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DEATH RESULTING FROM AIR CRASHES AT SEA—A SURVEY OF THE LAW

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I. INTRODUCTION

LONG before the invention of the airplane, there was a desire to enable the representative of one killed in an accident at sea to maintain an action for wrongful death. No such right existed at common law,¹ and there was a serious question as to whether a state could create such a cause of action, since this was well recognized as being within the province of admiralty. As enunciated in the often repeated *Plymouth* dictum: "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance."²

Shortly after the turn of the 20th century, however, in *The Hamilton*,³ the Supreme Court recognized the power of a state to create a cause of action for death on the high seas. Concurrent jurisdiction existed thereafter, since the action was triable in a land court or in admiralty. Regardless of where suit was brought, most cases involved complicated conflicts of law problems, and confusion oftentimes resulted, because courts were never sure what state law, if any, would be applicable.

This state of affairs reached a climax in *The Middlesex*,⁴ where the court decided that in a collision involving two ships, there could be no recovery under three possibly applicable state wrongful death acts. The court would not apply the "law of the flag" of either ship, since there was no basis for picking one over the other; nor would it apply its own law of the forum since the problem involved substantive rather than procedural negligence law.

This decision inspired a nationwide clamor for a single uniform federal right of action.⁵ In 1920, Congress responded with the passage of the Federal Death on the High Seas Act,⁶ hereinafter referred to as the FDHSA. The FDHSA has been subsequently held to apply to airplanes as well as to ships.⁷

II. THE FDHSA AND AN ACTION AGAINST AN AMERICAN DEFENDANT—SECTION ONE SUITS

A. "A CAUSE OF ACTION WHERE NONE EXISTED BEFORE"

Where an American defendant is involved, section one of the FDHSA provides a single, uniform remedy for death resulting from an accident

¹ *The Harrisburgh*, 119 U.S. 199 (1886).

² *The Plymouth*, 70 U.S. (3 Wall.) 125, 128 (1865).

³ 207 U.S. 398 (1907).

⁴ 253 Fed. 142 (D. Mass. 1916).

⁵ *Wilson v. Transocean Airlines*, 121 F. Supp. 85 (N.D. Cal. 1954), has an excellent discussion of the historical factors leading to the FDHSA. See also Comment, 41 Cornell L. Q. 243 (1957), which also discusses most of the other issues raised in this paper.

⁶ Federal Death on the High Seas Act, 41 Stat. 537, 538 (1920), 46 U.S.C. §§ 761-767 (1952); hereinafter referred to in the text as FDHSA, sections 1-7.

⁷ *Higa v. Transocean Airlines*, 124 F. Supp. 13 (D. Hawaii 1954), *aff'd*, 230 F. 2d 780 (9th Cir. 1955), *cert. denied*, 352 U.S. 802 (1956); *Wilson v. Transocean Airlines*, 121 F. Supp. 85 (N.D. Cal. 1954); *Lacey v. L. W. Wiggins Airways, Inc.*, 95 F. Supp. 916 (D. Mass. 1951); *Choy v. Pan-American Airways Co.*, (1941) Am. Mar. Cas. 483 (S.D.N.Y.); *Wyman v. Pan American Airways, Inc.*, 181 Misc. 963, 43 N.Y.S. 2d 420 (Sup. Ct. 1943), *aff'd*, 267 App. Div. 947, 48 N.Y.S. 2d 459 (1st Dep't), *aff'd* 293 N.Y. 878, 59 N.E. 2d 785 (1944), *cert. denied*, 324 U.S. 882 (1945).

on the high seas.⁸ The cause of action is enforceable by the personal representative of the deceased "for the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative."⁹ Damages recoverable are ". . . fair and just compensation for the pecuniary loss sustained by the person for whose benefit the suit is brought and shall be apportioned among them by the court."¹⁰ Thus the act allows damages for loss of support,¹¹ apportioned among the several beneficiaries named above.¹² Federal substantive law is applied to determine if the defendant "would have been liable if death had not ensued."¹³

B. THE FDHSA SUPERSEDES ALL STATE REMEDIES FOR WRONGFUL DEATH OCCURRING ON THE HIGH SEAS, BEYOND A MARINE LEAGUE FROM SHORE

There are those who argue that state statutes for wrongful death have not been superseded, but enjoy concurrent jurisdiction with the FDHSA. This construction is not without authority. Section seven of the FDHSA states: "The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter."¹⁴ This section was passed through the efforts of Representative Mann of Illinois, who hoped to establish concurrent jurisdiction.¹⁵ The views of Representative Mann found judicial acceptance in *Sierra v. Pan American World Airways, Inc.*,¹⁶ which held that section seven left state remedies unimpaired.

Echavarria v. Atlantic & Caribbean Steam Nav. Co.,¹⁷ however, adopted a different construction of section seven. According to this court, section seven is: ". . . a carefully devised Congressional plan to leave unaffected the operation of state death statutes over waters within one league of shore."¹⁸ Under this interpretation, it would seem that while section seven preserves the vigor of state statutes within territorial waters, the FDHSA is the exclusive remedy when death occurs on the high seas.

Any lingering effect of the *Sierra* decision was conclusively put to rest by Judge Goodman in *Wilson v. Transocean Airlines*.¹⁹ He endorsed *Echavarria* in full,²⁰ and added the death blow to *Sierra* by pointing out that the primary purpose of the FDHSA was to resolve the confusion inherent in

⁸ 41 Stat. 537 (1920), 46 U.S.C. § 761 (1952).

"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 death had not ensued."

⁹ *Ibid.*

¹⁰ 41 Stat. 537 (1920), 46 U.S.C. § 762 (1952). In certain state wrongful death statutes however, recovery is limited to a specified sum.

¹¹ *The Black Gull*, 90 F. 2d 619 (2d Cir.), *cert. denied*, 302 U.S. 728 (1937).

¹² *The City of Rome*, 48 F. 2d 333 (S.D.N.Y. 1930), (People take severally, not in the alternative); *Matter of Rademaker*, 166 Misc. 201, 2 N.Y.S. 2d 309 (Surr. Court Kings County 1938), (court apportions).

¹³ 41 Stat. 537 (1920), 46 U.S.C. § 761 (1952).

¹⁴ 41 Stat. 538 (1920), 46 U.S.C. 767 (1952).

¹⁵ See *Wilson v. Transocean Airlines*, 121 F. Supp. 85, 90 (N.D. Cal. 1954).

¹⁶ 107 F. Supp. 519 (D.P.R. 1952).

¹⁷ 10 F. Supp. 677 (E.D.N.Y. 1935).

¹⁸ *Id.* at 678.

¹⁹ 121 F. Supp. 85 (N.D. Cal. 1954).

²⁰ *Id.* at 91.

"Finally, in all the years that have elapsed since the passage of the Death on the High Seas Act, it appears to have been the unanimous view of both the cases and commentators that the Act supersedes the state wrongful death statutes as to actions for death occurring on the high seas. An ambiguous and ill-considered amendment [FDHSA, section 7] to the bill, which became the Act, is not sufficient justification for reaching a contrary conclusion at this late date."

numerous conflicting state statutes. If the FDHSA did not supersede these statutes within its own area of jurisdiction, all the earlier confusion would remain.²¹ Subsequent cases have adopted Judge Goodman's reasoning and undoubtedly represent the law today.²²

C. A CAUSE OF ACTION TRIABLE ONLY IN ADMIRALTY

The earlier cases recognized the plaintiff's preference for land courts. The unfamiliar procedure of admiralty would be avoided; the delay of the rarely held admiralty forum would not be encountered;²³ and most important, the plaintiff could try his case before a jury. The underlying basis of the *Sierra* decision, favoring concurrent jurisdiction, was to allow the plaintiff to proceed in a land court and thereby have a jury trial.²⁴

Other cases which have held that the action could be brought at law as well as in admiralty, interpreted the section one clause, "may bring an action in admiralty," as permissive rather than mandatory.²⁵ The strongest authority for alternative remedies springs from the argument of Judge Clancy in *Choy v. Pan American Airways Co.*²⁶ He based his argument on the Jones Act,²⁷ which was passed at about the same time as the FDHSA, and gave seamen a right of action at law for death on the high seas. The words in the Jones Act, "may . . . maintain an action for damages at law," were construed as giving seamen the option of bringing an action in admiralty or in a land court.²⁸ Judge Clancy said that if the Jones Act is construed to give alternative remedies, the FDHSA ought to be likewise construed, since the two acts were passed at the same time and the language is identical.

The above arguments, which seem to be based more on sympathy than syllogism, were eviscerated by Judge Goodman in *Wilson*. He disposed of the Jones Act argument by pointing out that the Jones Act was different from the FDHSA in many respects, and was passed simply because Congress did not believe the FDHSA was broad enough for seamen—"the traditional children of admiralty." The Jones Act merely gave them a broader remedy than anyone else.²⁹

²¹ *Id.* at 90.

"The Death on the High Seas Act was prompted, in large part, by the desire to put an end to the uncertainties attending the application of state statutes to deaths on the high seas. Many of these uncertainties would remain to plague both courts and litigants if the state statutes could still be availed of by suitors."

²² *Trihey v. Transocean Airlines*, 255 F. 2d 824 (9th Cir.), *cert. denied*, 358 U.S. 838 (1958); *Noel v. Linea Aeropostal Venezolana*, 154 F. Supp. 162 (S.D.N.Y.), *aff'd*, 247 F. 2d 677 (2d Cir. 1956), *cert. denied*, 355 U.S. 907 (1957); *Kunkel v. United States*, 140 Supp. 591 (S.D. Cal. 1956); *Higa v. Transocean Airlines*, 124 F. Supp. 13 (D. Hawaii 1954), *aff'd*, 230 F. 2d 780 (9th Cir. 1955), *cert. denied*, 352 U.S. 802 (1956).

²³ Comment, 55 Colum. L. Rev. 907, 915 (1955).

²⁴ In this case the plaintiff brought his action under a state statute which allowed the case to be tried in a land court.

²⁵ *Elliott v. Steinfeldt*, 254 App. Div. 739, 4 N.Y.S. 2d 9 (2d Dep't 1939), held that the FDHSA was the sole right of action, but it was triable at law as well as in admiralty. See also *Batkiewicz v. Seas Shipping Co.*, 53 F. Supp. 802 (S.D.N.Y. 1943); *Choy v. Pan-American Airways Co.*, (1941) Am. Mar. Cas. 483 (S.D.N.Y.).

²⁶ (1941) Am. Mar. Cas. 483 (S.D.N.Y.).

²⁷ 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1952).

²⁸ *Panama R.R. Co. v. Johnson*, 264 U.S. 375 (1924). Note that the court construed the Jones Act as allowing a suit in admiralty as well as in law to insure its constitutionality. If the action, for the benefit of seamen, were triable only at law, the act would be unconstitutional. Judge Goodman, in *Wilson*, at p. 96, is quick to point out that no such problem exists with the FDHSA.

²⁹ 121 F. Supp. 85, 96, 97 (N.D. Cal. 1954). Judge Goodman pointed out that the Jones Act, passed at the same time as the FDHSA, and giving alternative remedies at law and in admiralty, was passed because Congress did not feel that the FDHSA, giving a right of action only in admiralty, was broad enough for seamen. Furthermore, the Jones Act and the FDHSA are different in other respects

Judge Goodman then distinguished the remaining cases by showing that they were not based on independent reasoning, but followed either *Choy* or *Sierra*, which he had already rejected.³⁰ To conclude this wholesale slaughter of opposing precedent, Judge Goodman added a final argument based on section five of the FDHSA. This section grants a right of substitution of plaintiffs if the party bringing the suit dies while said suit is in progress.³¹ As this right is expressly limited to suits pending in admiralty, it seems inconceivable that the right of substitution would be so limited if Congress contemplated suits could also be brought at law.³²

The conclusion must be that Congress intended all causes of action under the FDHSA to be triable solely in admiralty.

D. DEATH OCCURRING ON THE HIGH SEAS—TERRITORIAL JURISDICTION

1. *Death Resulting From Airplane Crash in Ocean*

From time to time confusion has arisen in determining if the death actually occurred as the result of a crash on the high seas. The courts have resolved this issue by applying a "substance" test to the injury. If the "substance" of the occurrence took place on the high seas, the FDHSA applies.³³

besides the choice of forums. The Jones Act designates alternative beneficiaries, while the FDHSA provides for apportionment of the recovery among all the designated beneficiaries. Also, the Jones Act prohibits certain defenses, which the FDHSA does not.

³⁰ *Id.* at 98.

"This brief resume of the decisions asserted to support the view that the right of action given by the Death on the High Seas Act may be maintained at law demonstrates that only the five decisions in the state courts of New York and three of the federal decisions are holding to this effect. Of these eight decisions only two are predicated upon independent reasoning of the court. This reasoning, as has been noted, I do not find persuasive. My belief as to the unsoundness of these decisions is strengthened by the decision of Judge Weinfeld in *Iafrate v. Compagnie Generale Transatlantique*, S.D.N.Y. 1952, 106 F. Supp. 619, in which he reaches the same conclusion. It is noteworthy that Judge Weinfeld is a member of the United States District Court for the Southern District of New York where two of the contrary decisions were rendered."

³¹ 41 Stat. 538 (1920), 46 U.S.C. § 765 (1952).

"If a person dies as the result of such wrongful act, neglect or default as is mentioned in section 761 of this title during the pendency in a court of admiralty of the United States of a suit to recover damages . . . the personal representative of the decedent may be substituted . . ."

³² *Wilson v. Transocean Airlines*, 121 F. Supp. 85, 95 (N.D. Cal. 1954).

"If the Congress contemplated that suits enforcing the right of action given by the Death on the High Seas Act should be maintained in courts of law, there would have been no reason to limit the right of substitution granted in section five of the Act to suits for personal injuries which were pending in admiralty courts."

There have been other attempts to get such wrongful death cases before a jury, all of which were also unsuccessful. In *Kunkel v. United States*, 140 F. Supp. 591, 595 (S.D. Cal. 1956), the plaintiff tried to bring a death action at law under the provision of the Federal Torts Claims Act, 72 Stat. 348, 28 U.S.C. § 1346 (b) (1958), Pocket Pt. 63 Stat. 106, (1949) 28 U.S.C. §§ 2671-2680 (1952). The court held that the action was triable only in admiralty as "the government has consented to be sued and to be liable only 'under circumstances where . . . a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred' . . . and 'the place' is the high seas, and 'the law' is the Death on the High Seas Act giving an actionable claim only in admiralty . . ."

Where the decedent was an employee of an airline, an attempt was made to bring an action at law under the Jones Act, which provides a death action for seamen dying as a result of their employment. But the Air Commerce Act of 1926, 44 Stat. 576, 49 U.S.C. §§ 171-184 (1952), states that the navigation and shipping laws of the United States are not to be applied to aircraft, and this statute was cited in holding that the Jones Act does not apply to airplanes. *Stickrod v. Pan American Airways Co.*, (1941) U.S. Av. 69 (S.D.N.Y.).

³³ In construing section one of the FDHSA, "occurring on the high seas" refers back to "wrongful act, neglect, or default" rather than to "death." Thus, if the deceased in injured on the high seas but dies in bed, he has a proper action as

Lacey v. L. W. Wiggins Airways, Inc.,³⁴ is the best example of the application of this test. In that case, the defendant died in bed after exposure in the water resulting from a plane crash which was due to the faulty maintenance of the plane's engines. The court applied the FDHSA.

2. Where the Place of Death Is Unknown

In the *Choy* case, and later in *Wyman v. Pan American Airways, Inc.*,³⁵ an action was brought under the FDHSA. In both cases, there was no evidence that the plane actually crashed into the ocean. A presumption of death at sea was applied, since the planes involved vanished while in flight over the ocean. At the time of those decisions, considering the absence of thorough search techniques, counsel might have argued that the court had no right to make such a presumption without actual evidence. Today, however, there can be little doubt that this presumption is valid. If a plane crashed at an unknown place, and that place happened to be on land, it would almost certainly be found. Conversely, if it vanished over the ocean, it undoubtedly fell into the ocean. Thus there should be no real problem as to the applicability of the FDHSA in a situation of this type.

3. Death in the Airspace

There has never been a decision on whether or not the FDHSA applies to death in the airspace. In fact, the courts have shown a singular degree of skill in dodging the issue whenever it has been suggested.³⁶

Noel v. Linea Aeropostal Venezolana,³⁷ for example, was a case where the plaintiff did not want the FDHSA to apply, so that he might bring a suit under a state statute at law. The court avoided the issue by saying that the question of whether the FDHSA applied to the airspace was, itself, a question for admiralty.

There are two important reasons why the FDHSA will undoubtedly be held to cover deaths in the airspace. The more important of these is the policy reason. The FDHSA was passed primarily to eliminate the confusion resulting from the possible application of conflicting state statutes. Thus, if the FDHSA were held not to be applicable in the airspace, we would be right back in the same muddle. The plaintiff would be without a remedy unless he could invoke the jurisdiction of some state statute and again, the difficulties he would encounter on this count are what motivated the inauguration of the Act in the first place.

The second reason why death in the airspace is likely to fall under the FDHSA is that case law indicates a tendency to give the Act a broad interpretation. Judge Clancy, in construing the phrase "on the high seas," commented that "there is no reason why this should make the law applicable only on a horizontal plane."³⁸ While this is pure dictum, it does, nevertheless, indicate a judicial attitude. Furthermore, for purposes of criminal

the wrongful act itself did occur on the high seas. *Vancouver Steamship Co. v. Rice*, 288 U.S. 445 (1932); *The Samnanger*, 298 Fed. 620 (D. Ga. 1924); *The Chiswick*, 231 Fed. 452 (5th Cir. 1916).

³⁴ 95 F. Supp. 916 (D. Mass. 1951).

³⁵ 181 Misc. 963, 43 N.Y.S. 2d 420 (Supp. Ct. 1943), *aff'd*, 267 App. Div. 947, 48 N.Y.S. 2d 459 (1st Dep't), *aff'd* 293 N.Y. 878, 59 N.E. 2d 785 (1944), *cert. denied*, 324 U.S. 882 (1945).

³⁶ In the *Wilson* case, the question came up in the allegations, but the court dodged it by saying that the case at hand clearly involved a death resulting from a crash. In the only case where the issue came up squarely, *Hart v. Transcontinental & Western Airlines, Inc.*, (1950) U.S. Av. 287 (N.D. Cal.), involving a death in flight due to the failure to provide a pressurized cabin, the case was settled out of court.

³⁷ 154 F. Supp. 162 (S.D.N.Y. 1956), *aff'd*, 247 F. 2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957).

³⁸ *Choy v. Pan-American Airways Co.*, (1941) Am. Mar. Cas. 483 (S.D.N.Y.).

statutes, the airspace is in admiralty jurisdiction,³⁹ as is death occurring under the sea in a submarine.⁴⁰ If the FDHSA applies on the sea and under the sea, there seems to be no sound reason why it should not apply above the sea.

III. THE FDHSA AND AN ACTION AGAINST A FOREIGN DEFENDANT

A. SECTION FOUR SUITS—WHERE THE HOME COUNTRY OF THE DEFENDANT RECOGNIZES A CAUSE OF ACTION FOR WRONGFUL DEATH

Prior to the FDHSA, any right of action granted by foreign law for death on the high seas could be enforced in the state or federal courts of the United States, either in law or admiralty.⁴¹ Section four of the FDHSA codified this practice:

“Whenever a right of action is granted by the law of any foreign state on account of death by wrongful act, neglect or default occurring on 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.”

The “without abatement” provision of this section was passed to prevent the foreign defendant from taking advantage of the limitation of liability statutes of the United States,⁴² which are invoked by “section one” defendants to limit their liability in these death actions. Thus, the “without abatement” provision gives an advantage to American defendants, and enables a plaintiff to bring a suit free of this limitation against a foreign defendant—if such plaintiff brings the suit in admiralty.⁴³

This provision has no applicability in the case of actions based upon air crashes, as the limitation of liability statutes apply only to ship owners.⁴⁴

The foreign defendant cannot invoke the limitation of liability statutes, but the plaintiff might find his recovery will be less than a section one plaintiff anyway. As section four merely enables the plaintiff to bring the foreign action in the American court, his recovery will be dependent on the foreign law,⁴⁵ which includes any limitation of recovery provisions incorporated into the statute creating the cause of action, since such a provision is considered an “integral part of the cause of action.”⁴⁶ Most foreign nations

³⁹ 62 Stat. 683 (1948), 18 U.S.C. § 7 (1952).

⁴⁰ *The City of Rome*, 48 F. 2d 333 (S.D.N.Y. 1930).

⁴¹ *The Titanic*, 233 U.S. 718 (1914); *Wilson v. Transocean Airlines*, 121 F. Supp. 85, 97 (N.D. Cal. 1954); 67 Yale L. J. 1445, 1446 (1958); 41 Cornell L. Q. 243, 250 (1957).

⁴² 49 Stat. 1479 (1936), 46 U.S.C. § 183 (1952), *et seq.*

⁴³ *Powers v. Cunard S.S. Co., Ltd.*, 32 F. 2d 720 (S.D.N.Y. 1925); *Egan v. Donaldson Atlantic Line*, 37 F. Supp. 909 (S.D.N.Y. 1941); *The Silverpalm*, 13 F. Supp. 212 (N.D. Cal. 1935); *The Saturnia*, (1936) Am. Mar. Cas. 469 (S.D.N.Y.); 41 Cornell L. Q. 243, 250 (1957).

The words, “may maintain an action,” are thus treated differently in sections one and four. A section one action may be maintained only in admiralty, whereas a section four suit may be brought either at law or in admiralty. The words are mandatory in section one, but only permissive in section four. This difference is attributable to the different character of the two sections. Section four simply grants the plaintiff the same remedy as he would get under the foreign law, while section one “creates a cause of action where none existed before.” *Wilson v. Transocean Airlines*, 121 F. Supp. 85, 94 (N.D. Cal. 1954).

⁴⁴ *Noakes v. Imperial Airways, Ltd.*, 29 F. Supp. 412 (S.D.N.Y. 1939); *Dollins v. Pan-American Grace Airways, Inc.*, 27 F. Supp. 487 (S.D.N.Y. 1939).

⁴⁵ Conflicts of laws problems can easily manifest themselves here, particularly if there should ever be a collision between two planes over the ocean. The court will most likely apply the “law of the flag” if both planes are from the same nation; otherwise the “law of the forum.” *The Scotland*, 105 U.S. 1001 (1881).

⁴⁶ *Slater v. Mexican National R.R.*, 194 U.S. 120 (1904); *Northern Pacific R.R. v. Babcock*, 154 U.S. 190 (1894); *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 120 N.E. 198 (1918); 67 Yale L. J. 1445, 1450 (1957).

are far less generous than America in the amount they will award plaintiffs in a wrongful death action.⁴⁷ Thus, a section four plaintiff does not get the advantage of the loss of support damages awarded in a section one case.⁴⁸

Section four, then, does not create a cause of action as does section one; it simply opens the doors of the American courts to enforce the foreign cause of action.⁴⁹

B. SECTION ONE CASES—WHERE THE HOME COUNTRY OF THE DEFENDANT DOES NOT RECOGNIZE A CAUSE OF ACTION FOR WRONGFUL DEATH

One problem still remains—the plaintiff whose decedent was killed on board a plane which flies the flag of a nation which does not recognize a cause of action for wrongful death. He could not bring a section four case since there he is allowed only such recovery as could be obtained under the foreign law. The question is then presented whether suit might be brought under section one.

The first case dealing with this problem, *Fernandez v. Linea Aeropostal Venezolana*,⁵⁰ held that such an action could be maintained. In that case, the court rejected the argument of the defendant, a Venezuelan airline, that section four was the only part of the FDHSA applicable in a case arising under foreign law. The court stated:

“But the act as passed preserved not merely rights under foreign law, but also, by § 1 of the act, gave an additional right to the personal representative of the deceased to maintain an action against the ‘vessel, person, or corporation which would have been liable if death had not ensued.’”⁵¹

This case has several interesting ramifications. The court, though it allows the plaintiff to proceed under section one, still must look to the substantive negligence law of the foreign state to see if the defendant “would have been liable if death had not ensued,” just as in a section one case against an American defendant, they would have to look to American negligence law.⁵² Damages recoverable, however, are section one damages rather than the foreign measure of damages. It will be recalled that when the plaintiff proceeds under section four, he is limited to the amount of damages recoverable under the foreign law, since the damages awardable are an integral part of the statute creating the action.⁵³ No such situation exists when a plaintiff proceeds against a foreign defendant under section one. There is no foreign cause of action, and therefore no limitation can be an integral part of it. Any general limitation on the plaintiff's recovery in foreign law is termed procedural and refused recognition in the courts of the United States.⁵⁴ Thus, the plaintiff is eligible for the more generous American measure of damages.

The significance of this distinction in the *Fernandez* case is that the plaintiff, besides alleging a cause of action under section one, also claimed there was an action under a Venezuelan wrongful death act, though he did not allege substantive law based on it. This means he could, and should, have brought his action under section four. The court, by letting him proceed

⁴⁷ 67 Yale L. J. 1445, 1451 & n. 20 (1957).

⁴⁸ *The Black Gull*, 90 F. 2d 619 (2d Cir.), cert. denied, 302 U.S. 728 (1937).

⁴⁹ 41 Cornell L. Q. 243, 250 (1957).

⁵⁰ 156 F. Supp. 94, 98 (S.D.N.Y. 1957).

“The admiralty law of the United States, as expressed in the Death on the High Seas Act, now grants power to the admiralty courts to entertain an action for a wrong done on the high seas even though the person injured has died as a result of the wrong. This power granted to the courts is applicable even though the wrong occurred in an area not subject to the laws of the United States.”

See also 3 Vill. L. Rev. 571 (1958).

⁵¹ *Id.* at 96.

⁵² *Ibid.*

⁵³ See note 46 *supra*.

⁵⁴ *The Titanic*, 233 U.S. 718, 732 (1914).

under section one, could have had no other reason than to let him recover the more generous American measure of damages.⁵⁵

It would thus seem that this decision opens the doors to "section" shopping. The plaintiff can choose between sections one and four in order to recover the highest damages. If deciding on section four, he can then decide whether to bring the action at law or in admiralty. It is submitted that *Fernandez* should be interpreted so as to preserve the mutual exclusiveness of sections one and four. If the home flag of the defendant recognizes a cause of action for wrongful death, the plaintiff should be required to base his claim upon section four. The only time an action should be allowed against a foreign defendant under section one should be when his home state has not created a cause of action. This would conform to the true tenor of *Fernandez*, since the rationale of that decision was Judge Dawson's concern that the plaintiff would otherwise be left remediless.⁵⁶ This would eliminate the "section" shopping and allow section four to retain some vigor.

C. THE FOREIGN PLAINTIFF

The FDHSA was designed to end the confusion of numerous conflicting state statutes, and offered a procedure whereby a plaintiff could proceed against both an American and a foreign defendant. A foreign plaintiff can certainly bring an action against an American defendant, in a section one case, since the injury takes place on an American plane, and there is no reason whatsoever to refuse to give foreign citizens equal protection in a case of this nature.

A slightly different situation is presented when a foreign plaintiff brings an action against a foreign defendant. American courts could conceivably be asked to hear the case of a Yugoslavian citizen killed in a Brazilian plane in the Indian ocean.

The Jones Act is not enforceable against a foreign defendant for the benefit of a foreign plaintiff,⁵⁷ though this revelation may be of absolutely no significance. It will be recalled that Judge Goodman pointed out the numerous differences between the Jones Act and the FDHSA,⁵⁸ concluding, in effect, that you can't compare a substantive labor law with a statute that simply creates a right to bring an action.⁵⁹

The whole problem resolves itself into one of simple practicality. Foreign plaintiffs injured on foreign planes are not going to travel to the United States to bring a section four action just to get the law of the defendant's flag applied. They can do that as easily in the defendant's country. And if foreign plaintiffs have descended upon the courts of this country to bring section one actions in sufficient numbers to prevent the courts from protecting American citizens, Congress has not as yet realized it, nor has it seen fit to amend the FDHSA to prevent it.

As long as our courts are not inundated with Slavs suing Brazilians, it is better to leave the law as Benedict has stated it:

⁵⁵ Venezuelan damages are limited to \$8000. 67 Yale L. J. 1445, 14451 and n. 20 (1957).

⁵⁶ Judge Dawson, in denying the allegation that section four was the only applicable section, said:

"This position would mean that no action would lie for wrongful death on the high seas unless death occurred on a plane or vessel which flew the flag of a nation which had by statute granted a cause of action for wrongful death. This would be a harsh rule and would hardly seem consonant with the intent of Congress, in adopting the Death on the High Seas Act."

154 F. Supp. 94, 96 (S.D.N.Y. 1957).

⁵⁷ *Lauritzen v. Larson*, 345 U.S. 571 (1953).

⁵⁸ See note 29 *supra*.

⁵⁹ Judge Dawson expresses the same approach in *Fernandez v. Linea Aeropostal Venezolana*, 156 F. Supp. 94 (S.D.N.Y. 1957).

"Admiralty courts have jurisdiction of admiralty suits entirely between foreigners when proper service can be had, or property attached, but it is discretionary with the court whether it will accept such jurisdiction or not."⁶⁰

IV. DEATHS OCCURRING IN THE UNITED STATES

A. ON INLAND WATERS

State wrongful death statutes are fully applicable in territorial waters of the United States.⁶¹ As inland waters are within admiralty jurisdiction,⁶² and as federal statutes will supersede state acts where the federal government has acted,⁶³ the federal government may properly regulate inland waters relative to wrongful death actions. Currently, there is no conflict with the FDHSA on inland waters, since sections one and seven of the act clearly exclude territorial U.S. from the jurisdiction of the FDHSA.

B. OVER LAND

When the death occurs over land, the result is exactly the same as with deaths occurring on inland waters; state wrongful death statutes will be applicable. The only problems that will arise in this area will be those concerning conflicts of laws. Just as in FDHSA section one cases, the "substance" test is used to determine where the act causing death occurred.⁶⁴ The law of that locality, including the damages recoverable, is often applied. If that jurisdiction does not recognize a cause of action for wrongful death, the law of the forum will be applied.⁶⁵ The only time the plaintiff might find himself without a remedy is if both the state where the death occurred and the state where the action is brought, provide no remedy for wrongful death.

V. SUMMARY

In a suit against an American defendant, the FDHSA is the exclusive remedy if death results from an accident occurring more than one marine league from shore. Section one enables the representative of the decedent to bring an action for the benefit of surviving dependents. The action is triable only in admiralty. The law applied is the substantive negligence law of the United States, and damages recoverable are for loss of support.

Section four of the FDHSA opens the doors of the courts to foreign causes of action. The applicable law will be that of the foreign state. Damages recoverable are subject to any limitation incorporated in the foreign action. Unlike a section one case, the action may be brought in law or admiralty. If the foreign flag does not recognize a cause of action, the case is brought under section one, with foreign negligence law and American procedural law being applied.

⁶⁰ 1 Benedict, Admiralty § 84 (5th ed. 1925).

Convention, Oct. 29, 1934, art. 25, 49 Stat. 3020.

⁶⁷ Yale L. J. 1445, 1451 and n. 20 (1957).

⁶¹ 41 Stat. 538 (1920), 46 U.S.C. § 767 (1952).

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

⁶² The Plymouth, 70 U.S. (3 Wall.) 125 (1865), (Dictum).

⁶³ Echavarría v. Atlantic & Caribbean Steam Nav. Co., 10 F. Supp. 677, 678 (E.D.N.Y. 1935).

"With the enactment of the Federal Death Act, the conclusion cannot be avoided that the death statutes of the several states were superseded so far as they had been theretofore applied to death on the high seas."

⁶⁴ See note 33 *supra*.

⁶⁵ 15 C.J.S. *Conflicts of Laws* § 22 (1939); 25 C.J.S. *Death* § 28 (1941).