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# MARITIME AVIATION DEATHS

CALVIN F. DAVID\*

## I. INTRODUCTION

The liquidity of the earth's surface guarantees the applicability of the Death on the High Seas Act (DOHSA)<sup>1</sup> to numerous aviation disasters. The Supreme Court recently held, in *Mobil Oil Corp. v. Higginbotham*,<sup>2</sup> that the measure of damages in an action for wrongful death on the high seas is limited to the pecuniary measure prescribed by DOHSA. Thus, where DOHSA applies, the remedy is exclusive. The *Higginbotham* decision apparently establishes DOHSA as the exclusive remedy for death on the high seas.

This paper will examine DOHSA and related federal remedies including the Jones Act<sup>3</sup> and the judicially-created general maritime "wrongful death remedy".<sup>4</sup> It will address the issues of jurisdiction, exclusivity, interaction of foreign law and the measure of damages.

## II. HISTORY

Any study of the Death on the High Seas Act (DOHSA) must begin with the 1886 case of *The Harrisburg*, in which the Supreme Court held that, like the common law, the gen-

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<sup>1</sup> 46 U.S.C. § 761 (1976).

<sup>2</sup> 436 U.S. 618 (1978).

<sup>3</sup> 46 U.S.C. § 688 (1976).

<sup>4</sup> See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

eral maritime law provides no remedy for wrongful death.<sup>5</sup> Absent a state or federal statute, admiralty provides no such remedy.<sup>6</sup> The Supreme Court's decision in *The Harrisburg* was not popular and the Court attempted to ameliorate its harshness by ruling, in *The Hamilton*,<sup>7</sup> that a state's wrongful death act could apply to a maritime fatality. But there was still no federal maritime remedy until 1920, when Congress finally repudiated the holding in *The Harrisburg* and enacted DOHSA,<sup>8</sup> creating a remedy in admiralty for any death, "caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league [three nautical miles] from the shore of any State. . . ."<sup>9</sup> DOHSA limits damages to the pecuniary loss of the survivor,<sup>10</sup> establishes a three-year statute of limitations,<sup>11</sup> provides a right of action in admiralty under foreign law where foreign law grants such a right,<sup>12</sup> and permits suits filed by a victim to continue as wrongful death actions if the victim dies of his injuries while suit is pending.<sup>13</sup>

In 1920, Congress also passed the Jones Act<sup>14</sup> which pro-

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<sup>5</sup> 119 U.S. 199 (1886).

<sup>6</sup> See *Moragne*, 398 U.S. at 379-93. The common law rule that allowed recovery for injury but not for death was a legal anomaly stemming from the felony-merger doctrine, a feature of early English law. *Id.*

<sup>7</sup> 207 U.S. 398 (1907).

<sup>8</sup> Enacted by the Act of Mar. 30, 1920, Pub. L. No 66-165, 41 Stat. 537 (codified at 46 U.S.C. § 761 (1976)).

<sup>9</sup> 46 U.S.C. § 761 (1976). DOHSA also applies to deaths occurring beyond a marine league from any territory or dependency of the United States. DOHSA claims may be made for negligence or unseaworthiness. Recent decisions have recognized strict liability claims. See, e.g., *Lindsay v. McDonnell-Douglas Aircraft Corp.*, 460 F.2d 631 (8th Cir. 1972); *Miller Indus., Inc. v. Caterpillar Tractor Co.*, 473 F.Supp. 1147 (S.D. Ala. 1979). Three nautical miles is equivalent to 3.45 statute miles.

<sup>10</sup> 46 U.S.C. § 762 (1976).

<sup>11</sup> 46 U.S.C. § 763 (1976), repealed by Act of Oct. 6, 1980, Pub. L. 96-382, § 2, 94 Stat. 1525 (1980). The original limitations period was two years. In 1980, Congress established a uniform three-year statute of limitations for personal injury or death arising out of a maritime tort. 46 U.S.C. § 763(a) (Supp. IV 1981).

<sup>12</sup> 46 U.S.C. § 764 (1976).

<sup>13</sup> 46 U.S.C. § 765 (1976). DOHSA also preserves the applicability of local law of the Great Lakes, in the Panama Canal Zone, and within a state's territorial waters. 46 U.S.C. § 767 (1976). Contributory negligence will not bar recovery. 46 U.S.C. § 766 (1976).

<sup>14</sup> 46 U.S.C. § 688 (1976). The Jones Act states:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law,

vides seamen a right of action in negligence for personal injury against an employer and, in the case of death, provides the seaman's survivors a right of action in negligence for wrongful death.<sup>15</sup> Unlike DOHSA,<sup>16</sup> the Jones Act applies only to seamen within or without a state's territorial waters.<sup>17</sup> A Jones Act action is limited to negligence<sup>18</sup> while DOHSA affords a cause of action for both negligence and unseaworthiness.<sup>19</sup> A seaman may not recover under a state's wrongful-death act as the Jones Act preempts the field.<sup>20</sup>

After 1920, recovery was available for the death of a seaman regardless of the locale of the tort as long as the locality was maritime and within the purview of the Jones Act.<sup>21</sup> Recovery was available under DOHSA for the death of a non-seaman beyond a state's territorial waters. But the "dead hand of *The*

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with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

*Id.*

<sup>16</sup> *Id.* See *Guidry v. South La. Contractors, Inc.*, 614 F.2d 447, 452 (5th Cir. 1980) in which the court noted that: "The traditional formulation of the requirements for identifying a seaman are: (1) he must have more or less permanent connection with (2) a vessel in navigation and, (3) must contribute to the function of the vessel, the accomplishment of its mission or its operation or welfare in terms of its maintenance."

<sup>15</sup> 46 U.S.C. § 376 (1976).

<sup>17</sup> 46 U.S.C. § 688 (1976). See *supra* note 14.

<sup>18</sup> 46 U.S.C. § 688 (1976).

<sup>19</sup> 46 U.S.C. § 761 (1976). The Jones Act does not specify which damages are recoverable, but it incorporates the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60 (1976) which specifically limits recovery to pecuniary loss.

The Supreme Court has observed that: "The two statutes were enacted within days to address related problems—yet they are 'hopelessly inconsistent with each other.'" *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 283 (1980); see *Bodden v. American Offshore Inc.*, 681 F.2d 319 (5th Cir. 1982).

<sup>20</sup> See *Lindgren v. United States*, 281 U.S. 38 (1930); see also *In re Dearborn Marine Serv. Inc.*, 499 F.2d 263 (5th Cir. 1974), *cert. dismissed*, *Monk v. Chambers & Kennedy*, 423 U.S. 886 (1975).

<sup>21</sup> 46 U.S.C. § 688 (1976).

*Harrisburg*<sup>22</sup> denied a federal maritime remedy for the death of a non-seaman within a marine league from a state's shores.

### III. RECENT DEVELOPMENTS

In 1970, the United States Supreme Court overruled its decision in *The Harrisburg*<sup>23</sup> in *Moragne v. States Marine Lines, Inc.*<sup>24</sup> The Court in *Moragne* recognized a general maritime remedy for wrongful death.<sup>25</sup> Specifically, *Moragne* permitted recovery under any unseaworthiness doctrine for death in territorial waters.<sup>26</sup> The gap left open by DOHSA and the Jones Act was partially closed.<sup>27</sup> The *Moragne* court declined

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<sup>22</sup> *Law v. Sea Drilling Corp.*, 523 F.2d 793, 798 (5th Cir. 1975).

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

<sup>24</sup> 398 U.S. 375 (1970). The Court observed that, "[T]he [*Harrisburg*] decision, somewhat dubious even when rendered, is such an unjustifiable anomaly in the present maritime law that it should no longer be followed." *Id.* at 378.

<sup>25</sup> *Id.* at 401.

<sup>26</sup> *Id.*

<sup>27</sup> The Supreme Court in *Moragne*, discussing the anomalies of the law at that time, stated:

The United States, participating as *amicus curiae*, contended at oral argument that these statutes, if construed to forbid recognition of a general maritime remedy for wrongful death within territorial waters, would perpetuate three anomalies of present law. The first of these is simply the discrepancy produced whenever the rule of *The Harrisburg* holds sway: within territorial waters, identical conduct violating federal law (here the furnishing of an unseaworthy vessel) produces liability if the victim is merely injured, but frequently not if he is killed. As we have concluded, such a distinction is not compatible with the general policies of federal maritime law.

The second incongruity is that identical breaches of the duty to provide a seaworthy ship, resulting in death, produce liability outside the three-mile limit—since a claim under the Death on the High Seas Act may be founded on unseaworthiness, see *Kernan v. American Dredging Co.*, 355 U.S. 426, 430 n.4 (1958)—but not within the territorial waters of a State whose local statute excludes unseaworthiness claims. The United States argues that since the substantive duty is federal, and federal maritime jurisdiction covers navigable waters within and without the three-mile limit, no rational policy supports this distinction in the availability of a remedy.

The third, and assertedly the "strangest" anomaly is that a true seaman—that is, a member of a ship's company, covered by the Jones Act—is provided no remedy for death caused by unseaworthiness within territorial waters, while a longshoreman, to whom the duty of seaworthiness was extended only because he performs work traditionally done by seamen, does have such a remedy when allowed by a state statute.

*Id.* at 395-96.

to decide questions of beneficiaries and damages.<sup>28</sup> The Court left those issues to lower courts with instruction to analogize to DOHSA, the Jones Act, the Longshoremen's and Harbor Worker's Compensation Act and state wrongful-death acts.<sup>29</sup>

Four years later, the Supreme Court addressed the issue of damages in *Sea-Land Services, Inc. v. Gaudet*.<sup>30</sup> Although the Court had instructed in *Moragne* that, for the sake of uniformity, the new remedy should be modeled after the federal maritime statutes,<sup>31</sup> the *Gaudet* Court chose to align the general maritime scope of damages with the non-pecuniary standards of the majority of state wrongful death acts.<sup>32</sup> The Court approved recovery for loss of society and funeral expenses.<sup>33</sup> *Gaudet* appeared incompatible with *Moragne's* expressed goal of uniformity among the federal statutes. As one commentator observed: "[T]he Court chose humanity and thereby sacrificed uniformity."<sup>34</sup>

Compared with the situation a few years ago when there was no remedy for wrongful death, the seascape following *Gaudet* was afloat with remedies providing disparate recoveries.<sup>35</sup> After *Moragne* and *Gaudet*, DOHSA provided for a pecuniary loss-only recovery for death resulting from negligence or unseaworthiness occurring beyond a marine league;<sup>36</sup> the Jones Act provided pecuniary loss-only recovery for the negligent deaths of seamen within or beyond the marine

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<sup>28</sup> *Id.* at 407-08.

<sup>29</sup> *Id.*

<sup>30</sup> 414 U.S. 573 (1974).

<sup>31</sup> *Moragne*, 398 U.S. at 408.

<sup>32</sup> *Sea-Land Serv., Inc. v. Gaudet*, 414 U.S. at 579.

<sup>33</sup> *Id.* at 584-92.

<sup>34</sup> Swaim, *Requiem for Moragne: The New Uniformity*, 25 Loyola L. Rev. 1, 17 (1979) [hereinafter cited as Swaim]. Indeed, various lower courts, during the post-*Moragne* but pre-*Gaudet* period, were constrained to follow the *Moragne* decision's (apparent) direction and deny recovery for non-pecuniary damages for wrongful death under the general maritime law. See, e.g., *Petition of Canal Barge Co.*, 323 F. Supp. 805 (N.D. Miss. 1971).

<sup>35</sup> See, e.g., remedies found in DOHSA, 46 U.S.C. § 761 (1976); the Jones Act, 46 U.S.C. § 688 (1976); and state wrongful death acts.

<sup>36</sup> 46 U.S.C. § 761 (1976).

league boundary;<sup>37</sup> state wrongful-death acts, most of which permit non-pecuniary recovery, operated within a marine league from its shore; the general maritime law, permitting non-pecuniary recovery also operated within a marine league for unseaworthiness claims.<sup>38</sup> The question remained: How far out does the general maritime law extend? Does it intrude on DOHSA's statutory province?<sup>39</sup>

These questions were, arguably, answered in *Mobil Oil Corp. v. Higginbotham*.<sup>40</sup> This action arose from the crash of a helicopter used by Mobil in connection with its oil-drilling operations in the Gulf of Mexico about 100 miles from the Louisiana shore. The passengers' widows brought suit in admiralty under DOHSA and the Jones Act.<sup>41</sup> The district court found negligence and awarded pecuniary damages only.<sup>42</sup> The Fifth Circuit reversed, holding that the plaintiffs were entitled to claim damages for loss of society.<sup>43</sup>

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<sup>37</sup> 46 U.S.C. § 688 (1976).

<sup>38</sup> Both the *Moragne* and *Gaudet* decisions involved deaths occurring within a state's territorial boundaries.

<sup>39</sup> The lower courts were split as to the effect of *Gaudet* on DOHSA actions. The First Circuit Court of Appeals gave the decision a strict construction and held that DOHSA's pecuniary-only standard prevailed over the more liberal judicial creation. *Barbe v. Drummond*, 507 F.2d 794, 797 (1st Cir. 1974). The Fifth Circuit, on the other hand, read the case more expansively and stated that the statutory remedy provided by DOHSA was no longer needed. *See Law v. Sea Drilling Corp.*, 510 F.2d 242 (5th Cir. 1975).

<sup>40</sup> 436 U.S. 618 (1978). *Higginbotham* was the last case in what one author has dubbed "the unholy trilogy". Swaim, *supra* note 34, at 64. Professor Swaim and others have criticized the "trilogy" decisions as inconsistent and contrary to the current tide of liberal recovery evidenced by the non-pecuniary recovery permitted by most state wrongful-death acts. Perhaps a more compelling argument is that Congress has expressed no indication of such a wave and the *Higginbotham* Court quite appropriately declined to travel in legislative waters. The Court recently observed that: "[T]he liability schemes incorporated in DOHSA and the Jones Act should not be accorded overwhelming analogical weight in formulating remedies under general maritime law." *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 281 (1980) (acknowledging the current prevailing views on loss of society compensation).

<sup>41</sup> 436 U.S. 618 (1978).

<sup>42</sup> 360 F. Supp. 1140 (W.D. La. 1973).

<sup>43</sup> 545 F.2d 422 (5th Cir. 1977). The panel was compelled to follow *Law v. Sea Drilling Co.*, 510 F.2d 242 (5th Cir. 1975). Interestingly, the *Higginbotham* judges stated that if the matter were one of first impression they would have reached a result similar to that of the First Circuit in *Barbe v. Drummond*, 507 F.2d 794 (1st Cir. 1974) and "read *Moragne* to say that DOHSA is the exclusive *wrongful death* remedy outside of state territorial waters." 545 F.2d at 436 n.19. *See supra* note 40 and ac-

The Supreme Court granted *certiorari* limited to the single issue of whether, under DOHSA, plaintiffs were entitled to recovery for non-pecuniary damages such as loss of society.<sup>44</sup> In other words, whether, in addition to the damages authorized by the Act, a decedent's survivors may also recover damages under general maritime law. Justice Stevens articulated the Court's task to be one of deciding: "[W]hich measure of damages to apply in a death action arising on the high seas—the rule chosen by Congress in 1920 or the rule chosen by this Court in *Gaudet*."<sup>45</sup>

The Supreme Court followed the rule chosen by Congress, that is, DOHSA's statutory limit of recovery, and reversed the Fifth Circuit's award of damages for loss of society.<sup>46</sup> The Court acknowledged that admiralty courts often have to supplement maritime statutes, but observed that:

The Death on the High Seas Act, however, announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages . . . . The Act does not address every issue of wrongful-death law . . . but when it does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless.<sup>47</sup>

*Higginbotham* resolved the issue of the measure of damages, but many other issues were left to be settled. The remainder of this paper will focus on these specific issues.

#### IV. JURISDICTION

The Constitution provides that the judicial power of the

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companying text.

<sup>44</sup> 434 U.S. 816 (1977).

<sup>45</sup> 436 U.S. at 623. At least one circuit court has interpreted *Higginbotham* narrowly. In *Ford v. Wooten*, No. 80-5959, slip op. (11th Cir. July 26, 1982), the court refused to extend *Moragne* to permit recovery under the general maritime law for wrongful death caused by negligence. The *Ford* decision limited *Higginbotham* to *unseaworthiness* claims and followed instead, *Ivy v. Security Barge Lines, Inc.*, 606 F.2d 524, 527-28 (5th Cir. 1979) (en banc), *cert. denied*, 446 U.S. 956 (1980), in which the Court declined to supplement a Jones Act negligence claim with the *Moragne-Gaudet* *unseaworthiness* measure of damages.

<sup>46</sup> 436 U.S. at 626.

<sup>47</sup> *Id.* at 625.



United States shall extend to all cases of admiralty and maritime jurisdiction.<sup>48</sup> Congress implemented this power in Section 9 of the Judiciary Act of 1789, which provides:

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 all other remedies to which they are otherwise entitled.<sup>49</sup>

Admiralty was an important part of our early colonial jurisprudence. We were a seafaring nation and the early admiralty courts decided many maritime disputes including actions in contract, torts, and piracy. Shipping on the high seas was of paramount importance to the young country. Although the early decisions dealt with sailing ships rather than aircraft, many of the maritime principles established then are applied to aviation tort cases today.<sup>50</sup>

#### A. *Maritime Locality - Maritime Activity*

Whether a tort was cognizable in admiralty historically depended on the maritime location of the wrong — the “strict locality” or “locality alone” test. As the Supreme Court made clear in *The Plymouth*,<sup>51</sup> the standard for whether the tort was maritime was whether the tort occurred on the high seas or navigable waters, not whether the wrong occurred onboard a vessel.<sup>52</sup>

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<sup>48</sup> U.S. CONST. ART. III § 2, cl. 1.

<sup>49</sup> Judiciary Act of 1789, 28 U.S.C. § 1333 (1976). See *Hebert v. Diamond M. Co.*, 367 So.2d 1210 (La. App. 1978). The “Savings to Suitors” clause preserved the right of plaintiffs to pursue common law remedies in state courts. If an action cognizable in admiralty is brought in state court under this clause, the state court must apply substantive federal maritime law. *Id.*

<sup>50</sup> See *Choy v. Pan-American Airways Co.*, 1941 Am. Mar. Cas. 483 (S.D.N.Y. 1941) wherein, DOHSA was held applicable to wrongful deaths arising from crashes of land-based aircraft which occurred on the high seas beyond a marine league from shore. Admiralty jurisdiction over aviation cases has been extended beyond DOHSA to general maritime actions, see, e.g., *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972).

<sup>51</sup> 70 U.S. (3 Wall.) 20 (1865).

<sup>52</sup> The Extension of Admiralty Jurisdiction Act, currently codified at 46 U.S.C. § 740 (1976), was first enacted in 1948 to overrule cases such as *The Plymouth*. It provides in relevant part: “The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property,

*The Plymouth*,<sup>53</sup> however, did not expressly hold that locality alone is the exclusive test for admiralty jurisdiction. Some later courts, attempting to decide upon a test for admiralty jurisdiction, have articulated a nexus requirement in addition to the maritime locality. This "locality plus" standard was adopted by the Supreme Court in *Executive Jet Aviation, Inc. v. City of Cleveland*.<sup>54</sup> The Court addressed the complex jurisdictional issues involving airplane accidents and concluded that, in addition to the maritime locality, the wrong must bear a "significant relationship to traditional maritime activity."<sup>55</sup> The Court noted: "[U]nless such a relationship exists, claims arising from airplane accidents are not cognizable in admiralty in the absence of legislation to the contrary."<sup>56</sup>

The impact of *Executive Jet* has been prodigious. Since the court did not define what constitutes a "significant relationship,"<sup>57</sup> lower courts have grappled with that concept and with the application of the two-pronged test of maritime locality and maritime nexus. In *Holland v. Sea-Lane Service*,<sup>58</sup> a longshoreman's activity of transporting containers from storage on land to a pier for loading was considered maritime activity,<sup>59</sup> but because the injury occurred on land, it did not meet the locality plus test.<sup>60</sup> On the other hand, injuries incurred by shipyard workers from exposure to asbestos insulation materials used in the construction and repair of ships have been held cognizable in admiralty.<sup>61</sup>

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caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." *Id.*

<sup>53</sup> 70 U.S. 20 (3 Wall) (1865).

<sup>54</sup> 409 U.S. 249 (1972). *Executive Jet* did not abolish the locality test. Instead, the Court therein added a second prerequisite for admiralty jurisdiction, stating: "It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to the traditional maritime activity." 409 U.S. at 268. See *Holland v. Sea-Land Service, Inc.*, 655 F.2d 556 (4th Cir. 1981), *cert. denied*, 102 S. Ct. 1274 (1981).

<sup>55</sup> 409 U.S. at 268.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> 655 F.2d 556 (4th Cir. 1981), *cert. denied*, 102 S.Ct. 1274 (1982).

<sup>59</sup> *Id.* at 558.

<sup>60</sup> *Id.*

<sup>61</sup> See *White v. Johns-Manville Corp.*, 662 F.2d 234 (4th Cir. 1981), *cert. denied*, 102 S. Ct. 1037 (1982).

A fixed platform, located in the Gulf of Mexico and used for offshore oil and gas exploration, has been held not to constitute a maritime locality, although a floating platform used for the same purposes does.<sup>62</sup> A helicopter flight over the Gulf of Mexico from one land base (Key West, Florida) to another (St. Petersburg, Florida) has been held not to bear a significant relationship to traditional maritime activity.<sup>63</sup> A flight from Atlantic City, New Jersey to Block Island, New York has been held not to be "maritime activity"<sup>64</sup> while a flight between St. Thomas, Virgin Islands to Fajardo, Puerto Rico has been held to constitute "maritime activity."<sup>65</sup>

The cases involving aviation torts demonstrate the difficulty in applying the *Executive Jet* doctrine to airplane accidents. It has been questioned whether the post-*Executive Jet* decisions are more uniform than those antedating the case.<sup>66</sup> It is unclear whether *Executive Jet* solved what it termed "the perverse and causistic borderline situations that have demonstrated some of the problems with the locality test of maritime tort jurisdiction."<sup>67</sup>

## B. *The Executive Jet Rule and DOHSA*

The preceding has been an analysis of *Executive Jet's* impact on general maritime cases.<sup>68</sup> The accident in *Executive Jet* involved the crash of an aircraft into Lake Erie, an inland

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<sup>62</sup> See *Myriek v. Teledyne Movable Offshore, Inc.*, 516 F. Supp. 602 (S.D. Tex. 1981) (turning on whether the structure could be classified as a "vessel").

<sup>63</sup> See *Teachey v. United States*, 363 F. Supp. 1197 (M.D. Fla. 1973).

<sup>64</sup> See, e.g., *American Home Assurance Co. v. United States*, 389 F. Supp. 657 (M.D. Pa. 1975).

<sup>65</sup> See, e.g., *Hubscham v. Antilles Airboats, Inc.*, 440 F. Supp. 828 (D.V.I. 1977). The aircraft in question was a sea plane flying over international waters. The court quoted the *Executive Jet* hypothetical which postulates a maritime nexus in the case of a mid-ocean crash of a plane flying from New York to London since the flight's function is one traditionally performed by waterborne vessels. *Id.* at 835-36. It is arguable that a plane or helicopter flying across the Gulf of Mexico is also performing a function traditionally performed by waterborne vessels.

<sup>66</sup> See, e.g., *Hubscham v. Antilles Airboats, Inc.*, 440 F. Supp. 828, 836 (D.V.I. 1977).

<sup>67</sup> *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249, 255 (1972).

<sup>68</sup> See *supra* notes 54-67 and accompanying text.

sea, clearly not within the purview of DOHSA.<sup>69</sup> The *Executive Jet* Court, in a comprehensive examination of admiralty jurisdiction over aviation torts, expressly excluded DOHSA actions from its "significant relationship to traditional maritime activity" standard.<sup>70</sup> The Supreme Court stated:

[W]e conclude that the mere fact that the alleged wrong "occurs" or "is located" on or over navigable waters-whatever that means in an aviation context-is not of itself significant 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. We hold that unless such a relationship exists, claims arising from airplane accidents are not cognizable in admiralty *in the absence of legislation to the contrary*.<sup>71</sup>

The Court continued:

Of course, under the Death on the High Seas Act, a wrongful-death action arising out of an airplane crash on the high seas beyond a marine league from the shore of a State may clearly be brought in a federal admiralty court.<sup>72</sup>

Some such flights, e.g., New York City to Miami, Florida, no doubt involve passage over "the high seas beyond a marine league from the shore of any State." To the extent that the terms of the Death on the High Seas Act become applicable to such flights, that Act, of course, is 'legislation to the contrary.'<sup>73</sup>

Notwithstanding the *Executive Jet's* clear exclusion of DOHSA from its nexus requirement,<sup>74</sup> some courts and commentators<sup>75</sup> have, nevertheless, examined DOHSA claims for a maritime nexus. The district court in *Higginbotham v. Mobil*

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<sup>69</sup> 46 U.S.C. § 761 (1976).

<sup>70</sup> 409 U.S. at 268.

<sup>71</sup> *Id.* (emphasis added).

<sup>72</sup> *Id.* at 271 n.20.

<sup>73</sup> *Id.* at 274 n.26.

<sup>74</sup> *Id.* at 268-71.

<sup>75</sup> See, e.g., Calamari, *The Wake of Executive Jet — A Major Wave or a Minor Ripple*, 4 Mar. Law. 52, 83 (1979).

*Oil Corp.*,<sup>76</sup> analyzed the activity engaged in by the helicopter and concluded that it was "traditionally maritime."<sup>77</sup> In *Hayden v. Krusling*,<sup>78</sup> a Florida district court recently held, in a DOHSA action, that the aircraft's flight from New Orleans, Louisiana to Pensacola, Florida across the Gulf of Mexico bore no significant relationship to traditional maritime activity.<sup>79</sup> It dismissed the action on the authority of *Executive Jet*.<sup>80</sup> A contrary interpretation of *Executive Jet's* applicability to DOHSA actions in a case involving almost the identical geography was expressed in *Teachey v. United States*<sup>81</sup> in which the aircraft in question, a helicopter, flew from Key West, Florida across the Gulf of Mexico, to St. Petersburg, Florida. The court held that a flight from one land base to another could not be considered "maritime" but noted that the *Executive Jet* doctrine would permit an action under DOHSA or the Federal Tort Claims Act.<sup>82</sup>

*Teachey* expresses the view, held by the majority of courts and commentators, that DOHSA contains its own statutory base of jurisdiction requiring only that the tort occur more than one marine league from shore.<sup>83</sup> The Supreme Court in *Executive Jet* clearly excluded DOHSA actions from its maritime nexus requirement.<sup>84</sup> As one court recently observed: "[T]he [*Executive Jet*] Court made it quite clear that such a showing was not required in aviation cases brought under the Death on the High Seas Act."<sup>85</sup>

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<sup>76</sup> 357 F. Supp. 1164 (W.D. La. 1973). The Supreme Court, reversing on other grounds, did not address the maritime nexus issue. See *supra* notes 41-44 and accompanying text.

<sup>77</sup> *Id.* at 1167.

<sup>78</sup> 531 F. Supp. 468 (N.D. Fla. 1982).

<sup>79</sup> *Id.* at 469-70.

<sup>80</sup> *Id.* at 470.

<sup>81</sup> 363 F. Supp. 1197 (M.D. Fla. 1973).

<sup>82</sup> *Id.* at 1198-99.

<sup>83</sup> *Id.* at 1199.

<sup>84</sup> See *supra* note 74 and accompanying text.

<sup>85</sup> *In re Air Crash Disaster Near Bombay*, 531 F. Supp. 1175, 1184 (W.D. Wash. 1982).

### C. Definition of "High Seas"

Another jurisdictional issue found in DOHSA actions is that of the *scope* of its jurisdiction. The Act states where DOHSA jurisdiction begins but does not specify how far it extends.<sup>86</sup> A number of decisions appear to have settled this question. DOHSA applies to deaths occurring on the high seas more than a marine league from the shores of any state or territory within the meaning of the Act.<sup>87</sup> The "high seas" includes foreign territorial waters. DOHSA has been applied to a crash occurring in Indian territorial waters,<sup>88</sup> to a death occurring on Lake Maracaibo, Venezuela,<sup>89</sup> to the crash of an airplane 300 feet short of a Kingston, Jamaica runway,<sup>90</sup> to the wrongful death of a seaman in Peruvian navigable waters,<sup>91</sup> and to a death in Bahamian territorial waters.<sup>92</sup>

### D. Definition of Navigable Waters

Unique issues of navigability arise in aviation cases. Admiralty jurisdiction applies to navigable waters. A body of water is "navigable" if it is used or susceptible to use in its natural or ordinary condition as a highway for commerce over which trade and travel are or may be conducted in customary modes.<sup>93</sup> This includes waters which "were navigable in the past or which could be made navigable in fact by 'reasonable improvements,' and waters within the ebb and flow of the tide."<sup>94</sup>

If a tort occurs on a "vessel" on a body of water, certain

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<sup>86</sup> 46 U.S.C. § 761 (1976).

<sup>87</sup> *Id.* See also 46 U.S.C. § 767 (1976).

<sup>88</sup> *In re Air Crash Disaster Near Bombay*, 531 F. Supp. 1175 (W.D. Wash. 1982).

<sup>89</sup> *Sanchez v. Loffland Brothers Co.*, 626 F.2d 1228 (5th Cir. 1980), *cert. denied*, 452 U.S. 962 (1981).

<sup>90</sup> *Mancuso v. Kimex, Inc.*, 484 F. Supp. 453 (S.D. Fla. 1980).

<sup>91</sup> *Cormier v. Williams/Sedco/Horn Constructors*, 460 F. Supp. 1010 (E.D. La. 1978).

<sup>92</sup> *Symonette Shipyards, Ltd. v. Clark*, 365 F.2d 464 (5th Cir. 1966), *cert. denied*, 387 U.S. 908 (1967); *but see Chiazor v. Transworld Drilling Co.*, 648 F.2d 1015 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 1714 (1982).

<sup>93</sup> *Puget Sound Power & Light Co. v. Federal Energy Regulatory Comm'n*, 644 F.2d 785, 787 (9th Cir.), *cert. denied*, 102 S. Ct. 596 (1981).

<sup>94</sup> *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 749 (9th Cir. 1978).

issues of navigability *in fact* are not raised. Torts occurring on an airplane flying *over* water raise additional novel issues. For example, what if the water where the crash occurs is three feet deep, two feet deep or ten inches deep? Caribbean waters depths range from inches to miles, yet an airplane crash into those waters may be classified as occurring on the high seas even though the place of the accident is not "navigable" in terms of supporting a vessel.

## V. EXCLUSIVITY

### A. *The Interaction of Sections 761 and 764*

In *Mobil Oil Corp. v. Higginbotham*,<sup>95</sup> the Supreme Court directed that once DOHSA subject matter jurisdiction is established, DOHSA is the exclusive remedy.<sup>96</sup> Section 761 of the Act applies to wrongful death actions resulting from deaths occurring in navigable waters more than a marine league from any state regardless of whether the site of the accident is within the territorial waters of a foreign country.<sup>97</sup> A cursory reading appears to reveal that this section conflicts with section 764 of the same Act.<sup>98</sup> Section 764 provides:

#### RIGHTS OF ACTION GIVEN BY LAWS OF FOREIGN COUNTRIES

Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect or a default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.<sup>99</sup>

A potential conflict arises from the interaction of sections 761 and 764. Section 761 permits recovery under DOHSA section 762 for pecuniary damages only. A foreign nation's laws

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<sup>95</sup> 436 U.S. 618 (1978).

<sup>96</sup> See *supra* notes 40-47 and accompanying text.

<sup>97</sup> 46 U.S.C. § 761 (1976).

<sup>98</sup> *Id.* § 764.

<sup>99</sup> *Id.*

applicable under section 764, may afford a greater measure of recovery. The legal dispute has centered on whether section 761 and section 764 provide cumulative remedies, or whether the two sections are mutually exclusive. The controversy has not been settled by the Supreme Court, but the weight of case law supports the position that the two sections are mutually exclusive.<sup>100</sup> Determination of which section applies requires the factual/legal analysis enunciated by the Supreme Court in *Lauritzen v. Larsen*,<sup>101</sup> which was a Jones Act case.<sup>102</sup> Although its applicability to DOHSA<sup>103</sup> cases has not been authoritatively settled, numerous courts have applied its choice of law principles in DOHSA actions.<sup>104</sup> The factors used by the Supreme Court in *Lauritzen* included: (1) the place of the wrongful act, (2) the law of the flag, (3) the allegiance or domicile of the injured, (4) the allegiance of the ship owner, (5) the place of the contract, (6) the inaccessibility of a foreign forum, and (7) the law of the forum.<sup>105</sup>

#### B. *Is DOHSA the Exclusive Remedy When Death Occurs on the High Seas?*

Historically, certain maritime tort actions could be initiated in state courts and were not limited to admiralty jurisdiction.<sup>106</sup> A plaintiff could sue to recover for a death on the high

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<sup>100</sup> See *In re Air Crash Disaster Near Bombay*, 531 F. Supp. 1175 (W.D. Wash. 1982); *Bergeron v. KLM*, 188 F. Supp. 594 (S.D.N.Y. 1960), *appeal dismissed*, 299 F.2d 78 (2d Cir. 1962).

<sup>101</sup> 345 U.S. 571 (1953).

<sup>102</sup> 46 U.S.C. § 688 (1976).

<sup>103</sup> 46 U.S.C. §§ 761, 764 (1976).

<sup>104</sup> See *DeMateos v. Texaco, Inc.*, 562 F. 2d 895 (3d Cir. 1977), *cert denied*, 435 U.S. 904 (1978); *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976); *Symonette Shipyards, Ltd. v. Clark*, 365 F.2d 464 (5th Cir. 1966), *cert. denied*, 387 U.S. 908 (1967); *In re Air Crash Disaster near Bombay*, 531 F. Supp. 1175 (W.D. Wash. 1982); *Noel v. United Aircraft Corp.*, 202 F. Supp. 556 (D. Del. 1962); *Bergeron v. KLM*, 188 F. Supp. 594 (S.D.N.Y. 1960), *appeal dismissed*, 299 F.2d 78 (2d Cir. 1962). The *Lauritzen* choice of law test has been held applicable to general maritime cases also. See, e.g., *Romero Int'l Terminal Operating Co.*, 358 U.S. 354 (1959).

<sup>105</sup> *Lauritzen*, 345 U.S. at 583-91.

<sup>106</sup> See *Safir v. Compagnie Generale Transatlantique*, 241 F. Supp. 501 (E.D.N.Y. 1965).



seas in state court.<sup>107</sup> Such a case would be removed to federal court, but as a diversity action rather than an admiralty action. If the suit had been brought in admiralty rather than in maritime law, it could not have been filed in state court in the first place. The passage of DOHSA in 1920 has not curtailed some state courts from continuing to entertain actions for wrongful death on the high seas.<sup>108</sup>

This issue was comprehensively examined in the recent case of *Rairigh v. Erlbeck*,<sup>109</sup> in which the court acknowledged the decisions finding federal DOHSA jurisdiction exclusive,<sup>110</sup> but opted to follow those courts which have upheld concurrent jurisdiction.<sup>111</sup> The *Rairigh* court declined to extract a mandate of DOHSA exclusivity from the *Higginbotham* decision.<sup>112</sup> Several circuits, however, have recently reaffirmed DOHSA's exclusivity.<sup>113</sup>

## VI. BENEFICIARIES UNDER DOHSA

Section 761<sup>114</sup> provides:

The personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.<sup>115</sup>

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.* The *Safir* court observed that Section 7 of the Act, currently codified at 46 U.S.C. § 767 (1976), preserves the effect of state statutes and is essentially remedial and supplementary rather than substantive. *Id.* at 508 n.2.

<sup>109</sup> 488 F. Supp. 865 (D. Md. 1980).

<sup>110</sup> See, e.g., *Barbe v. Drummond*, 507 F.2d 794 (1st Cir. 1974); *Higa v. Transocean Airlines*, 230 F.2d 780 (9th Cir. 1955), *appeal dismissed*, 352 U.S. 802 (1956).

<sup>111</sup> See *Lowe v. Trans World Airlines, Inc.*, 396 F. Supp. 9 (S.D.N.Y. 1975); *Safir v. Compagnie Generale Transatlantique*, 241 F. Supp. 501 (E.D.N.Y. 1965).

<sup>112</sup> *Rairigh v. Erlbeck*, 488 F. Supp. 865, 868 n.7.

<sup>113</sup> See, e.g., *Bodden v. American Offshore, Inc.*, 681 F.2d 319, 327 (5th Cir. 1982); *Ford v. Wooten*, 681 F.2d 712, 716 (11th Cir. 1982).

<sup>114</sup> 46 U.S.C. § 761 (1976).

<sup>115</sup> *Id.* The Jones Act, 46 U.S.C. § 688 (1976), provides a right of action to spouses and children primarily. 46 U.S.C. § 688 (1976). Parents and dependent next of kin are "contingent beneficiaries." See *Rowston v. Oglebay Norton Co.*, 180 F. Supp. 803 (N.D. Ohio 1960).

The surviving spouse, parent or child need not show "dependency." Only dependent relatives need prove their dependency.<sup>116</sup> A dependent relative may be related by affinity as well as consanguinity.<sup>117</sup> Stepchildren may recover under section 761.<sup>118</sup> A stepson who is supported but not adopted has been considered a dependent relative for purposes of the act.<sup>119</sup> An illegitimate child, as well, may be a beneficiary.<sup>120</sup>

Thus the surviving spouse, parent or child need only prove and show the pecuniary loss sustained by the death. The "dependent" relative must show both a dependency and the pecuniary loss sustained in order to recover.

## VII. DAMAGES

### A. *A Pecuniary Measure*

The damages recoverable under the Death on the High Seas Act (DOHSA) are limited to pecuniary damages only.<sup>121</sup> Pecuniary damages are damages which flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries. A pecuniary loss or damage is one which can be measured by some standard.<sup>122</sup> These pecuniary damages do not include loss of society, companionship, love or affection,<sup>123</sup> nor do they include either the decedent's conscious pain and suffering,<sup>124</sup> or the survivor's pain and suffering or grief.<sup>125</sup> They may include the loss of net accumulations from the estate or recovery for inheritable estate if the survivor is reasonably expected to have inherited from the decedent.<sup>126</sup> There is a split

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<sup>116</sup> See *Petition of Risdal & Anderson, Inc.*, 291 F. Supp. 353 (D. Mass. 1968).

<sup>117</sup> *Petition of United States*, 418 F.2d 264 (1st Cir. 1969).

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

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

<sup>120</sup> *Petition of Risdal & Anderson, Inc.*, 291 F. Supp. 353 (D. Mass. 1968); *Doyle v. Albatross Tanker Corp.*, 260 F. Supp. 303, *aff'd*, 367 F.2d 465 (2d Cir. 1966).

<sup>121</sup> 46 U.S.C. § 762 (1976).

<sup>122</sup> See *Michigan Central R.R. Co., v. Vreeland*, 227 U.S. 59 (1913).

<sup>123</sup> *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978).

<sup>124</sup> See *Barbe v. Drummond*, 507 F.2d 794 (1st Cir. 1974).

<sup>125</sup> See *Sea-Land Serv., Inc. v. Gaudet*, 414 U.S. 573 (1974).

<sup>126</sup> See *Solomon v. Warren*, 540 F.2d 777 (5th Cir. 1976), *cert denied*, 434 U.S. 801

of authority as to whether expenses for funeral or memorial services are recoverable under this pecuniary standard. In *Barbe v. Drummond*,<sup>127</sup> the First Circuit held that funeral expenses were not recoverable, but the Supreme Court has indicated that if the survivor has paid for the funeral, he has suffered a pecuniary loss for which he can recover. There is, of course, no recovery if the estate has paid for the funeral.<sup>128</sup>

What, then, is recoverable under DOHSA's pecuniary standard? A survivor may recover for both loss of support and loss of services.<sup>129</sup> Loss of services involves services that the decedent performed for the survivor which can be measured financially. These services might include household duties such as mowing the lawn or doing the dishes.

Children may recover for loss of nurture. Loss of nurture is a separate item of damage from the loss of a parent's society and companionship.<sup>130</sup> It is the loss by a child of parental guidance and training. Nurture has also been defined as the parent's guidance, care and discipline.<sup>131</sup> The loss of nurture, guidance and control is distinct from the loss of love and affection.<sup>132</sup> Courts are in agreement that although this item of damage cannot be computed with any degree of mathematical certainty, the loss of nurture, instruction, physical, intellectual and moral training may be considered as pecuniary loss under DOHSA.<sup>133</sup> The difficulty inherent in creating a formula to compute loss of nurture was articulated by a Texas federal district court as follows:

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(1977); *National Airlines, Inc. v. Stiles*, 268 F.2d 400 (5th Cir.), *cert. dismissed*, 361 U.S. 885 (1959); *Thompson v. Offshore Co.*, 440 F. Supp. 752 (S.D. Tex. 1977).

<sup>127</sup> 507 F.2d 794 (1st Cir. 1974).

<sup>128</sup> *Mobil Oil Corp. v. Higginbotham*, 436 U.S. at 624 n.20.

<sup>129</sup> *See Sea-Land Serv., Inc. v. Gaudet*, 414 U.S. 573 (1974).

<sup>130</sup> *See Soloman v. Warren*, 540 F.2d 777 (5th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977).

<sup>131</sup> *See, e.g., Higginbotham v. Mobil Oil Corp.*, 360 F. Supp. 1140 (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).

<sup>132</sup> *See Law v. Sea Drilling Corp.*, 510 F.2d 242, *reh'g denied, modified in part*, 523 F.2d 793 (5th Cir. 1975).

<sup>133</sup> *Id. See also Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583 (2d Cir. 1961), *cert. denied*, 368 U.S. 989 (1962).

Generally, the courts have defined the 'nurture' element on a case to case basis. The facts and circumstances of each particular case control, not only the legal basis for such damages, but the quantum as well. The courts consider many factors, including the amount of attention and time previously given by the parent to the child.<sup>134</sup>

### B. *Pre-Judgment Interest*

Pre-judgment interest may be recovered in DOHSA actions. Although generally the award of pre-judgment interest is discretionary with the court, in suits of admiralty the allowance of interest is the rule rather than the exception.<sup>135</sup> Denial of pre-judgment interest is appropriate only when there are "peculiar circumstances" that render it inequitable for a losing party to pay pre-judgment interest. Among the circumstances that may justify awarding interest only from the date of judgment are: (1) plaintiff's delay in bringing suit, (2) the existence of a genuine dispute regarding ultimate liability or the complexity of the legal or factual issues to be resolved, and (3) judgment in an amount substantially less than claimed.<sup>136</sup> There is another circumstance not yet addressed by the courts. That is the case in which liability is admitted, and the defendant expresses a desire to settle for pecuniary loss, but for one reason or another, the plaintiff refuses to take the money.

### C. *Inflation and Income Taxes*

The general rule is that inflation and the decrease in the purchasing power of a dollar may be taken into consideration in damage awards.<sup>137</sup> The effect of income taxes on future

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<sup>134</sup> *Stanford v. McLean Trucking Co.*, 506 F. Supp. 1252, 1257 (E.D. Tex. 1981)(emphasis added).

<sup>135</sup> See *National Airlines, Inc. v. Stiles*, 268 F.2d 400 (5th Cir.), *cert denied*, 361 U.S. 885 (1959); see also *Noritake Co. v. M/V Hellenic Champion*, 627 F.2d 724 (5th Cir. 1980).

<sup>136</sup> *Mecom v. Levingston Shipbuilding Co.*, 622 F.2d 1209 (5th Cir. 1980).

<sup>137</sup> See *Byrd v. Reederei*, 638 F.2d 1300 (5th Cir. 1981). See also *Culver v. Slater Boat Co.*, 688 F.2d 280 (5th Cir. 1982).

earnings may also be considered in damage awards.<sup>138</sup>

#### D. *Right to Jury Trial*

Suits in admiralty are tried by the courts unless otherwise provided for by statute. The Jones Act provides for trial by jury; DOHSA and the general maritime law do not.<sup>139</sup> But if an admiralty claim is brought with a Jones Act claim, a jury trial may be requested for both.<sup>140</sup>

### VIII. CONCLUSION

The jurisdiction of the states' wrongful-death acts may not be conclusively defined, as some courts have ruled, by *Higginbotham*, but if DOHSA is not the exclusive remedy for deaths on the high seas, the jurisdictional tangles will be myriad. For example: an airplane crashes in Bahamian waters, and as a result, suit is brought in a Florida court. Does the Florida Wrongful Death Act, which is not limited to Florida boundaries, apply? Does the Bahamian Fatal Accidents Act apply? Does DOHSA apply, and if so, concurrently or exclusively? What of pendant jurisdiction? If it is unknown whether the accident occurred within or beyond the three-mile limit, should the action be brought in state or federal court? Is the state action pendant to the federal action? Whether or not DOHSA affords the exclusive remedy, many sub-issues remain unsettled.

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<sup>138</sup> *Norfolk Western Ry. Co. v. Lipelt*, 444 U.S. 490 (1980).

<sup>139</sup> See *Romero v. Int'l. Terminal Operating Co.*, 358 U.S. 354, 371 n.28 (1959).

<sup>140</sup> See *Sea-Land Serv., Inc. v. Gaudet*, 414 U.S. 573, 589 n.24 (1974). See also *Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963)(involving Jones Act, unseaworthiness, and maintenance and cure claims); *Peace v. Fidalgo Island Packing Co.*, 419 F.2d 371 (9th Cir. 1969)(Jones Act and DOHSA claims). See generally 5 J. Moore, *Moore's Federal Practice* § 38.35[4] n.42 (2d Ed. 1982).