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# JUDICIAL AND REGULATORY DECISIONS

## ADMIRALTY JURISDICTION IN WRONGFUL DEATH ACTIONS ARISING FROM AIRPLANE CRASHES INTO THE HIGH SEAS

THE absence of any common law remedy for wrongful death has been remedied in most jurisdictions by statutes which authorize recovery by the decedent's representative. It is not questioned that the statutes of the several states are available to representatives of passengers killed in airplane crashes within the territorial limits of the United States.<sup>1</sup> However, when the death is caused by a crash into the high seas beyond the territorial limits of the United States, the source of the remedy and the proper forum in which to bring the action are in dispute. This problem has arisen as a result of decisions which have held that the Federal Death on the High Seas Act (F.D.H.S.A.) provides the exclusive remedy in such actions and that this remedy may be asserted only in admiralty.<sup>2</sup>

This situation was recently highlighted in the case of *Higa v. Transocean Airlines*.<sup>3</sup> The decedent, a resident of Hawaii, was a passenger on an airplane which crashed into the Pacific Ocean. The plane was owned by a California corporation. As a basis for recovery in a diversity suit in the Federal District Court for the District of Hawaii, the plaintiff relied on Section I of the FDHSA.<sup>4</sup> However, the action was dismissed for lack of jurisdiction, but without prejudice to the filing of an appropriate suit for damages in admiralty.<sup>5</sup>

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the dismissal. The court held that an action under the FDHSA may be brought only in admiralty. Furthermore, the court held that a diversity suit could not be maintained unless the laws of Hawaii specifically provided a remedy for a death on the high seas, beyond its territorial waters.

### ADMIRALTY OR NON-ADMIRALTY FORUM

If it is assumed that the FDHSA provides a federal remedy for a death occurring on a transoceanic flight, it is uncertain whether or not the claimant can avoid the admiralty forum by asserting a state death statute or the FDHSA in a non-admiralty forum. Significant motivation prompts the claimant to bring his action in a state court or in the civil side of the federal district courts, rather than in the admiralty side of the district courts. Since the admiralty proceeding follows the civil law tradition, a jury is not available in the admiralty courts.<sup>6</sup> Moreover, the discovery procedures of the Federal Rules of Civil Procedure or of the modern state pleading codes are broader than those available in the admiralty courts.<sup>7</sup> It is not surprising, therefore, that the cases involving deaths on the high seas are marked by attempts to assert the FDHSA in non-admiralty forums. The cases conflict as to whether the statute is enforceable in a court of law as well as in admiralty.<sup>8</sup> However, both the express language of the FDHSA and its legislative history support the view that it is cognizable only in admiralty.<sup>9</sup>

An amendment to the FDHSA permitting an action at law would not only benefit claimants, but would be consistent with other congressional and judicial policies with respect to actions arising from personal injuries of a maritime nature. Prior to the enactment of the FDHSA, the general maritime law, like the common law, did not provide a remedy for survival of a decedent's claim.<sup>10</sup>

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NOTE: Footnotes will be found at end of this article.

However, despite the Constitution's exclusive grant of admiralty jurisdiction to the federal judiciary,<sup>11</sup> the "saving to suitors" clause of the Judiciary Act of 1789 was interpreted as allowing the laws of the states as well as the federal maritime law to grant remedies in controversies arising from maritime matters.<sup>12</sup> Both the state courts and the federal admiralty courts, therefore, entertained actions under state death statutes for maritime injuries resulting in death.<sup>13</sup> The motivation behind the enactment of the FDHSA, in addition to the lack of uniformity created by the application of local death statutes, was the fact that they failed to provide a remedy for all cases of death on the high seas.<sup>14</sup>

Since the enactment of the FDHSA, the cases are unanimous in holding that the state death statutes can no longer be applied to actions arising on the high seas.<sup>15</sup> Although these decisions were based upon the language of the FDHSA and its legislative history, a dictum in the *Higa* case raised some question as to whether the FDHSA alone provides the exclusive source of action.<sup>16</sup> However, even if there were nothing in the FDHSA or its legislative history indicating that its purpose was to provide the exclusive right of action for death on the high seas, it is doubtful whether the state wrongful death statutes would still be saved by the "saving to suitors" clause. This is due to the development of the maritime supremacy doctrine which requires that in most cases involving maritime matters the substantive right and liabilities of the parties shall be governed by the general maritime law as expounded by the federal admiralty courts and by Congress.<sup>17</sup> This doctrine does not mean that the jurisdiction of the state courts in maritime actions is no longer saved by the "saving to suitors" clause. However, when a state court accepts jurisdiction over such a case it can still follow its own rules of procedure and grant relief according to its own laws, but it must look to the general maritime law to determine the substantive rights and liabilities of the parties.<sup>18</sup> Thus, the deceased passenger of the *Higa* case, if he had lived, could have still maintained an action at law for damages by virtue of the savings clause. With respect to actions at law for wrongful deaths on the high seas the problem created by the supremacy doctrine would depend upon whether the state courts could apply the local death statutes or the FDHSA.<sup>19</sup>

Although the scope of the maritime supremacy doctrine is not settled,<sup>20</sup> it should create no insurmountable problems with respect to actions at law for the wrongful deaths of passengers on the high seas. *First*: The FDHSA, itself, does not create any new substantive rights and liabilities, but merely provides for the survival of any right of action that the decedent would have against the vessel or vessel owner.<sup>21</sup> *Second*: Under the general maritime law the basis of the vessel owner's liability to the deceased passenger, if he had lived, is negligence.<sup>22</sup> This is the same standard of liability that is recognized by the common law. The only significant problem which would arise is whether non-admiralty forums should follow the admiralty rule that contributory negligence merely mitigates the damages or the common law rule that contributory negligence bars the claim.<sup>23</sup> Thus, if such actions were allowed in state courts or in the civil side of the federal district courts, the basis of the vessel owner's liability would be the same whether the actions were governed by the FDHSA as part of the maritime law or by the local death statutes. Under either the local death statutes or the FDHSA, the claimant would have the benefit of a jury trial.<sup>24</sup>

The Jones Act is another indication that the exclusive jurisdiction of the federal admiralty courts over wrongful death actions arising on the high seas is not a necessary characteristic of a uniform maritime law. This act, passed during the same session of Congress as the FDHSA, gave injured seamen or their personal representative in cases of death, the right to sue their employer in an action at law for damages.<sup>25</sup> By judicial interpretation,

the seamen were given the right to assert the statute in admiralty.<sup>26</sup> Although as wards of the admiralty, seamen have enjoyed a privileged position under the maritime law,<sup>27</sup> it is irrational to maintain that their right to sue at law would be less disruptive of a uniform system of maritime law than that of passengers.<sup>28</sup>

#### AIR POWER AND ADMIRALTY

Apart from the problem of whether an action arising from a wrongful death on the high seas may be asserted in a court of law, there is the problem of the source, if any, of admiralty's jurisdiction over death actions arising on transoceanic flights. Unfortunately, the court in the *Higa* case gave only cursory attention to this problem. Since the FDHSA provides merely for the survival of any claim the decedent could have asserted if he had lived, the passage of that act did not expand the geographical limits of the admiralty jurisdiction. Therefore, if admiralty does have jurisdiction over death actions arising on transoceanic flights, it must be rationalized on the basis of accepted principles of tort jurisdiction. This has been done by relying upon the assumption that death did not occur until the plane plunged into the water, and thus within the locality of admiralty's tort jurisdiction.<sup>29</sup> Such a theory implies that there would have been no basis for either the FDHSA or the admiralty jurisdiction had the death resulted from a tort that occurred in the air.<sup>30</sup> Because this theory would make the claimant's choice of a remedy and forum depend upon a technicality in pleading, the soundness of such an approach is questionable. Furthermore, if the tort had no relation to maritime matters, there is some doubt as to whether the locality of the tort alone is a sufficient test for admiralty jurisdiction.<sup>31</sup>

Although the application of the locality test of admiralty tort jurisdiction may be sound from a conflicts of law point of view when an airplane crashes into the high seas, it is doubtful whether Congress intended the FDHSA, which is cognizable only in admiralty, to apply to the airways above the high seas.<sup>32</sup> Except for the application of certain rules of navigation to seaplanes while afloat on navigable waters<sup>33</sup> and provisions of the United States Criminal Code pertaining to vessels at sea,<sup>34</sup> Congress has treated aviation as something separate and distinct from maritime matters.<sup>35</sup> The courts, following a similar policy, have generally treated aviation as "sui generis."<sup>36</sup>

#### THE WARSAW CONVENTION

Irrespective of the problems of the application of the FDHSA and the jurisdiction of admiralty, a further argument that could have been raised in the *Higa* case is that the plaintiff be allowed to recover under the Warsaw Convention.<sup>37</sup> However, the question raised by such an argument is whether the Convention created a substantive cause of action, a point about which there is a considerable conflict. In *Wyman v. Pan American Airways Inc.*,<sup>38</sup> the court held that the convention merely imposed a presumption of liability on the part of the airlines,<sup>39</sup> with a corresponding right to limit airline liability in the absence of willful misconduct without creating any new substantive rights.<sup>40</sup> Conversely, in *Salaman v. K.L.M. (Royal Dutch Airlines)*, it was held that the convention did create a cause of action.<sup>41</sup> The problem becomes more confusing when the accident occurs in the territory of a non-signatory nation,<sup>42</sup> or in a nation whose laws do not grant a cause of action.<sup>43</sup>

The language of the Convention seems to support the view that it does not create a new cause of action. *Article 24(1)* implies that either an action

for damages must originate from a source outside the Convention, or that any cause of action created by the Convention is not exclusive. Otherwise, the phrase, "... Any action for damages, however founded ... " would be superfluous.<sup>44</sup> In addition *Article 24(2)* does not designate the person to whom the decedent's cause of action should accrue.<sup>45</sup> Therefore, the identity of that person presumably must be determined by the law of the place of injury. Thus, if the law of the place of injury does not provide for the survival of the decedent's cause of action, the Convention does not remedy that defect. Furthermore, the presumption of liability created by *Article 17* is rebuttable if the airline can prove that it was free from negligence.<sup>46</sup> The Convention does not, however, prescribe any standards of care by which negligence can be determined. These standards, therefore, presumably must be ascertained by the law of the place of injury. Hence, the most reasonable conclusion is that the Warsaw Convention merely shifts to the airline the burden of proof on the issue of negligence and that no additional rights are created for the injured parties.

### CONCLUSIONS

The decision in the *Higa* case is indicative of the unsatisfactory state of the law governing the right of action for the wrongful death of passengers upon the surface of the high seas as well as in the airways above the high seas. The FDHSA, though originally intended as a humanitarian measure guaranteeing a remedy for all cases of death on the high seas, has in practice restricted the rights of claimants by confining them to courts of admiralty. Although the maritime industry, because of its numerous interstate and international characteristics, should be a subject of uniform federal regulation, it is questionable whether exclusive jurisdiction of federal admiralty courts in cases arising from personal injuries is necessary for this uniformity. The need for a special tribunal arises where expertise is desired for resolving certain complex factual and legal problems that are peculiar to a given industry. In the maritime industry such problems are usually related to its commercial aspects and no special competence is required in dealing with the problems arising in an action arising from personal injuries.<sup>47</sup> Furthermore, the FDHSA's grant of exclusive jurisdiction to the courts of admiralty is contrary to all other judicial and congressional policies with respect to action arising from personal injuries of a maritime nature.<sup>48</sup> Therefore, the FDHSA should be amended in order to permit an action at law.

As for the application of the FDHSA to wrongful deaths arising on transoceanic flights, there is little to commend this policy except expediency. In granting the claimant a remedy under the FDHSA, the courts have not held that the airways above the high seas were within the geographical limits of the admiralty jurisdiction. Instead, by relying upon the assumption that the death did not occur until the plane hit the water, the court implied that the plane was not within the admiralty jurisdiction until the occurrence of this event. Apart from the problem of whether locality of the tort alone is a sufficient test for admiralty jurisdiction, this narrow ground suggests that the claimant would have no federal remedy if it were shown that the death occurred in the air. That this would be the probable result is evident from the fact that neither the courts nor Congress have revealed a tendency towards treating aviation as a subject of admiralty jurisdiction. The provisions of the FDHSA, moreover, are oriented towards actions related to the shipping industry and are not intended for application to non-maritime subjects.<sup>49</sup> Therefore, it is submitted, that Congress enact a statute providing a remedy for wrongful deaths arising on transoceanic flights.

Since the application of the FDHSA to deaths arising on transoceanic flights is a mere matter of expediency, it is further submitted that until Congress acts to provide a federal cause of action, the claimant be allowed to assert a state death statute in a state court. The state courts could use such conflict of law connecting factors as the domicile of the airplane owner as a basis for applying local laws. Under this method the claimant could obtain a civil trial with a right to a jury. The only detriment to the defendant airline is the possibility that a jury will be more liberal in finding negligence and in awarding damages than would a judge in a court of admiralty.<sup>50</sup> The claimant's rights, furthermore, would not depend on a technicality in pleading specifying whether death occurred in the air or in the water. Thus, irrespective of the present uncertainty attendant to suits under the FDHSA, plaintiff's asserting claims for deaths arising from aviation accidents over the high seas would be assured of an unquestioned forum in which to bring their suit. Moreover, maritime law would not be inappropriately applied to tort cases bearing no maritime characteristics other than the fact that the plane was flying over the ocean when the accident occurred.<sup>51</sup>

#### FOOTNOTES

<sup>1</sup> See *e.g.*, *Bratt v. Western Airlines*, 169 F. 2d 214 (10th Cir. 1948); *Smith v. Pennsylvania Central Airlines Corp.*, 76 F. Supp. 940 (D.D.C. 1948); *In re Kinsey's Estate*, 152 Neb. 95, 40 N.W. 2d 526 (1949).

<sup>2</sup> 41 Stat. 537 (1920), 46 U.S.C. §§ 761-767 (1952).

<sup>3</sup> 230 F. 2d 780 (9th Cir. 1955), *cert. denied*, 352 U.S. 802 (1956).

<sup>4</sup> "Whenever the death of a person shall be 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, 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 the death had not ensued." 41 Stat. 537 (1920), 46 U.S.C.A. § 761 (1952).

<sup>5</sup> *Higa v. Transocean Airlines*, 124 F. Supp. 13 (D. Hawaii 1954).

<sup>6</sup> See *Noel v. Linea Aeropostal Venezolana*, 144 F. Supp. 359, 361 (S.D.N.Y. 1956); *Gilmore and Black, The Law of Admiralty*, § 1012 (1957).

<sup>7</sup> See *Noel v. Linea Aeropostal Venezolana*, 144 F. Supp. 359, 361 (S.D.N.Y. 1956); 3 *Benedict, Admiralty*, § 386 (6th ed. 1940).

<sup>8</sup> The following cases held that admiralty is the exclusive forum for actions under the FDHSA: *Noel v. Linea Aeropostal Venezolana*, 247 F. 2d 677 (2d Cir. 1957); *Higa v. Transocean Airlines*, 230 F. 2d 780 (9th Cir. 1955); *Kunkel v. United States*, 140 F. Supp. 591 (S.D. Cal. 1956); *Wilson v. Transocean Airlines*, 121 F. Supp. 85 (N.D. Cal. 1954); *Iafrate v. Compagnie Generale Transatlantique*, 106 F. Supp. 619 (S.D.N.Y. 1952); *Egen v. Donaldson Atlantic Line*, 37 F. Supp. 909 (S.D.N.Y. 1941); *Birks v. United Fruit Co.*, 48 F. 2d 656 (S.D.N.Y. 1930); *Dall v. Casulich Line*, 1936 Am. Mar. Cas. 359 (S.D.N.Y. 1928); *Kristansen v. Steinfeldt*, 300 N.Y. Supp. 543 (Sup. Ct. 1937). In the following cases the claimant was allowed to assert the FDHSA in a court of law: *Sierra v. Pan American World Airways*, 107 F. Supp. 519 (D. Puerto Rico, 1952); *Atcheson v. United States*, 1949 Am. Cas. 72 (N.D. Cal. 1949); *Batkiewicz v. Seas Shipping Co.*, 53 F. Supp. 802 (S.D.N.Y. 1943); *Choy v. Pan American Airways*, 19 Am. Mar. Cas. 483 (S.D.N.Y. 1941); *Powers v. Cunard S.S. Co.*, 32 F. 2d 720 (S.D.N.Y. 1925); *Bugden v. Trawler Cambridge, Inc.*, 319 Mass. 315, 65 N.E. 2d 533 (1946); *Wyman v. Pan American Airways, Inc.*, 43 N.Y.S. 2d 420 (Sup. Ct. 1943); *Elliot v. Steinfeldt*, 4 N.Y.S. 2d 9 (Sup. Ct. 1938).

<sup>9</sup> It has been held that if the FDHSA were construed as allowing an action in a court of law, the words "in admiralty" as used in section 1 of the statute would be rendered superfluous and would thus violate the policy calling for a construction of a statute which gives effect to every part of its language. *Higa v. Transocean Airlines*, 230 F. 2d 780, 784 (9th Cir. 1955). See also *Market Co. v. Hoffman*, 101 U.S. 112 (1879). However, in support of the view that the use of the admiralty forum is permissive rather than mandatory, it has been suggested that the purpose of the reference to the admiralty forum in Section 1 was to assure the constitutionality of the statute by avoiding an interpretation that would deprive admiralty of jurisdiction over death actions arising on the high seas. *Choy v. Pan-American*

Airways Co., 1941 Am. Mar. Cas. 483, 487 (S.D.N.Y. 1941); See also, *Panama R.R. v. Johnson*, 264 U.S. 375 (1924), note 25, *infra*.

The Congressional committee reports of the FDHSA specifically state that the statute is enforceable only in admiralty. See S. Rep. No. 216, 66th Cong. 1st sess., (1919); H.R. Rep. No. 674, 66th Cong. 2d sess. (1920). See also, Note 16 *supra*.

<sup>10</sup> See *e.g.* *The Harrisburg*, 119 U.S. 199 (1886).

<sup>11</sup> "The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction . . ." U.S. Const. Art. III, § 2, ch. 1.

<sup>12</sup> The original "saving to suitors" clause of Section 9 of the Judiciary Act of 1789 read as follows: "The district courts shall have exclusive original cognizance of all cases of admiralty and maritime jurisdiction, *saving to suitors in all cases the right of a common law remedy when the common law is adequate to give it.*" 1 Stat. 73 (1789) (later amended by 62 Stat. 931 (1948), 63 Stat. 101 (1949), 28 U.S.C.A. § 1333 (1949)).

In earlier cases, this clause was construed to permit state courts to accept jurisdiction over cases involving maritime matters and to decide the merits in accordance with their own laws and procedures. See *Chappel v. Bradshaw*, 128 U.S. 132 (1888) (Upheld recovery of damages in state court from owner of scow which negligently collided with plaintiff's vessel while in port); *Schoonmaker v. Gilmore*, 102 U.S. 118 (1880) (Upheld recovery in personal action in state court of Pennsylvania for damages due to collision on Ohio River); *Leon v. Galcern*, 178 U.S. (11 Wall.) 185 (1870) (Upheld suit for mariner's wages, *in personam*, in court of Louisiana). However, the "saving to the suitors" clause has been held inapplicable where the claimant attempted to proceed *in rem* or against the vessel in state courts because this mode of procedure is *exclusively* within the admiralty jurisdiction and was not available at common law. State Statutes granting such a right have been declared unconstitutional in *The Belfast*, 74 U.S. (7 Wall.) 624 (1868); *The Hine v. Trevor*, 71 U.S. (4 Wall.) 555 (1866); *The Moses Taylor*, 71 U.S. (4 Wall.) 411 (1866). See also, 1 *Benedict, Admiralty*, §§ 20, 21 (6th ed. 1940). It is not always clear, however, what constitutes a proceeding *in rem*. Thus, a state court has been allowed to grant an equitable decree enforcing a lien against a vessel for towage charges on the grounds that a sale of the vessel pursuant to the decree would pass the property subject to prior liens while a sale *in rem* in admiralty is a complete divestiture of all prior liens. See *Knapp Stout and Co. v. McCaffrey*, 177 U.S. 638 (1900). It has also been held that a state court may issue a writ of attachment against a vessel in order to bring it within the jurisdiction of the court for enforcement of any judgment which may be rendered against the defendant owner. *Leon v. Galcern*, *supra*. In *Madruga v. Superior Ct.*, 346 U.S. 556 (1954) it was held that a state court was competent to order the sale of a boat and the partition of the proceeds in a suit by the owners, because the suit was against a minority owner rather than the vessel and the state court only acted upon the interests of the parties. Furthermore, the term "common law remedy" has been held to include remedies of an equitable nature, even though traditionally admiralty courts have no equitable powers except as granted by statute: See *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924) (Specific performance of agreement to arbitrate a charter party contract). In *Black, Admiralty Jurisdiction: Critique and Suggestions*, 50 Colum. L. Rev. 259, 270, n. 51 (1950) it was suggested that this case can be rationalized on the ground that an action to compel arbitration was not maritime and thus not exclusively within the admiralty jurisdiction.

Since 1948, the "saving to suitors" clause has been revised twice and now reads as follows: ". . . saving to suitors in all cases all other remedies to which they are otherwise entitled." 1 Stat. 73 (1789), 28 U.S.C.A. § 1333 (1949). According to the revisor's note the purpose of the amendment was to enable the language to conform to rule 2 of the Federal Rules of Civil Procedure which abolishes the distinction between law and equity. However, the question has been raised as to whether the revised language changes the rule of those cases which held that a state court cannot entertain a proceeding *in rem* on the ground that it was not a common law remedy. See *Gilmore and Black, The Law of Admiralty* § 1-13 (1957); *Black, Admiralty Jurisdiction: Critique and Suggestions*, 59 Colum. L. Rev. 259, 270 (1950). Although the Supreme Court has not as yet passed upon this question, it appears from their tendency to refer to the original language that the scope of the "savings" clause has not been expanded by the revised language. See *Madruga v. Superior Court*, *supra*.

<sup>13</sup> By virtue of the "saving to suitors" clause, the state courts were allowed to entertain actions under local death statutes for deaths occurring on local navigable waters. See *Sherlock v. Alling*, 93 U.S. 99 (1876); *Steamboat Co. v. Chase*, 83 U.S. (16 Wall.) 522 (1872). See also, *Butler v. Boston and Savannah Steamship Co.*, 130 U.S. 527 (1889) (Action in Massachusetts Court under local death statute. Defendant allowed to initiate limitation of liability proceedings in admiralty).

On the theory that a ship upon the high seas was an extension of the state in which its owner was domiciled, both the state courts and federal admiralty courts applied the death statute of the state of owner's domicile in cases arising upon the high seas. *The Hamilton*, 207 U.S. 389 (1907) (Suit in admiralty under Delaware death statute); *Southern Pacific Co. v. De Valle da Costa*, 190 Fed. 689 (1st Cir. 1911) (Diversity suit in federal court under Kentucky statute); *International Navigation Co. v. Lindstrom*, 123 Fed. 475 (2d Cir. 1903) (Diversity suit in federal court under New York statute); *The James McGee*, 300 Fed. 93 (S.D.N.Y. 1924) (Suit in admiralty under New Jersey death statute); *McDonald v. Mallory*, 77 N.Y. 546 (1879) (Suit in state court under New York statute). See also, *Crapo v. Kelly*, 83 U.S. (16 Wall.) 610 (1872). These decisions have also been rationalized as an exercise of the state's power to regulate their domestic corporations. See Magruder and Grout, *Wrongful Death Within the Admiralty Jurisdiction*, 35 Yale L. J. 395, 409-418 (1926). By applying the policy of the "savings" clause, a claimant has been allowed to assert the FDHSA in an action at law. See *Bugden v. Trowler Cambridge Inc.*, 319 Mass 315, 65 N.E. 2d 533 (1946).

<sup>14</sup> The wrongful death statutes of the several states did not provide a remedy for all cases involving death on the high seas. E.g., *The Robert Graham Dun*, 70 Fed. 270 (1st Cir. 1895) (Illustrated inapplicability of a statute which required proof of the decedent's conscious suffering prior to death—an impossibility if death were due to drowning); *The Middlesex*, 253 Fed. 142 (D. Mass. 1916) (Collision between vessels owned by New Jersey and Maine Corporations. New Jersey vessel was registered at the port of Boston. Without discussing the reasons for its holding, the federal district court refused to apply the New Jersey death statute to the New Jersey vessel). See S. Rep. No. 216, 66th Cong. 1st sess. (1919); H.R. Rep. No. 674, 66th Cong. 2d sess. (1920); Cunningham, *Shall We Continue to be Drowned at Sea Without a Remedy?* 22 Case and Com. 129 (1915); Putnam, *The Remedy for Death at Sea*, 22 Case and Com. 125 (1912); Whitelock, *Extra-Territorial Marine Torts*, 22 Harv. L. Rev. 403 (1904).

<sup>15</sup> See cases cited in note 8, *supra*.

<sup>16</sup> The Congressional Committee reports expressly stated that the FDHSA should provide the exclusive cause of action for death as the high seas. See S. Rep. No. 675, 66th Cong. 2d sess. (1920).

When the proposed statute came from the House Judiciary Committee, the first sentence of section 7 read as follows: "That the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this act (as to causes occurring within the territorial limits of any State . . ." (Emphasis supplied.) Thus, by implication, section 7 excluded the state death statutes from actions arising on the high seas. The purpose of the amendment, according to its sponsor, was to preserve any right that was then granted by any state, whether the death occurred within the territorial limits of the state or upon the high seas. It was the view of the sponsor of this amendment that the purpose of the act was to correct a then existing inadequacy in the law and that it would be inconsistent with this purpose if the act took away any right that a claimant had under the state laws. Thus, as passed by the House, the language of section 7, was the same as it appears above, except the clause: "as to causes occurring within the territorial limits of any state" was eliminated. 59 Cong. Rec. 4482, 4484 (1920). The present form of section 7 is as follows: "*The provisions of any state statute giving or regulating rights of action for death shall not be affected by this chapter.* Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any state, or to any navigable waters in the Panama Canal Zone." (Emphasis added.) 41 Stat. 538 (1920), 46 U.S.C.A. § 767 (1944). The courts, however, have refused to attach any significance to this amendment on the grounds that Congress did not understand the purpose of the amendment and that it was implicit in section 1 of the FDHSA that the state statute would be confined to actions arising in local waters. See e.g. *Wilson v. Transocean Airlines*, 121 F. Supp. 85, 90 (N.D. Cal. 1954). But, in the *Higa* case, after citing cases prior to the enactment of the FDHSA, in which state statutes were applied to deaths on the high seas, the court concluded that "even if Congress had not agreed with the interpretation of the proponent of the amendment, we would hesitate to construe the exceptive clause as depriving the states of the then existing jurisdictions shown as exercised in the above cited cases." (See cases cited in note 13 *supra*). 230 F. 2d at 783. Some cases have interpreted section 7 as granting the right to assert the FDHSA in a state court. See e.g. *Elliot v. Steinfeldt*, 4 N.Y.S. 2d 9 (Sup. Ct. 1938).

<sup>17</sup> In cases prior to the enactment of the FDHSA, where a recovery was granted under a state statute for a death on the high seas, the "saving to suitors" clause was interpreted in a manner which appeared to give the states the authority to legislate with respect to matters within the admiralty jurisdiction. See cases

cited in note 13 *supra*. Thus, in *The Hamilton*, 207 U.S. 398 (1907) the "savings" clause was interpreted as follows: "... The doubt in this case arose as to the power of the States where Congress has remained silent . . . That doubt, however, cannot be serious. The grant of admiralty jurisdiction, followed and construed by the *Judiciary Act of 1789*, leaves open the common law jurisdiction of the state courts over torts committed at sea. This, we believe, always has been admitted. (Citations omitted.) And as the state courts in their decisions would follow their notions about the law and might change them from time to time, it would be strange if the State might not make changes by its legislature . . ." 207 U.S. at 404. In addition to wrongful death statutes, states were permitted to enact laws governing other matters of a maritime nature which were not inconsistent with the general maritime law or an act of Congress. See the *Lottawanna*, 88 U.S. (21 Wall.) 558 (1874) (Upheld Louisiana statute granting to material men a lien for supplies furnished to vessel while in home port); *The St. Lawrence*, 66 U.S. (1 Black) 522 (1861) (lien for supplies furnished to vessel while in home port).

The status of state law in suits under the "savings" clause was rendered uncertain by a series of cases beginning with *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). In that case, the court held that the Constitution contemplated a uniform maritime law, operative throughout the nation and that this intent would be violated if the New York Workmen's Compensation Law granted a recovery for the wrongful death of a stevedore aboard the defendant's vessel. As for the "saving to suitors" clause, the court said: "... The remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction." 244 U.S. at 218. The status of the "saving to suitors" clause under the doctrine announced in the *Jensen* case was further defined in *Chelentis v. Luckenbach S.S. Co., Inc.*, 247 U.S. 372 (1918). In that case, an injured seaman alleged that the "saving to suitors" clause and Merchant Seaman Act of 1915 gave them the right to recover full indemnity from the vessel owner according to the common law. Dismissing the plaintiff's argument, the court said with regard to the "saving to suitors" clause: "the distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury . . . Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common law standards rather than those of the maritime law. Under the circumstances here presented, without regard to the court where he might ask relief, petitioner's rights were those recognized by the law of the sea" 247 U.S. at 384.

Following the *Jensen* case, Congress amended the "saving to suitors" clause in attempts to preserve to claimants the benefits of the workmen's compensation laws. However, these amendments were declared unconstitutional on the grounds that they constituted an unlawful delegation to the states of congressional power to legislate with respect to matters within the admiralty jurisdiction. See, *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920). In the latter case, in further defining the positions of the saving clause under the *Jensen* doctrine, the Court implied that the state wrongful death statutes were still saved by distinguishing *The Hamilton*, *supra*, as follows: "In *The Hamilton*, 207 U.S. 398, an admiralty proceeding. effect was given as against a ship registered in Delaware, to a statute of that State which permitted recovery by an ordinary action for fatal injuries, and the power of a State to supplement the maritime law to that extent was recognized. But here, the state enactment prescribes exclusive rights and liabilities, undertakes to secure their observance by heavy penalties and onerous conditions and providing novel remedies incapable of enforcement by an admiralty court." (Citations omitted.) The doctrine of *The Hamilton* may not be extended to such a situation." 253 U.S. at 166.

After the *Knickerbocker Ice Co.* case, the court held that state wrongful death statute could be applied to the death of a longshoreman occurring within local navigable waters on the theory the "(T)he subject is maritime and local in character and the specified modification of or supplement to the rule applied in admiralty courts . . . will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations." *Western Fuel Co. v. Garcia*, 257 U.S. 233, 242 (1921). In *Just v. Chambers*, 312 U.S. 383 (1941), an admiralty suit in personam, under a Florida statute, for a death on local waters, the tortfeasor died during the proceedings. Although admiralty will not enforce an in personam claim against the estate of the deceased tortfeasor, the court allowed

the proceedings to continue because of a Florida statute providing that the action shall survive his death. See also, *Davis v. Department of Labor*, 317 U.S. 249 (1942); *Moore's case*, 323 Mass. 162, 80 N.E. 2d 478, *aff'd*, 335 U.S. 874 (1948).

A series of recent cases have further confused the problem of the extent to which state law is applicable in maritime cases under the "saving to suitors" clause. In *Garrett v. Moore-McCormack Co.* 317 U.S. 239 (1942), the court held that a Pennsylvania court must apply the admiralty rule that the defendant vessel owner had the burden of proving the validity of release signed by an injured seaman, on the grounds that the *Jensen* doctrine required the state courts to give the plaintiff the full benefits of the general maritime law.

Following the *Garrett* case, several cases arose concerning the question of whether an agent-operator of a government vessel, pursuant to a wartime General Agent Service Agreement, was liable to seamen and others for injuries sustained while working on the vessel. In *Hust v. Moore-McCormack Lines*, 327 U.S. 771 (1946), a state court of Oregon held that the agent was not liable under the Jones Act for injuries sustained by a seaman because under the common law rules, the United States and not the agent was the employer. The United States Supreme Court reversed on the grounds that Congress never intended that the agreement would deprive seamen of their rights under the Jones Act and thus for purposes of the Jones Act the agents were considered as employers. In *Caldarola v. Eckert*, 332 U.S. 155 (1947), the New York Court held that because the agent was not the owner of the vessel and because under New York law, an agent is not liable for injuries sustained by a business invitee, a stevedore could not recover damages from the agent for injuries sustained while working on the vessel. The United States Supreme Court sustained the New York Court on the grounds that the General Agent Service Agreement made the agent the owner only for purposes of the Jones Act, but not for all practical purposes and therefore, the plaintiff's only cause of action is against the United States, in admiralty, under Section 2 of the Suits in Admiralty Act. 41 Stat. 525 (1920), 46 U.S.C. § 742 (1953). In a dicta, the court went on to say that if the contract had been construed as to render the agent the owner for all practical purposes, his liability would be governed by the law of New York.

In *Pope and Talbot v. Hawn*, 346 U.S. 406 (1953), a diversity suit in the federal district court for injuries sustained by a carpenter while working aboard defendant's vessel in the waters of Pennsylvania, the court held that since the action is maritime in nature it will be governed by the admiralty rule that contributory negligence merely mitigates the damages, rather than the Pennsylvania rule which completely bars the claim. However, in *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310 (1955), the court held that the construction of the warranties of a marine insurance policy will be governed by state law because of the lack of federal maritime or congressional rules pertaining to the subject and because the regulation of insurance companies and contracts has been, historically, a state function. Based on the *Wilburn Boat Co.* case, it has been held that a stevedoring contract is governed by state law. *Amador v. The Ronda*, 146 F. Supp. 617 (S.D.N.Y. 1956).

See also, Gilmore and Black, *The Law of Admiralty*, §§ 6-45, 6-58 (1957); Stevens, *Erie R.R. v. Tompkins and The Uniform General Maritime Law*, 64 Harv. L. Rev. 246 (1950); Dodd, *The New Doctrine of the Supremacy of Admiralty over the Common Law*, 21 Colum. L. Rev. 647 (1921); Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 Colum. L. Rev. 259 (1950).

<sup>18</sup> See *Pope and Talbot v. Hawn*, 346 U.S. 406 (1953); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 384 (1918); *Reynolds v. Royal Mail Lines*, 147 F. Supp. 223 (S.D. Cal. 1956); *Rojas v. Robin*, 230 La. 1096, 90 So. 2d 58 (1956). But see *Davis v. Matson Navigation Co.*, 143 F. Supp. 537 (N.D. Cal. 1956) (Case involved suit for damages by stevedore based upon negligence and unseaworthiness in state court. On the basis of the 1948 revision of the Removal Statute, 62 Stat. 937 (1948) 28 U.S.C.A. § 1441 (a) (1950), which provides that any action over which the federal district court has original jurisdictions can be removed to that court, the defendant was allowed to remove the case to admiralty side of federal district court. Held that "saving to suitors" clause only affords litigants a choice of remedies and not of forums.) However, in *Hill v. United Fruit Co.*, 149 F. Supp. 470 (S.D. Cal. 1957), the *Davis* case was rejected and criticized on the grounds that the Removal Statute cannot be construed in a manner that nullifies the "saving to suitors" clause.

<sup>19</sup> In *Pope and Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953), it was held that state courts must follow the admiralty rule of contributory negligence in cases involving personal injuries of a maritime nature. The courts have refused to follow this decision in cases arising under state wrongful death statutes for deaths due to injuries occurring on local waters. These cases proceed on the theory that

because the general maritime law failed to provide a cause of action for a death on local waters, the action was rooted in state law rather than maritime law. See *Turner v. Wilson Line of Massachusetts*, 242 F. 2d 414 (1st Cir. 1957); *Curtis v. A. Garcia Y. Cia*, 241 F. 2d 30 (3d Cir. 1957); *Byrd v. Napoleon Avenue Ferry Co.*, 125 F. Supp. 573 (E.D. La. 1954), *aff'd*, 227 F. 2d 958 (5th Cir. 1955), *cert. denied* 351 U.S. 925 (1956); *Meade v. Luksefjell* 148 F. Supp. 708 (S.D.N.Y. 1957). However, where the death statute was of the survival type, which merely continues the decedent's cause of action after his death, it was held that the action was rooted in the maritime law and therefore, the admiralty rule of comparable negligence controls. See *Curtis v. A. Garcia y Cia*, *supra*.

<sup>20</sup> See note 17 *supra*.

<sup>21</sup> Section 1 of the FDHSA reads as follows: "... (T)he personal representative of the decedent may maintain a suit for damages . . . against the vessel, person, or corporation which would have been liable if death had not ensued." (Emphasis supplied.) 41 Stat. 537 (1920), 46 U.S.C. § 761 (1952).

<sup>22</sup> See *Byrd v. Napoleon Avenue Ferry Co.*, 125 F. Supp. 573 (E.D. La. 1954); *Gilmore and Black, The Law of Admiralty*, §§ 1-10 n. 77 (1957).

<sup>23</sup> See *e.g.* *Pope and Talbot v. Hawn*, 346 U.S. 406 (1953). See Note 19 *supra*.

<sup>24</sup> If the defendant airline's liability is limited by the Warsaw Convention, however the judge may remove the question of damages from the province of the jury. See *Pierre v. Eastern Airlines, Inc.*, 2 CCH Aviation L. Rep. 17,515 (D.C. N.J. 1957). See also, note 39, *infra*.

<sup>25</sup> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law with the right of trial by jury . . . 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 . . . 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." 41 Stat. 1007 (1920), 46 U.S.C.A. § 688 (1944). The Jones Act, by incorporating the FEIA, adopted negligence as the basis of liability. See 35 Stat. 65 (1908), 45 U.S.C. §§ 51-60 (1952).

<sup>26</sup> In *Panama R.R. v. Johnson*, 264 U.S. 375 (1923), in order to save the constitutionality of the Jones Act, the court held that it was part of the general maritime law and therefore, assertable in admiralty. See also, *Panama R.R. v. Vasquez*, 271 U.S. 557 (1926); *Engel v. Davenport*, 271 U.S. 33 (1926) (State Courts have concurrent jurisdiction with federal courts to enforce seamen's rights of action established by this act.)

<sup>27</sup> See *The Osceola*, 189 U.S. 158 (1903); *Gilmore and Black, The Law of Admiralty*, 6-6, (1957).

<sup>28</sup> The fact that seamen can sue at law under the Jones Act has led some courts to hold that a claimant has the same right under the FDHSA. However, this interpretation of the FDHSA is questionable since the Jones Act, unlike the FDHSA, specifically provides for an action at law. See *Sierra v. Pan American World Airways*, 107 F. Supp. 519, 520 (D. Puerto Rico, 1952); *Batkiewicz v. Seas Shipping Service*, 53 F. Supp. 802 804 (S.D.N.Y. 1943); *Choy v. Pan American Airways Co.*, 19 Am. Mar. Cas. 483, 486 (S.D.N.Y. 1941).

<sup>29</sup> See *Wilson v. Transocean Airlines* 121 F. Supp. 85, 92, (N.D. Cal. 1954). The basis for holding an aircraft subject to the admiralty jurisdiction because it crashed into the ocean was the following dictum in *The Plymouth*, 70 U.S. (3 Wall.) 20 (1865): "... The jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas, or navigable waters where it occurred. Every species of tort, however occurring, and whether aboard a vessel or not, if upon the high seas or navigable water, is of admiralty cognizance." 70 U.S. (3 Wall.) at 36. Prior to the *Wilson Case*, *supra*, a suit arising from a fatal air crash at sea was successfully maintained in admiralty under the FDHSA but the jurisdiction of the court was not placed in issue. *Lacey v. L. W. Wiggins Airways*, 95 F. Supp. 916 (D. Mass. 1951).

<sup>30</sup> In *Noel v. Linea Aeropostal Venezolana*, 154 F. Supp. 162 (S.D.N.Y. 1956), the court dismissed an action at law under the FDHSA on the grounds that it was cognizable only in admiralty and went on to hold that the jurisdictional requirements of the FDHSA do not depend on the "elusive fact as whether a person died above, on or in the sea." 154 F. Supp. at 164. However, on appeal, the court said that inasmuch as the FDHSA is cognizable only in admiralty, no opinion would be expressed as to "whether the Death on the High Seas Act grants a right of action for death in the airspace." 247 F. 2d 677, 680 (2d Cir. 1957).

<sup>31</sup> See *The Admiral Peoples*, 295 U.S. 649 (1935) (libellant injured by falling from the shore side of a gang plank while disembarking from a vessel. Respondent contended that admiralty did not have jurisdiction because the injury did not occur on navigable waters. Held that admiralty jurisdiction was supported by fact

that gangplank was part of the vessel and that *The Plymouth*, note 27 *supra*, must be confined to the circumstances of that case). *Minnie v. Port Huron Co.* 295 U.S. 647 (1935) (admiralty does not have jurisdiction when swinging crane launched longshoreman into water since action arose on the land). In *Reinhardt v. Newport Flying Service Corp.*, 232 N.Y. 115, 133 N.E. 371 (1921), after holding that admiralty had jurisdiction over a personal injury caused by seaplane while adrift on navigable waters, Judge Cardozo went on to say: "... It is true that the primary function is their movement in the air, and that the function of movement in the 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." 232 N.Y. at 118, 133 N.E. at 372.

See also, *Campbell v. H. Hackfield & Co.*, 125 Fed. 696 (9th Cir. 1893); Veeder, *The Legal Relation Between Aviation and Admiralty*, 2 Air L. Rev. 29, 32-37 (1931); 1 Benedict, Admiralty § 127 (6th ed. 1940); Robinson, Admiralty § 10 (1939).

<sup>32</sup> In *Choy v. Pan American Airways Co.*, 19 Amer. Mar. Cas. 483 (S.D.N.Y. 1941), the plaintiff asserted the FDHSA in an action at law. The defendant did not contest the applicability of the FDHSA, but claimed that the action should be removed to a court of admiralty. In order to determine if there was a proper basis for the jurisdiction over the action, the court reviewed the applicability of the FDHSA on its own initiative. The court held that the phrase "on the high seas" as used in section 1 of the FDHSA was inclusive of the area above the high seas. However, the court avoided the problem of whether admiralty had jurisdiction of the airways above the high seas by concluding that an action under the FDHSA could be maintained in a court of law. After the *Choy* case, there were several other cases involving fatal airplane crashes into the high seas in which the FDHSA was asserting in an action at law. *Sierra v. Pan American World Airways*, 107 F. Supp. 519 (D. Puerto Rico, 1952); *Hart v. Transcontinental and Western Airlines, Inc.*, 1950 U.S. Av. R. 287 (S.D.N.Y. 1950); *Atcheson v. United States*, 1949 U.S. Av. R. 72 (N.D. Cal. 1949); *Wyman v. Pan American Airways*, 43 N.Y.S. 2d 420 (Sup. Ct. 1943).

<sup>33</sup> "Regulations for prevention of Collisions at Sea" are to be followed by seaplanes if applicable. 65 Stat. 406 (1951); 33 U.S.C. § 143 (1952).

<sup>34</sup> Airplane while flying over the high seas is within the maritime jurisdiction for purposes of the criminal code. 18 U.S.C. § 7 (5) (1952). Misdemeanor to stowaway aboard aircraft. 18 U.S.C. § 2199 (1952).

<sup>35</sup> One year following the enactment of the FDHSA, a bill was introduced in Congress which would have declared all navigable air spaces to be within the admiralty jurisdiction. See *President Harding's Special Message*, 61 Cong. Rec. 524, (1921). However, there is no record that this bill was ever acted upon. The American Bar Association, although in favor of the bill, felt that its purpose could not be accomplished without amending the Constitution. *Report of the Special Committee on the Law of Aviation*, 46 ABA Rep. 498, 523 (1921).

Further indication that Congress has not subjected aircraft to admiralty law of jurisdiction is the following provision of the Air Commerce Act of 1926: "The navigation and shipping laws of the United States, including the definition of 'vessel' or 'vehicle' found therein and including the rules for the prevention of collisions, shall not be construed to apply to seaplanes or other aircraft or to the navigation of vessels in relation to seaplanes or other aircraft." 44 Stat. 568 (1926), 49 U.S.C. § 177 (1952). Amended in 1951 to subject seaplanes to certain regulations pertaining to collisions at sea. 65 Stat. 406 (1951). See Knauth, *Aviation and Admiralty*, 6 Air L. Rev. 226, 229 (1935); Veeder, *The Legal Relation Between Aviation and Admiralty*, 2 Air L. Rev. 29 (1931).

In *Choy v. Pan American Airways*, 19 Amer. Mar. Cas. 483 (S.D.N.Y. 1941), the court held that the FDHSA is not a navigation and shipping law within the meaning of the above provision of the Air Commerce Act. However, in further holding that the FDHSA is cognizable in a court of law, the *Choy* case did not deny that the Air Commerce Act implies that Congress has not recognized the airways to be part of the admiralty jurisdiction.

<sup>36</sup> The courts have refused to allow creditors the right to assert maritime liens against aircraft. *United States v. Northwest Air Service*, 80 F. 2d 804 (9th Cir. 1935); *Crawford Bros. No. 2*, 215 Fed. 269 (D. Wash. 1914). Owners of aircraft, involved in fatal crashes at sea, have not been allowed to limit liability in admiralty. *Noakes v. Imperial Airways*, 29 F. Supp. 412 (S.D.N.Y. 1939); *Dallins v. Pan American Grace Airways*, 27 F. Supp. 487 (S.D.N.Y. 1939). Member of plane's crew has been held to be not covered by the Jones Act. *Stickrod v. Pan American Airways Co.*, 1941 U.S. Av. Rep. 69 (S.D.N.Y. 1941). An airplane flying above the high seas has been held not to be within the maritime jurisdiction of the United States Criminal Code. *United States v. Cordova*, 89 F. Supp. 298 (E.D.N.Y. 1950).

Code was later amended to include airways above high seas. 66 Stat. 589, 18 U.S.C. § 7 (1952). In addition, the word "vessels," as used in a federal statute punishing stowaways was held not to include aircraft. *United States v. Peoples*, 50 F. Supp. 462 (N.D. Cal. 1943). This statute was later amended to include aircraft, 58 Stat. 111 (1944), 18 U.S.C. § 2199 (1952).

However, seaplanes while afloat on navigable waters have been subjected to the admiralty jurisdiction. *Lambros Seaplane Base v. The Botary*, 215 F. 2d 228 (2d Cir. 1954) (Salvage claim against seaplane rescued at sea by petitioner); *Reinhardt v. Newport Flying Service Corp.*, 232 N.Y. 115, 133 N.E. 371 (1921) (Jurisdiction of admiralty excluded award under workmen's compensation law to employee injured in attempt to save seaplane adrift in navigable waters).

<sup>37</sup> Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (proclaimed, October 29, 1934). It is assumed that the decedent was a passenger on an "international flight" which is defined in Article 1 (2) of the Warsaw Convention as follows: "For the purposes of this convention, the expression *international transportation* shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are within the territories of two High Contracting Parties, or within the territory of a Single High Contracting Party, if there is an *agreed stopping place* within a territory subject to the sovereignty . . . of another Power, even though that Power is not a party to this Convention . . ."

<sup>38</sup> 43 N.Y.S. 2d 420 (Sup. Ct., 1943), *aff'd.*, 293 N.Y. 878, 59 N.E. 2d 785 (1944), *cert. denied*, 324 U.S. 882 (1945). See also, *Noel v. Linea Aeropostal Venezolana*, 144 F. Supp. 359 (S.D.N.Y. 1956); 247 F. 2d 677 (2d Cir. 1957).

<sup>39</sup> "The carrier shall be liable for damages sustained in the event of the death or wounding of a passenger or any bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operation of embarking or disembarking." Article 17.

<sup>40</sup> "In the transportation of passengers the liability of the carrier shall be limited to the sum of 125,000 francs—nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability." Article 22 (1).

<sup>41</sup> 107 N.Y.S. 2d 768, (Sup. Ct., 1951). In this case, the court appeared to be influenced by the difficulty of plaintiff in establishing the place of injury which was necessary in determining the law by which the defendant's liability should be tested. The court relied upon the following articles of the Convention to support the holding that it created a cause of action:

#### Article 17

See note 39, *supra*.

#### Article 20 (1)

"The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

#### Article 21

(Allows court to treat the defense of contributory negligence in accordance with the provisions of its own law.)

#### Article 28

"Action for damages may be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court of the domicile of the carrier or of his principal place of business, or before the court at the place of destination."

<sup>42</sup> Where the injury occurred within the territory of Portugal, a non-signatory nation, and the plaintiff alleged the law of Portugal, the defendant was still allowed to limit its liability. *Ross v. Pan American Airways, Inc.*, 229 N.Y. 88, 85 N.E. 2d 880 (1949) *cert. denied*, 349 U.S. 947 (1955) (liability of defendant limited by terms of Convention because ultimate destination of flight was England, a signatory nation). *Garcia v. Pan American Airways*, 55 N.Y.S. 2d 317, (Sup. Ct. 1945), *aff'd.*, 295 N.Y. 852, 67 N.E. 2d 257 (1946), *cert. denied*, 329 U.S. 741 (1946), 338 U.S. 824 (1949) (Fact that decedent purchased return ticket to New York before departure, created international flight within the territory of a "Single High Contracting Party." See Article 1 (2), note 37, *supra*). These decisions are not clear as to whether the cause of action was considered as arising from the Convention or under the law of Portugal. However, both of these cases are cited in *Salamon v. K.L.M.*, 107 N.Y.S. 2d 768 (Sup. Ct. 1951), as support for its holding that the Convention does create a cause of action.

<sup>43</sup> Although there is no case in which the issue has been litigated, there is dicta to the effect that the convention does provide a remedy if the law of the place of injury does not provide a cause of action. See *Komlos v. Compagine*

Nationale Air France, 111 F. Supp. 393 (S.D.N.Y. 1952) *cert. denied*, 348 U.S. 820 (1954).

<sup>44</sup> Article 24 (1) provides:

"In cases covered by Article 18 and 19, any action for damages, however founded, can only be brought subject to the conditions and limits of this convention."

(Section 18 creates a presumption of liability for damage to property.) Section 19 creates a presumption of liability for damages occasioned by delay. See Comment, 41 Cornell L. Q. 243, 255 (1955).

<sup>45</sup> Article 24(2) provides: "In cases covered by article 17, the provisions of the preceding paragraph (Art. 24(1)) shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights." (Article 17 pertains to personal injuries. For text see note 39, *supra*).

<sup>46</sup> "The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his willful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to willful misconduct." Article 25(1).

<sup>47</sup> See Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 Colum. L. Rev. 259, 276-280 (1950).

<sup>48</sup> See "Saving to suitors" clause of the Judiciary Act, 1 Stat. 73 (1789), 28 U.S.C.A. § 1333 (1949); Notes 12, 13, *supra*; Jones Act, 41 Stat. 1007 (1920), 46 U.S.C.A. § 688 (1944); Notes 24, 25, *supra*.

<sup>49</sup> Section 1 of the FDHSA authorizes a suit *in rem* against the vessel. 41 Stat. 537 (1920); 46 U.S.C. 761 (1953). However, it has been held that aircrafts are not subject to a maritime lien, which is the basis of an action *in rem*. *United States v. Northwest Air Service*, 80 F. 2d 804 (9th Cir. 1935); *Crawford Bros. No. 2*, 215 Fed. 269 (W.D. Wash. 1914).

If an action is asserted against a foreign vessel or its owner pursuant to Section 4 of the FDHSA, there is no right to limit liability. 41 Stat. 537 (1920), 46 U.S.C. 764 (1953), *Egan v. Donaldson Atlantic Line*, 37 F. Supp. 909 (S.D.N.Y. 1941); *The Vestris*, 53 F. 2d 847, (S.D.N.Y. 1931). However, this section could not prevent the owner of an aircraft, who is the citizen of a signatory nation to the Warsaw Convention, from limiting his liability pursuant to Article 22 (1) of that treaty. See note 40, *supra*.

Section 6 of the statute adopts the admiralty rule of comparative negligence rather than the common law rule that contributory negligence is a complete bar to the claim. 41 Stat. 537 (1920), 46 U.S.C. § 766 (1953).

Although *Choy v. Pan American Airways Co.*, 1941 Am. Mar. Cas. 483 (S.D.N.Y. 1941) held that the FDHSA did not particularly pertain to the shipping industry and therefore was applicable to the airways above the high seas, the court failed to consider the implications of the above provisions of the statute.

<sup>50</sup> Of course, if the action is covered by the Warsaw Convention, the defendant airline's liability is limited to \$8300. Moreover, a trial judge may decline to submit the damage question to the jury. It has been held that a jury determination of the damage question under the Warsaw Convention is a matter of practice and not of right, and thus, a denial of a jury trial on the question of damages would not constitute a violation of the Constitution. See *Pierre v. Eastern Airlines, Inc.*, 2 CCH Aviation L. Rep. 17,515 (D.N.J. 1957).

<sup>51</sup> Reliance on state wrongful death statutes is not the most satisfactory solution to the problems created by deaths arising from aviation accidents over the high seas. First of all, the basis of recovery of many local death statutes is the decedent's conscious suffering before death. This may be impossible to prove if death was due to an airplane crash into the high seas. *E.g.* *The Robert Graham Dun*, 70 Fed. 270 (1st Cir. 1895). Secondly, local courts may refuse to give their death statutes any extra-territorial application. *E.g.* *The Middlesex*, 253 Fed. 142 (D. Mass. 1916). Furthermore, since the courts of more than one state might have a basis for jurisdiction over the airline, the right and liabilities of the parties would be dependent upon the forum in which the plaintiff elected to bring his suit. Therefore, the most desirable solution to this problem created by deaths arising from airplane crashes into the high seas is a uniform federal cause of action assertable only in a court of law.