooner was killed and his family sought a wrongful death action. The Court ruled that there was no remedy in federal common law for death occurring on the high seas, and that admiralty law could not supply a remedy. *Id. See also* Steven R. Pounian, *TWA 800 and Death on the High Seas Act*, N.Y.L.J. at 3 (Aug. 29, 1997).

[244] 46 U.S.C. §§ 761-67. Uniform and comprehensive legislation set forth provisions for all actions involving deaths on the high seas, including:

§ 761–Established the cause of action and the designation of beneficiaries;

§ 762–Restricts the recoverable damages to the "pecuniary loss" sustained by the designated beneficiaries;

§ 763–Provides a two year limitation (Since changed to 3 years with the enactment of the Uniform Statute of Limitation for Maritime Torts, 46 U.S.C. § 763a (1980);

§ 764–Preserves rights under foreign law, where applicable;

§ 765–Permits the continuance of a claim if a victim files the action under DOHSA and dies while the claim is still pending;

§ 766–Provides that contributory negligence of the decedent will not bar a recovery; and

§ 767–Allows concurrent jurisdiction in state courts and the preservation of state law in territorial waters.

[245] 46 U.S.C. § 761.

[246] Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988).

B. Application of DOHSA to Aviation Cases

Application of DOHSA to aviation cases began in 1941 with *Choy v. Pan American Airways.*[247] The Supreme Court recognized that if an aircraft accident satisfied the requirements of § 761, then DOHSA would apply to any action brought as a result of the accident.[248] The language is broad and has been found to apply to any accident occurring on the high seas which results in death, including actions involving air carriers,[249] aviation product manufacturers,[250] and aircraft maintenance facilities.[251] In *Executive Jet,* the Supreme Court recognized the applicability of DOHSA to aircraft accidents by stating:

> Since Choy, many actions for wrongful death arising out of aircraft crashes into the high seas beyond one marine league from shore have been brought under the Death on the High Seas Act, and federal jurisdiction has consistently been sustained in those cases. Indeed, it may be considered as settled that [DOHSA] gives the federal admiralty courts jurisdiction of such wrongful-death actions.[252]

In *Offshore Logistics v. Tallentire,* the Supreme Court reversed the Fifth Circuit and ruled that DOHSA preempted state law. "[W]here Congress had spoken, or where general federal maritime law controlled, the states exercising concurrent jurisdiction over maritime matters could not apply conflicting state substantive law."[253]

Zicherman v. Korean Air Lines,[254] serves as a strong example for the application of DOHSA to aviation cases. In the 1983 Korean Air Line disaster, the Supreme Court ruled that the case fell within the "literal terms" of DOHSA and that "it is well established that those literal terms apply to airplane crashes."[255] In *Zicherman,* an international flight was shot down and crashed into the high seas, causing the death of all aboard.[256] The Court held that DOHSA was the applicable law on damages for inter-

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247 *See* Batkiewicz v. Seas Shipping Co., 53 F. Supp. 802, 804 (S.D.N.Y. 1943) (citing the previous unpublished decision in *Choy v. Pan Am. Airways*).

248 *See* Offshore Logistics v. Tallentire, 477 U.S. 207, 212-15 (1986); Miles v. Apex Marine Corp., 498 U.S. 19, 22-24 (1990).

249 *See Offshore Logistics,* 477 U.S. at 212-15; *Miles,* 498 U.S. at 22-24.

250 *See Offshore Logistics,* 477 U.S. at 212-15; *Miles,* 498 U.S. at 22-24.

251 *See Offshore Logistics,* 477 U.S. at 212-15; *Miles,* 498 U.S. at 22-24.

252 *Executive Jet,* 409 U.S. at 263-64.

253 *See Offshore Logistics,* 477 U.S. at 228.

254 516 U.S. 217 (1996).

255 *Id.*

256 *Id.* at 219.

national flights governed by the Warsaw Convention,[257] making DOHSA the exclusive source of recovery for wrongful death damages.[258]

DOHSA creates a wrongful death action that compensates designated beneficiaries for losses sustained as the result of the decedent's death.[259] Survivor actions, which allow the continuation of an action by decedent for personal injuries prior to death, are not permitted.[260]

The Supreme Court granted certiorari to *Dooley v. Korean Air Lines, Co.*,[261] to resolve a conflict among the circuits.[262] The Court followed its earlier decisions in *Offshore Logistics, Inc. v. Tallentire*[263] and *Mobile Oil Corp. v. Higginbotham*,[264] holding that congressional designation of potential claimants and recoverable damages under DOHSA was clear, and neither decedent estates as claimants in a survival action, nor non-pecuniary damages were permitted.[265]

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[257] *Id.* at 218-19.

[258] *Id. See also* Jad J. Stepp & Michael J. AuBuchon, *Flying Over Troubled Waters: The Collapse of DOHSA's Historic Application to Litigation Arising from High Seas Commercial Airline Accidents*, 65 J. AIR L. & COM. 805, 842 (2000) ("For cases arising under [DOHSA] jurisdiction is guaranteed 'in admiralty' [and] the law is well-settled that, in all admiralty cases, the applicable substantive law is general maritime law."); Jimmy Wilkens, *Application of Admiralty Jurisdiction to Aviation Disaster on the High Seas*, 20 MAR. L. J. 465 (1996); William C. Brown, III, *Problems Arising from the Intersection of Traditional Maritime Law and Aviation Death and Personal Injury Liability*, 68 TUL. L. REV. 577 (1994).

[259] A personal representative of the decedent must initiate the action, and the action must exclusively benefit the decedent's spouse, parent, child or dependent relative. A dependent relative is one who is financially dependent on the decedent at the time of his/her death. Future promise of support is not enough, neither is emotional dependence. *See* Oldham v. Korean Air lines, 127 F.3d 43 (D.C. Cir. 1997); Zicherman v. Korean Air Lines, 43 F.2d 18 (2d Cir. 1994), *rev'd in part on other grounds*, 116 S. Ct. 629 (1996); Evich v. Connelly, 759 F.2d 1432 (9th Cir. 1985); 46 U.S.C. § 761 (2001). *See also* Kole v. Korean Air Lines, 92 F.3d 1192 (9th Cir. 1996); Alcabasa v. Korean Air Lines, 62 F.3d 404 (D.C. Cir. 1995); Cruz v. Korean Air Lines, 838 F. Supp. 843 (S.D.N.Y. 1993).

[260] *See* Dooley v. Korean Airlines, 524 U.S. 116 (1998).

[261] *Id.*

[262] *Id.*

[263] *See Offshore Logistics*, 477 U.S. at 218.

[264] *See* Higginbotham v. Mobil Oil Corp., 357 F. Supp. 1164 (W.D. La. 1973), *aff'd in part*, 545 F.2d 422 (5th Cir. 1977), *rev'd on other grounds*, 436 U.S. 618 (1978).

[265] *See Dooley*, 524 U.S. at 116. *See also* Hugh R. Koss & Michael L. Rodenbaugh, *Recent Developments in Aviation Law*, 65 J. AIR L. & COM. 3 (1999).

C. DAMAGES UNDER DOHSA

1. *Pecuniary*

Recovery for pecuniary losses[266] under DOHSA has been held to include damages for loss of support and maintenance,[267] loss of services, loss of parental nurture, loss of inheritance, and funeral or burial expenses.

2. *Non-Pecuniary*

The Supreme Court has interpreted DOHSA to preclude the recovery of non-pecuniary damages, whether based on state law[268] or general maritime law.[269] In a state action, awarding non-pecuniary damages can be significant. Key elements of such claims including loss of society, survivor's grief, and pre-death pain and suffering. Loss of society encompasses a wide variety of mutual benefits family members receive from each other such as love, attention, companionship, and protection. According to the Zicherman Court, DOHSA precludes loss of society damages.[270] The negative impact of grief upon the survivors is also not recoverable.[271] In this area, DOHSA follows most states in denying recovery to survivors for mental anguish, grief and sorrow.

3. *Pre-Death Pain and Suffering*

Prior to the Supreme Court cases in *Dooley* and *Zicherman*, the lower courts generally allowed DOHSA to be supplemented with a survival action for non-pecuniary pre-death pain and suffering damages.[272] A California district court stated the typical application of a lower court decision: "The Court . . . has expressly reserved decision on whether a *survival* action brought by the

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266 46 U.S.C. § 762. The recovery in suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought. *Id.*

267 DOHSA restricts damages to the support and maintenance a claimant would have received if the decedent had lived. DOHSA does not allow recovery for lost or future earnings. *See* Miles v. Apex Marine Corp., 498 U.S. 19, 23-36 (1990).

268 *See Offshore Logistics*, 477 U.S. at 218.

269 *See Higginbotham*, 357 F. Supp. at 1164.

270 *See Zicherman*, 516 U.S. at 217.

271 *Id.*

272 *Id.*

decedent's estate and seeking non-pecuniary damages could be permitted where DOHSA applies."[273] Claims were permitted on the basis of the Warsaw Convention, general maritime law and state law.[274] It should be noted the Hawaii accident was construed as a DOHSA claim, even though the aircraft was able to land following the mid-air accident over international water.[275] The *Zickerman* decision appeared to remove the availability of non-pecuniary damages, including survivor's grief, and pre-death pain and suffering.[276] Doubts were removed with the Supreme Court's conclusions in *Dooley v. Korean Air Lines.*[277]

In previous decisions, courts had decided that since DOHSA only specifically addressed wrongful death actions, it was up to the courts to fill the void created by Congress. In *Dooley*, however, the Court determined that Congress intended to withhold survival remedies by only permitting pecuniary damages.[278] By inference, the Court determined that Congress had "chosen to adopt a more limited survival provision,"[279] otherwise, those seeking to recover non-pecuniary damages for pre-death pain and suffering would illegally enlarge the class of beneficiaries and recoverable damages specifically limited by the provisions of DOHSA.[280] The Court was further persuaded by comparing the provisions of DOHSA with other federal maritime remedies,

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[273] *In re* Air Crash Disaster Near Honolulu, Hawaii, on Feb. 24, 1989, 792 F. Supp. 1541, 1545 (N.D. Cal. 1990). *See also* Bowden v. Korean Air Lines, 814 F. Supp. 592, 598 (E.D. Mich. 1993), *rev'd sub nom,* Bickel v. Korean Air Lines, 83 F.3d 127, 132 (6th Cir.), *amended on reh'g,* 96 F. 3d 151 (6th Cir. 1996); *In re* Inflight Explosion on TWA Aircraft Approaching Athens, Greece on Apr. 2, 1986, 778 F. Supp. 625, 637 (E.D.N.Y. 1991), *rev'd on other grounds sub nom.*, Ospina v. TWA, 975 F.2d 35 (2d Cir. 1992).

[274] *See* Azzopardi v. Ocean Drilling & Exploration Co., 742 F.2d 890, 893 (5th Cir. 1984); Barbe v. Drummond, 507 F.2d 794, 799 (1st Cir. 1974); Dugas v. Nat'l Aircraft Corp., 438 F.2d 1386, 1389 (3d Cir. 1971).

[275] *See In Re Air Crash Disaster Near Honolulu,* 792 F. Supp. at 1544.

[276] *See* Dooley v. Korean Airlines, 524 U.S. 116 (1998); Saavedra v. Korean Air Lines, 93 F.3d 547, 549-51 (9th Cir. 1996) (discussing *Zicherman* in Circuit Court of Appeals decisions).

[277] 524 U.S. 116 (1998).

[278] DOHSA expresses Congress' judgment that there should be no [survival] 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 death that occurs on the high sea. *Id.*

[279] *Id.*

[280] *Id.*

such as the Jones Act[281] and the Federal Employers' Liability Act,[282] which specifically provide a survival cause of action. The Court conclusively foreclosed the non-recovery of pre-death pain and suffering damages governed by DOHSA, reasoning that "we will not upset the balance struck by Congress by authorizing a cause of action with which Congress was certainly familiar but nonetheless declined to adopt."[283]

4. Punitive Damages

Punitive damages are not available in an action governed by DOHSA. In addition, most DOHSA actions are impacted by the provisions of the Warsaw Convention which specifically prohibits punitive damages.[284]

D. DOHSA Changes in 2000

Following several air crashes, particularly the TWA 800 crash in 1996 off the coast of New York,[285] political pressure was exerted on Congress to make changes to DOHSA.[286] Attached to a comprehensive aviation reform measure,[287] amendments to DOHSA became effective April 5, 2000, but the remedies were extended retroactively to one day prior to the crash of TWA flight 800 to allow application of the new provisions to those litigants.[288]

New provisions mean that DOHSA no longer applies to a wrongful death act that occurs on the high seas within twelve

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281 46 U.S.C. § 688, at app. (2001). The Jones Act was enacted the same year as DOHSA, and actually provides the survival cause of action through incorporation of the Federal Employers' Liability Act.

282 45 U.S.C. § 51, at app. (2001).

283 *Dooley*, 524 U.S. at 124.

284 *See* Bergen v. F/V St. Patrick, 816 F.2d 1345, 1348 (9th Cir. 1987); *In re* Disaster Near Honolulu, Hawaii, 792 F. Supp. 1541, 1545-46 (N.D. Cal. 1990); *In re* Korean Air Lines Disaster at Lockerbie, Scotland, on Dec. 21, 1988, 928 F.2d 1267, 1284 (2d Cir. 1991); Floyd v. E. Airlines, Inc., 872 F.2d 1462, 1483 (11th Cir. 1989), *rev'd in part on other grounds sub. nom.*, E. Airlines v. Floyd, 499 U.S. 530 (1991).

285 *In re* Air Crash off Long Island, New York, on July 17, 1996, 209 F.3d 200 (2000).

286 *See generally* Stepp & Au Buehon, *supra* note 261.

287 *See* Wendell H. Ford Aviation Investment Reform Act for the 21st Century ("AIR 21"), Pub. L. No. 106-181, 114 Stat. 61 (codified as amended at 46 U.S.C. app. § 761 (2001)).

288 Other cases that may have been assisted by the changes were Egypt Air flight 990 and Swiss Air 111.

nautical miles of the United States shoreline.[289] But beyond twelve nautical miles, where DOHSA applies, non-pecuniary damages are now recoverable.[290] These amendments only apply to commercial aviation accidents. Inside the territorial sea, the amendment provides "the rules applicable under federal, state and other appropriate law shall apply," but only involving commercial aviation cases.[291]

Following the crash of a helicopter into a fixed oil rig platform, the plaintiffs in *Brown v. Euorocopter S.A.*,[292] first sought recovery under state law as made applicable by the Outer Continental Shelf Lands Act (OCSLA).[293] The court ruled DOHSA applied, and thus non-pecuniary damages were not available.[294] The plaintiffs then sought remedy under the amended version of DOHSA. The court found that the helicopter accident fell within the "commercial aviation accident" provision and held that the plaintiffs were entitled to recover non-pecuniary damages for loss of care, comfort, and companionship.[295]

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289 "AIR 21" amends DOHSA:

1. Within 12 Miles: DOHSA does not apply to a commercial aviation accident occurring on the high seas 12 nautical miles or closer to the shore of the United States. In those instances, the rules applicable under Federal, State, and other appropriate law shall apply.
2. Beyond 12 Miles: DOHSA applies to a commercial aviation accident occurring on the high seas beyond 12 nautical miles from the shore of the United States but:
   a. additional compensation for non-pecuniary damages (defined as compensation for loss of decedent's care, comfort, and companionship) is recoverable.
   b. Punitive damages are expressly made not recoverable.
3. Effective date: The amendment shall apply to any death occurring after July 16, 1996.

Id. (This is the day before TWA 800 crashed off the coast of Long Island.)

290 *Id.*

291 *Id.*

292 111 F. Supp. 2d 859 (S.D. Tex. 2000).

293 43 U.S.C. § 1331 (2001). OCSLA most frequently appears in the context of helicopter accidents on oil drilling platforms. "Federal law controls but the law of the adjacent State is adopted as surrogate federal law to the extent that it is not inconsistent with applicable federal laws and regulations." Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 217 (1986). The platforms, as covered by OCSLA, are treated as if they were islands, or "federal enclaves within a landlocked state." *Id.*

294 *Brown*, 111 F. Supp. 2d at 863.

295 *Id.* at 864.

E. Territorial Waters of a Foreign State

In addition, applicability of DOHSA to foreign territorial waters has been an issue. Courts have generally held that if the accident occurs beyond the territorial waters of the United States, then "high seas" is relevant, even when the incident occurs in the territorial waters of a foreign nation.[296] Most would argue that since the Supreme Court's decision in *Zicherman*, there is no doubt when a plane crashes in the high seas causing death, DOHSA will default to the applicable law of the United States, and not foreign law.[297] However, such cases are frequently the subject of *forum non conveniens* issues.[298]

VI. MARITIME LAW APPLICATION–MORAGNE WRONGFUL DEATH CLAIMS

A. Recognizing Wrongful Death Actions

In *Moragne v. State Lines Marine Lines, Inc.*,[299] the widow of a longshoreman brought suit against a vessel owner to recover for wrongful death, basing one claim on negligence, and a second claim in admiralty on the unseaworthiness of the vessel.[300] Liability could not be found on the negligence claim on the basis of state law.[301] However, the Court did find that an action for wrongful death in territorial waters was subject to admiralty jurisdiction.[302] Overruling *The Harrisburg*,[303] the Court declared a new rule of maritime law, holding "that an action does lie under general maritime law for death caused by violation of maritime duties."[304] The boundaries of the wrongful death action were not defined. Instead, it took four subsequent Supreme Court decisions to determine the parameters. In *Sea-Land Services, Inc. v. Gaudet*,[305] the Court decided that damages for loss of society are available in general maritime wrongful death actions.[306] A

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296 *See In re* Air Crash Disaster Near Bombay, India, 531 F. Supp. 1175, 1182 (W.D. Wash. 1982).

297 *See* Zickerman v. Korean Air Lines Co., Ltd., 516 U.S. 217, 224 (1996).

298 *See In re* Air Crash in Bali, Indonesia on Apr. 22, 1974, 684 F.2d 1301 (9th Cir. 1982).

299 398 U.S. 375, 387-402 (1970).

300 *Id.* at 375-76.

301 *Id.* at 376.

302 *Id.* at 409.

303 119 U.S. 199 (1886). Relief was not provided for wrongful death.

304 *Moragne*, 398 U.S. at 409.

305 414 U.S. 573 (1974).

306 *Id.* at 575.

Moragne action is independent of any action the decedent may have for his personal injuries.[307] But damages for loss of society in actions resulting from death on the high seas were not allowed in *Mobil Oil Corp. v. Higginbotham.*[308] Non-pecuniary damages, which are available under state law, are not allowed in wrongful death actions that are heard under the auspices of DOHSA, according to *Offshore Logistics, Inc. v. Tallentire.*[309] In the fourth case, *Miles v. Apex Marine Corp.*,[310] the Court determined that the Jones Act,[311] which provides pecuniary damages, is the exclusive remedy for Jones Act "seaman," even if the claim is based upon a general maritime action.

B. WRONGFUL DEATH EXTENDED BEYOND UNSEAWORTHINESS

The wrongful death action may be based upon either negligence or strict liability principles.[312] The general maritime cause of action recognized in *Moragne* was based on the duty of seaworthiness.[313] Recently, the Supreme Court, in *Norfolk Shipbuilding & Drydock Corp. v. Garris*, confirmed that Moragne wrongful death actions could be equally available for negligence.[314] With reference to the Supreme Court's opinion in *Yamaha*, Justice Scalia's opinion for the Court stated:

> As we have noted in an earlier opinion, the wrongful death rule of *Moragne* was not limited to any particular duty, but *Moragne's* facts were limited to the duty of seaworthiness, and so the issue of wrongful death for negligence has remained technically open.

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307 *Id.* at 578.

308 *Id.*

309 477 U.S. 207 (1986).

310 498 U.S. 19 (1990).

311 46 U.S.C. app. § 688 (2001). The Jones Act is fundamentally a claim of seaworthiness that has been applied to matters involving general maritime law.

312 *See* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY §§ 6-32, at 368 (2d ed. 1975) (indicating a strong belief that the general maritime wrongful death action created by *Moragne* provides recovery for negligence as well as unseaworthiness). *See* Nelson v. United States, 639 F.2d 469, 473 (9th Cir. 1980); Pan-Alaska Fisheries, Inc., v. Marine Constr. & Design Co., 565 F.2d 1129, 1135 (9th Cir. 1977).

313 *Moragne*, 398 U.S. at 409.

314 532 U.S. 811 (2001). It is interesting to note that in the underlying appellate action of the Fourth Circuit, the panel was split on the application of *Moragne*. Senior Judge Hall, writing for the majority, noted that if the *Moragne* Court had meant to confine its holding to the seaworthiness issue it would have distinguished *The Harrisburg*, rather than overruling it. Further, the Fourth Circuit interpreted the Supreme Court's *Yamaha* decision to "embrace" negligence as a remedy allowed by *Moragne*. *Id.*

> We are able to find no rational basis, however, for distinguishing negligence from seaworthiness.[315]

The Court also looked to the uniformity principle decided in *Moragne*, and concluded that it was "centered on the extension of relief,"[316] rather than "on the contraction of remedies."[317] Thus, the courts articulated a broad relief for torts committed in navigable waterways, and left the door open to bring general negligence claims for wrongful death in a general maritime wrongful death action.

C. Damages Available in a Moragne Wrongful Death Claim

Damages available under a *Moragne* wrongful death claim include both pecuniary and non-pecuniary damages.

1. Pecuniary and Non–Pecuniary

Both pecuniary and non-pecuniary damages are available in *Moragne* wrongful death claims.[318] However, claims that are also subject to either DOHSA or the Warsaw Convention must be scrutinized to determine how the various provisions interplay.[319]

2. Punitive Damages

Courts have not addressed whether punitive damages are available in a non-seafarer *Moragne* action.[320] There is, however, a long history of punitive damages in admiralty cases.[321] Punitive damages are available in a survivor action in jurisdictions that allow such claims.[322] Note, since most maritime cases involve commercial air carriers, the provisions of the Warsaw Con-

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[315] *Id.* at 814 (noting Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 214 n.11 (1996) (dictum)).

[316] *Yamaha Motor Corp.*, 516 U.S. at 213.

[317] *Id.* The Court supported its conclusion with previous decisions allowing remedies available to longshore and harbor workers where federal law remedies were also available. *Id.* at 214-15.

[318] *Moragne*, 398 U.S. at 409.

[319] *See supra* Part III and Part V for discussion of these doctrines.

[320] *See In re* Air Crash Off Point Mugu, 145 F. Supp. 2d 1156, 1166 (N.D. Cal 2001).

[321] *See* Benedict on Admiralty, *supra* note 11, § 5.04[D]; Schoenbaum, *supra* note 12, §§ 5-17.

[322] *Id.*

vention will preclude punitive damage awards when the Convention is applicable.[323]

3. Survivor Actions

Prior to the Supreme Court's decision in *Dooley*,[324] survival recoveries were allowed under general maritime law. With the decision in *Dooley*, the Supreme Court stated that DOHSA does not include a survival remedy, and general maritime law will not allow for recovery of loss of society–except in state waters.[325] One should note that Justice Thomas may have opened a door by stating that "[a]ccordingly, we need not decide whether general maritime law *ever* provides a survival action."[326] *Dooley* also indicates that general maritime law will not allow recovery for loss of society, except in state waters.[327]

The Court allowed survival recoveries in *Miles v. Apex Marine Corp.*[328] The Jones Act and the Federal Employers' Liability Act specifically allow recovery for losses suffered during a decedent's lifetime.[329] The Court would not allow recovery for future lost earnings, although some state statutes would allow this remedy in their survival statutes.[330] Following *Apex*, the court in *In re Air Crash Disaster Near Honolulu*, allowed a survival action based upon the "internal laws" of the United States in conjunction with the "survival" component of the Warsaw Convention.[331]

Pre-death pain and suffering is an element in most states' survival statutes.[332] Some circuits recognize a survivor action under general maritime law. For example, the Ninth Circuit recognizes the right of a victim's estate to recover damages for his personal injuries prior to death.[333] Since the Ninth Circuit rec-

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323 *See supra* Part VI.

324 524 U.S. 116 (1998).

325 *Id.* at 123.

326 *Id.* at 124 n.2.

327 *Id.* at 125.

328 498 U.S. 19 (1990). This case involved a Jones Act unseaworthiness claim, available only to crew members.

329 46 U.S.C. § 688 (2001); 45 U.S.C. § 59 (2001).

330 *Apex Marine Corp.*, 498 U.S. at 19.

331 783 F. Supp. 1261, 1266 (1992).

332 *See* RESTATEMENT (SECOND) OF TORTS §§ 924, 926; KEETON, PROSSER AND KEETON ON TORTS § 126.

333 *See* Sutton v. Earles, 26 F.3d 903, 919 (9th Cir. 1994); Evich v. Connelly, 759 F.2d 1432, 1434 (9th Cir. 1985). Damages available may include pre-death pain and suffering, emotional distress, and loss of future wages. *Id. See also* Evich v. Connelly, 819 F.2d 256, 258 (9th Cir. 1987) [hereinafter Evich II]. Punitive damages are also permitted in a survivor action.

ognizes survival actions, the plaintiffs in *In re Air Crash Off Point Mugu*, will be able to seek punitive damages against the plane's manufacturer.[334]

4. *Application of Maritime to Crew Members*

As with other personal injury tort claims, damages recoverable for a wrongful death depend upon the status of the deceased, and whether the suit is brought against an employer or non-employer.[335] If admiralty law is applied to an aviation incident, deceased crew member-employees can receive compensation through the applicable state workers' compensation law or under general maritime principles.[336] Determination of when crew members may receive state workers' compensation remedies or may seek maritime law remedies depends upon the forum state of the employee and its workers' compensation laws.[337]

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[334] *See In Re Air Crash Off Point Mugu*, 145 F. Supp. 2d at 1162. The court also said that plaintiffs can bring wrongful death and survival actions against the airline and the manufacturer. *Id.* Damages may include compensation for the passengers' and crew members' pain before death and loss of their future wages. *Id.* These damages might not have been available under Alaska state law.

[335] For the wrongful death of seaman when the action is against the seaman's employer, the Jones Act is applicable. On the other hand, if the action is against a non-employer, then at high seas, DOHSA is applicable, but similar to aviation accidents, the courts are split on recovery for deaths in state territorial waters or the area in between. *See* Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 232 (1986). Court in Louisiana and California disallowed non-pecuniary losses based on *Offshore*. *See* Trident Marine, Inc. v. M/V Atticos, 876 F. Supp. 832 (E.D. La. 1994); Davis v. Bender Shipbuilding & Repair Co., Inc., 27 F. Supp. 3d 426 (9th Cir. 1994). *But see* Gerdes v. G & H Towing Co., 967 F. Supp. 943, 945 (S.D. Tex. 1997) (allowing non-pecuniary damages to a seaman, and criticizing other courts for seeking uniformity under the premise of general maritime law, ad depriving seaman of full available compensation). *See also In re* Denet Towing Serv., Inc., No.Civ.A. 98-1523, 1999 WL 329698, at *6 (E.D. La. May 21, 1999) (refusing to deprive plaintiff of full damages). Wrongful death of longshoreman or harbor workers during employment falls under the auspices of LHWCA. 33 U.S.C. §§ 901-950 (2001). If death occurs on the high seas, DOHSA provides the exclusive remedy whether against an employer or non employer under the LHWCA. 33 U.S.C. § 905(a) (2001). However, a death occurring in state waters finds the LHWCA silent on damages and the courts have allowed non-pecuniary damages, including loss of society. *See* Sea-Land Serv., Inc. v. Gaudet, 414 U.S. 573 (1974).

[336] *See* Chandris, Inc. v. Latsis, 515 U.S. 347, 356 (1995); *see also* Flying Boat, Inc. v. Alberto, 723 So.2d 866 (Fla. Dist. Ct. App. 1998) (finding that the Warsaw Convention preempts state workers' compensation statute).

[337] *See* Chan v. Soc'y Expeditions Inc., 39 F.3d 1398, 1402 (9th Cir. 1994). The Ninth Circuit allowed an employee of the state of Washington to invoke a negligence claim under admiralty law against his employer because the state's law specifically excluded maritime actions from its workers' compensation exclusivity

VII. CONSEQUENCES OF MARITIME LAW APPLICATION–BETWEEN THE BEACH AND 12 NAUTICAL MILES

"[O]nce admiralty is established, then all of the substantive rules and precepts peculiar to the law of the sea become applicable."[338] Exclusive jurisdiction is granted to federal courts, sitting as admiralty courts, to determine substantive and procedural admiralty law, to exercise and enforce admiralty remedies, and to declare admiralty law.[339] Concurrent jurisdiction exists between the state courts and federal courts, sitting as law courts, to hear in personam claims for damages arising out of admiralty torts.[340] Once it is determined that a tort is by its nature, maritime, then maritime law applies. However, a state-based claim is permitted in a maritime case as longs as:

(1) It will not contravene an essential purpose of a congressional act governing maritime law, or work a material prejudice to the general maritime law, or interfere with the harmony and uniformity of the general maritime law in its international and interstate relations,[341] and either

(2) fulfills a state's significant and pressing interest in a matter,[342] or

(3) fills a void in the general maritime law by serving its humane and liberal character of providing remedies to those injured or killed by the perils of the sea.[343]

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provision. See also Green v. Vermillion Corp., 144 F.3d 332, 335 (5th Cir. 1998), where the Fifth Circuit ruled that Louisiana's exclusive remedy proscribed in the Logician Workers' Compensation scheme was overridden by federal maritime law. *Id.* at 335 (citing King v. Universal Elec. Const. Corp., 799 F.2d 1073, 1074 (5th Cir. 1986)). *But see* Brockington v. Certified, 903 F.2d 1523, 1533 (11th Cir. 1990) (holding that in the absence of an exclusivity provision, an employee was prevented from making a maritime claim by the state workers' compensation law).

[338] *In re* Dearborn Marine Serv., Inc., 499 F.2d 263, 277 n.27 (5th Cir. 1974).

[339] *See* 2-14 AVIATION ACCIDENT LAW § 14.01 (Bender 2001).

[340] *Id.*

[341] *Id.*

[342] *See* Comind, Compannia de Seguros v. Sikorsky Aircraft, 116 F.R.D. 397, 426-28 (D. Conn. 1987).

[343] *See* AVIATION ACCIDENT LAW, *supra* note 342, § 14.01 (citing Moragne v. United States Marine Lines, Inc., 398 U.S. 475, 387-402 (1970)); *In re* S/S Helena v. United States, 529 F.2d 744 (5th Cir. 1976).

A. Admiralty Jurisdiction Does Not Necessarily Preempt State Law

In the landmark decision of *Yamaha Motor Corp., U.S.A. v. Calhoun*[344] the Supreme Court ruled that the federal maritime wrongful death action recognized in *Moragne v. States Marine Lines, Inc.*,[345] did not preempt application of state wrongful death statutes.[346] In *Calhoun*, a twelve-year-old was on a vacation with her family at a Puerto Rico resort hotel. She rented a jet ski, and while operating the jet ski, she collided with a vessel anchored in the waters near the hotel.[347] Her parents sued Yamaha alleging defective design and manufacture in the U.S. District court for the Eastern District of Pennsylvania based upon Pennsylvania's wrongful death and survivor statutes. Yamaha claimed that the federal wrongful death action announced in *Moragne* provided the exclusive source of recovery, and precluded state law remedy.[348]

The Court asserted that *Moragne's* wrongful-death action extended to nonseafarers.[349] It concluded with recognition of its previous deference to Congress when Congress had enacted comprehensive tort remedies.[350] However, the Court noted that Congress had not chosen to act in prescribing remedies for wrongful deaths of nonseafarers in territorial waters. Thus, the Court chose to preserve the application of state statutes to deaths occurring in territorial waters.[351]

The *Calhoun* decision carefully examined the *Moragne* outcome in an effort to demonstrate the narrow holding pursuant to the facts in *Moragne*. The *Moragne* Court sought to gain uniformity of law in the specific parameters of availability of unsea-

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344 516 U.S. 199 (1996).

345 398 U.S. 375 (1970).

346 *Yamaha Motor Corp.*, 516 U.S. at 202.

347 *Id.*

348 *Id.* at 203. Yamaha contended that the Calhouns could only recover funeral expenses as pecuniary damages if federal maritime law applied. The district court found for Yamaha under the maritime death claim, however the court held that loss of society and loss of support and services were compensable under *Moragne*. *Id.*

349 *Id.* at 625 n.7.

350 *See Yamaha Motor Corp.*, 516 U.S. at 216 (citing Offshore Logistics v. Tallentire, 477 U.S. 207, 212-15 (1986)); Miles v. Apex Marine Corp., 498 U.S. 19, 22-24 (1990) (noting that 46 U.S.C. § 767 of the Death on the High Seas Act specifically precluded the displacement of state law in territorial water).

351 *Yamaha Motor Corp.*, 516 U.S. at 216.

worthiness as a remedy.[352] The uniformity that was sought in *Moragne* was "centered on the extension of relief, not on the contraction of remedies."[353] Adopting the Third Circuit's analysis that *Moragne* "showed no hostility to concurrent application of state wrongful death statutes," the Court held that general maritime and state wrongful death remedies can operate concurrently in cases involving nonseafarers' deaths in territorial waters.[354] The Court returned to the expansive relief doctrines of early admiralty cases and recalled that "it better becomes the humane and liberal character of proceedings in admiralty to give than withhold the remedy, when not required to withhold it by established and inflexible rules."[355] Since general maritime law provided the remedy, rather than Congress, the court found no bar to applying state law.[356] The Court did not address the question of whether federal or state substantive law governed liability and ruled only on the issue of damages.[357] The court also did not discuss the ultimate forum decision–whether Pennsylvania or Puerto Rico law should apply.[358]

B. When State and Admiralty Forums are Concurrent–Plaintiff May Choose

"The implication of *Yamaha* is that plaintiffs may choose a state remedy, but they are also free to choose a federal one . . ."[359] In *Yamaha*, the plaintiffs sought a state remedy, rather than maritime, but the plaintiffs sought the opposite remedy in *In re Air Crash Off Point Mugu*. The defendant airline sought to preclude admiralty jurisdiction, and invoke the choice of law of the decedents' or defendants' domiciles, by unsuccessfully analogizing the case to *Executive Jet*.[360] Plaintiffs sought

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[352] *Id.* at 211. Survivors of longshoremen who were killed in territorial waters could recover under the seaworthiness theory, but survivors of similarly situated seamen could not.

[353] *Id.* at 213.

[354] *Id.* at 214.

[355] Moragne v. State Marine Lines, Inc. 398 U.S. 375, 387 (1970) (quoting The Sea Gull, 21 F. Cas. 909, 910 (C.C. Md. 1985)).

[356] *Yamaha Motor Corp.*, 516 U.S. at 216.

[357] *Id.*

[358] *Id.* Much was at stake. On remand, the district court and Third Circuit decided that the law of the state of domicile, Pennsylvania, should cover the compensatory damages, while the punitive damages would be decided by Puerto Rico law. *Yamaha Motor Corp.*, 216 F.3d 338 (3d Cir. 2000).

[359] *In re* Air Crash Off Point Mugu, California, on Jan. 30, 2000, 145 F. Supp. 2d 1156, 1166 (N.D. Cal. 2001).

[360] *Id.* at 1163.

maritime law.[361] The crash was an international flight, originating in Puerto Vallarta, Mexico with a scheduled landing in San Francisco and ultimate destination of Seattle. The plane crashed into California waters (and probably within the 12 miles of federal territorial waters), thus admiralty law applied.[362] The court focused on the "but for" analysis of other maritime cases finding that "but for aviation, the journey would have been conducted by sea."[363] Once admiralty applies, the consequences follow. Therefore, the court determined that the punitive damages sought by the plaintiffs were precluded by the Warsaw Convention. However, maritime law recognized both wrongful death actions and survival actions. The Ninth Circuit has a history of recognizing survival actions, but not compensating for survivors' grief.[364]

In applying maritime law, the court listed a number of ramifications. First, maritime law would allow both pecuniary and non-pecuniary damages. Economic damages could include loss of wages, future loss of earning capacity, medical expenses, loss of support, loss of services, and funeral expenses. Non-economic damages include loss of consortium and loss of society for the decedents' beneficiaries.[365] Second, deceased employees could recover against the airlines under workers' compensation law or general maritime tort principles.[366] Third, application of maritime law gave uniformity in recovery to all the claims, and noted that relative uniformity was not the reason for the court's decision, but a consequence of it.[367] Finally, the court addressed the "fortuosity" argument by finding that the importance of the location of the crash should not be determinative of the law to be applied. So long as the crash occurred in navigable waters, but fell short of the jurisdiction of DOHSA, then maritime law was the proper law to apply.[368]

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361 *Id.*

362 *Id.* The parties stipulated that DOHSA did not apply since the location was not in high seas–beyond a marine league.

363 *Id.* at 1165 (citing *Offshore Logistics*, 477 U.S. at 207).

364 *Id.* at 1166.

365 *Id.* The court noted survival damages would be available to the decedents' estates to prosecute a negligence or strict liability claim that could include pre-death pain, suffering, and emotional distress, and loss of future wages, but would be precluded by Warsaw.

366 *Id.* at 1167.

367 *Id.*

368 *Id.*

VIII. CONCLUSION

As one court has noted, the advantage of the application of maritime law to aviation accidents is that "all claims will be subject to one body of law, except as governed by the Warsaw Convention or workmen's compensation."[369] Uniformity of law saves the courts and the parties both time and expense.[370] Courts will be spared the task of applying choice of law rules as they examine the numerous jurisdictions that may have a relationship with the aviation incident, and of ascertaining the appropriate substantive law.[371]

As applied in *In re Air Crash Off Point Mugu*,[372] once maritime jurisdiction is ascertained, the "pass through" doctrine of *Zicherman*[373] can be utilized to simplify the damage law when passengers who die come from many different domiciles. Rather than mandate the application of state law exclusively for deaths in territorial waters, *Yamaha* expanded wrongful death remedies in maritime cases.[374] General maritime law can be applied in addition to, or in substitution of state remedies. Once *Moragne* and its progeny *Gaudet* are asserted, compensatory damages are allowable, as are non-pecuniary damages of loss of services, loss of society and funeral expenses. General maritime law allows recovery from some damages not available under some state jurisdictions–particularly the availability of pre-death pain and suffering and survivor damages. Punitive damages, while not recoverable under the Warsaw Convention and DOHSA, might be recoverable against non-carrier aviation defendants.

Within the nine miles between territorial waters and the twelve mile territorial boundary for DOHSA, some general maritime law will apply. Before *Moragne*, decided in 1970, state law was routinely applied for non-crew deaths in state waters. As the *Calhoun* court announced by its application of *Moragne* general maritime law to state waters, much of the gap has been filled

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369 *See id.*

370 Note the number of years of litigation, from the time of the aircraft crash to the final court decision in such cases as: *In re Air Disaster at Lockerbie, Scotland* (11 years); *Dooley* (15 years); *Korean Airlines* (15 years).

371 *See generally* Melissa Pucciarelli, *Compensating Victims of Aviation Disasters: Establishing Uniform and Equitable Remedies for Accidents Over Water*, 24 FORDHAM INT'L. L. J. 889, 938 (2001) (noting currently three plus bodies of law now govern navigable water incidents).

372 *In Re Air Crash Off Point Mugu*, 145 F. Supp. 2d at 1161.

373 Yamaha Motor Corp. v. Calhoun, 516 U.S. 199 (1996).

374 *See* Szollosy v. Hyatt Corp. 208 F. Supp. 2d 205, 213 (D.C. Conn. 2002) (finding admiralty in a jet ski accident).

between state waters and DOHSA. The *Calhoun* court articulated that "Congress has not prescribed remedies for the wrongful deaths of non-seafarers in territorial waters." Courts are therefore required to provide a means to fill the gap and *Moragne* should be used to provide a maritime law remedy for wrongful death claims.

For families seeking recovery for the loss of loved ones, there is certainly a need for simplification and equity.[375] Still at issue would be federal circuit court symmetry regarding survival actions. Pre-death injuries and pain and suffering damages should follow the lead of the Ninth and Fifth Circuits and provide recovery. Even in the case of survivor issues, still left unresolved by *Dooley*, there is a body of law allowing recovery for pain and suffering under maritime law where there is proof of something more than instantaneous death.[376] Although *Dooley* was decided on a statutory construction basis, finding differences between the Jones Act and DOHSA crucial to the ultimate decision that pre-death pain and suffering were not covered by DOHSA, the decision was not dispositive.[377] In fact, the *Dooley* court concluded its ruling by saying it did not decide "[whether] general maritime law [ever] provides a survival action."[378]

So what should happen when fortuosity or happenstance place an aircraft accident in the territorial waters–between the beach and twelve nautical miles, or between state boundaries and twelve miles? The answer in *In re Air Crash Off Point Mugu*, is that general maritime law should be applicable when no other statute or Warsaw Convention provisions limit recovery or pre-

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375 *See* Christine Anne Guard, *Counterpoint: An Excerpt From–Dooley v. Korean Air Lines Co.: Are Survival Actions Lost to Davey Jones' Locker where DOHSA Applies?*, 23 TUL. MAR. L. J. 245 (1998) (discussing the unfairness of the difference remedies available). If a passenger crashes into the sea within a marine league of shore, he could recover not only pecuniary damages in a wrongful action under the general maritime law, but also potentially non-pecuniary damages in a survival action under state law. Meanwhile the passenger on a plane that crashes into the high seas beyond the marine league limit will only recover pecuniary damages. *Id.*

376 *See Yamaha Motor Corp.*, 516 U.S. at 213. *See also* Major B. Harding, *Judicial Decision-Making Analysis of Federalism in Modern United States Supreme Court Maritime Cases*, 75 TUL. L. REV. 1517, 1548-50 (2001) (*Moragne* provided a floor, not a ceiling to wrongful death claims).

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

378 *Id.* at 120. Some perceive this aspect of the law unclear because *Dooley* was brought only under a DOHSA cause of action.

scribe other remedies.[379] Court dockets could be streamlined, both by the reduction of substantive law application, and the ability to hear all of the claims under one body of law. Procedural efficiency would save both time and money.

Ultimately, families receive the greatest benefit. Although money can never compensate for the real loss of a loved one, monetary compensation is the recognized vehicle for legal remedy in aviation accidents. "Fortuosity" should never determine the recovery outcome of death or injury in aviation accidents. The nature of air travel is such that arbitrary boundaries seem meaningless, and a system that values life differently based upon an incident occurring on land or on sea is arbitrary and unjust. Instead, the courts should provide equitable application of uniform legal remedies in airline disasters, including a concerted effort to utilize the long-standing laws of admiralty to determine damages in aviation incidents over navigable waters.

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[379] Applicable statutes include the Jones Act, OSCLA, and other federal statutes. In a Warsaw Convention case, the law of the forum would apply, including the forum's conflict of law statutes.