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SHOULD THE VALUE OF LIFE DEPEND ON THE PLACE OF DEATH?*

by

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INTRODUCTION

On June 8, 1998, the U.S. Supreme Court decided *Dooley v. Korean Air Lines,*[1] in a decision that may impact all future air disasters occurring on the high seas. The case, however, is of immediate interest to the aviation tort law community because of its possible effect on pending and future claims relating to the crash in Long Island Sound, on July 17, 1996, of TWA Flight 800.

The case afforded the Supreme Court the opportunity to settle a question that has divided various Circuit Courts: whether pain and suffering, as an element of damages, is recoverable by the representatives of decedents whose death was the result of an airliner crash on the high seas?[2] This paper addresses the evolution of the issues now before the Court, and concludes with the position that a legal dilemma exists for which a remedy is necessary, and since the Supreme Court did not fashion one, Congress should.

FACTS

On August 31, 1983, Korean Air Lines Flight 007 (AKE007") departed from JFK bound for Seoul. The aircraft stopped for fuel in Anchorage and resumed its flight. The last contact from KE007 was a transmission to Tokyo to the effect that the plane was rapidly decompressing and descending.[3]

Investigation of the crash showed that the aircraft, a Boeing 747, had flown off its course by approximately 170 miles and had crossed into Soviet airspace. It was thereupon shot down over the Sea of Japan by the Soviet Union=s SU-15 interceptor aircraft. All 269 persons aboard were killed when the plane went down twelve minutes after being hit. The flight recorders were never recovered.

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Forty-two actions were initially commenced in various District Courts. [4] The actions were consolidated by the Judicial Panel on Multidistrict Litigation and transferred to the District Court of the District of Columbia.[5] At the trial, plaintiffs based their case on the contention that the flight crew erroneously programmed the Internal Navigation System (AINS≅) prior to departure from Anchorage and, knowing of the misprogramming, decided to proceed rather than turn back and face possible disciplinary action.[6]

THE LAW

Fifteen years after the crash, the issue of damages is still being litigated.[7] The unusual duration is, of course, due to the relative size of the corporate defendant and its well-financed defense, the number of plaintiffs and their desire for a substantial recovery. However, the process was prolonged substantially by the complexity of the issues related to applicable law and the appropriate measure of damages.

Modern tort law provides that the death of a person to whom a duty was owed may result in two types of actions, a *wrongful death* action and/or a *survival* action.[8] A wrongful death action affords the beneficiaries a right of action for losses *they suffered* as a result of the decedent's death. This type of action is sometimes referred to as one for pecuniary loss.[9] A survival action allows a decedent's estate to recover for injuries *suffered by the decedent*, such as pain and suffering, loss of income, or medical expenses and is sometimes referred to as one for non-pecuniary loss.[10]

The difference between these two types of actions can be dramatically illustrated by comparing the recovery rights that may flow from the deaths of two different decedents. A dependent spouse and two children surviving a middle-aged head of household earning $100,000 a year, in a wrongful death action, may recover substantial damages because they personally suffered financially as the result of the death. A mother and father and two siblings surviving a seventeen year old student with no income, in a wrongful death action, may receive no award because they did not suffer economically from the death. If, however, a survival action is available and in each case the victim suffered physically or economically prior to death, the decedent's representatives in both cases may recover damages on behalf of the decedent. Thus, the availability of a survivor's action becomes a profoundly important issue when a decedent experienced pain and suffering before dying.

The principal laws affecting the issue of recoverable damages in *Dooley* are the Warsaw Convention and the Death on the High Seas Act. *The Convention for Unification of Certain Rules Relating to International Transportation by Air*, commonly referred to as the Warsaw Convention, was enacted after two international conferences held in 1925 and 1929[11] and became effective in the United States on October 29, 1934.[12] As an international treaty, the Convention became the law of the land by application by the supremacy clause of the U.S. Constitution.[13] The Convention provided a limit on the potential liability of international air carriers and was designed to protect the commercial aviation business which was then relatively new from possibly devastating liability claims, and to achieve uniformity

among applicable laws.[14]

Article 17 of the Convention imposes liability on the carrier for damage sustained in the event of the death or wounding of a passenger if the accident occurred on board an aircraft in international flight. By the terms of Article 22 (1), and by application of the Montreal Agreement of 1966,[15] the liability imposed by Article 17 was limited to $75,000. If, however, the plaintiff could prove Awillful misconduct by the defendant, in accordance with Article 22 (1), the defendant was prevented from availing itself of the monetary limitation. By virtue of an Intercarrier Agreement[16] adopted in 1995 and an Order of the U.S. Department of Transportation[17] approving the agreement, the limit on liability was effectively waived by the airlines. Because the industry waiver of the limit of liability occurred after Flight KE007, the plaintiffs had to, and did, prove Awillful misconduct, to avoid the Convention's monetary limit.

The Death on the High Seas Act (ADOHSA),[18] a maritime law statute applicable to death or injury on the high seas, was adopted in 1922 to provide compensation, which was otherwise unavailable, for lost income to widows and orphans of sailors lost at sea.[19] It is, in effect, a wrongful death statute.[20] Its authors probably never envisioned that it would be applied to air crashes, but today, DOHSA is involved when an air disaster occurs more than one league (three miles) out to sea.[21] Because the *Dooley* case involves an international carrier which crashed on the high seas, both the Convention and DOHSA apply.

On the one hand, while Article 17 of the Convention imposes liability, it does not address the issues of who may bring suit and for what damages they may be compensated. On the other hand, DOHSA does provide a cause of action A . . . for the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative . . . [22] The relationship of the two laws was addressed by the Supreme Court, on January 16, 1996, in *Zicherman v. Korean Air Lines Co., Ltd.*[23]

Zicherman, a wrongful death action arising from the same Korean Air Lines flight as *Dooley,* was tried in the Second District of New York and appealed to the Second Circuit. Muriel A.M.S. Kole, a psychotherapist, died in the crash. Her mother and sister filed a suit asking for damages based on loss of society of Muriel Kole. ALoss of society refers to nonpecuniary benefits that the decedent would have provided to his or her family had he or she lived. ASociety includes many mutual familial benefits such as Alove, Aaffection, and Acare.[24]

On August 2, 1989, the jury found that the crash was due to the Awillful misconduct of Korean Air Lines, thus piercing the $75,000 limitation of the Convention.[25] On appeal to the Second Circuit, the court rejected Korean Air Lines arguments that: (i) because the crash occurred on the high seas, DOHSA applied to determine the parties plaintiff and the damages recoverable, and (ii) that DOHSA did not permit recovery for loss of society. The Second Circuit, citing the need for uniformity in cases brought under the Convention, held that general maritime law applied the substantive law of compensatory damages in an action

under the Convention whether the accident occurred on land or on the high seas, and that loss of society damages are recoverable under that law if the plaintiff was decedent's dependent at the time of death.[26]

The Supreme Court granted certiorari and on January 16, 1996, held that: both the Convention and DOHSA apply to crashes involving international air travel on the high seas; in a suit brought under Article 17 of the Convention, a plaintiff may *not* recover loss of society damages within the meaning of DOHSA; the Convention permits compensation for legally cognizable harm, but leaves the specification of what harm is legally cognizable to the domestic law applicable to the forum=s choice-of-law rules; in *Zicherman,* United States law applies; and the death that occurred falls within the literal terms of DOHSA ∋761.[27] Since recovery in a ∋761 suit is, by the terms of ∋762[28] limited to pecuniary damages, petitioners could not recover for loss of society (non-pecuniary damages) under DOHSA.

The Court in *Zicherman* did not address the availability of a separate and independent survival cause of action under general maritime law for pre-death pain and suffering.[29]

CONFLICT IN THE CIRCUITS

After *Zicherman*, the question of damages in the KE007 case was raised in three Federal Circuit Courts. *Bickel v. Korean Air Lines Co., Ltd.,*[30] (in the Sixth Circuit); and *Forman v. Korean Air Lines, Co., Ltd.,*[31] and *Oldham v. Korean Air Lines Co., Ltd.,*[32] (both in the D.C. Circuit), held that Korean Air Lines Co., Ltd. had failed to preserve its right to challenge the assertability of the survival actions by not raising the issue in its initial briefs. The Ninth Circuit in *Saavedra v. Korean Air Lines Co., Ltd.*[33] permitted Korean Air Lines to challenge the award for pain and suffering. That Court held that the legislative intent behind DOHSA supported the preclusion of non-pecuniary damages, and that a general maritime law survival action could not, therefore, be asserted.

Korean Air Lines relying on *Zicherman*, moved for dismissal of all claims for non-pecuniary damages that were still to be tried.[34] The motion was granted by the D.C. District Court[35] which then certified the decision for interlocutory appeal[36] and the District of Columbia Circuit Court of Appeals accepted the appeal.

The D.C. Circuit Court noted that: (i) the Supreme Court had declined to allow a general maritime law survival cause of action;[37] (ii) that a majority of Courts of Appeals had recognized a general maritime law survival action for pre-death pain and suffering; [38] and (iii) the First and Fifth Circuits permitted general maritime law survival actions in cases governed by DOHSA.[39] The Court agreed with *Saavedra* in the Ninth Circuit,[40] and denied the availability of a survival action for pre-death pain and suffering based on its holding that DOHSA limited damages to pecuniary damages and that DOHSA preempted any general maritime law that may provide for a survival cause of action.

The Eleventh Circuit examined the reasoning of the Ninth Circuit in *Saavedra* and concluded in *Gray v. Lockheed Aeronautical Sys. Co.,*[41] that while DOHSA may be the exclusive source for recovery for wrongful death on the high seas, Congress did not intend to preclude survival actions, and a general maritime survival cause of action is cognizable and may be asserted to recover pre-death pain and suffering with a wrongful death DOHSA action. To resolve the issues, the Supreme Court of the United States issued a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.[42]

THE CASE IN SUPPORT OF A SURVIVAL CAUSE OF ACTION FOR PRE-DEATH PAIN AND SUFFERING

The Petitioners' brief[43] in *Dooley*, presents a well-reasoned and persuasive case for recognition of the availability in DOHSA cases of a survival action for pre-death pain and suffering. It focuses principally on three arguments: (i) inequity and unfairness should be prevented based on public policy considerations,[44] (ii) a survival action for pre-death pain and suffering is recognized by general maritime law,[45] and (iii) preclusion of a survival action was not part of the Congressional intent when DOHSA was enacted.[46]

A. Public Policy Dictates that Inequity and Unfairness Be Avoided

It is patently unfair (and illogical) that the value of a life should depend on the place of death. In the context of *Dooley* and similar cases, the value of life now depends on whether death occurred over land or sea. If the Supreme Court holds DOHSA to be the exclusive remedy available for death on the high seas as a result of an aircraft disaster, [47] the decision would have the effect of distinguishing those estates of persons who were unfortunate enough to die on the high seas, and then punishing them by withholding the right to sue for non-pecuniary damages; the very same rights the individual decedent could have asserted had he or she survived.[48]

Without the right to recover for pre-death pain and suffering, the hypothetical estate of the unemployed seventeen year old student who was a passenger in a plane that crashed on Long Island Sound rather than on Long Island, could not recover for pain and suffering. The unavailability of a survival action would probably result, in all similarly situated cases, in a minimal recovery under DOHSA.

The Convention was intended to assure compensation to victims of international aviation disasters.[49] So long as DOHSA is applicable to airliner crashes on the high seas it should not be interpreted to undermine the intention of the Convention.

The prevailing public policy in the United States is evidenced by the majority of states that have created statutory authority for survival actions.[50] To ignore that policy to the detriment of representatives of victims of an air catastrophe occurring on the high seas would be unfair and would procure an unduly harsh result.

B. Survival Action for Pre-Death Injuries is Recognized by General Maritime Law.

The Supreme Court in *Moragne v. States Marine*,[51] recognized the existence of a general maritime law cause of action for wrongful death. In that case a wrongful death action was brought by the widow of a seaman killed in territorial waters.[52] The defendant argued for dismissal on the basis that DOHSA expressly limited recovery to actions that arose on the high seas.[53]

The Supreme Court accepted the defendant's argument and held that although DOHSA does not directly address a death remedy for death on territorial waters, A . . . no intention appears that the act have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law.[54]

In *Sea-Land Services, Inc. v. Gaudet,*[55] the Supreme Court held that separate causes of action existed for wrongful death *and* for pain and suffering.[56] In that case, a seaman was seriously injured, but before his death sued and settled for his personal injuries. After his death, his widow sued for his wrongful death. The Court held that the wrongful death action was separate from and not a continuation of the action for personal injuries. If it were not, the doctrine of *res judicata* would have barred the subsequent action.[57] The Court, examining DOHSA, noted that DOHSA had not been interpreted to bar a wrongful death recovery when the decedent had already recovered for personal injuries during his life time.[58]

After the recognition of a general maritime wrongful death action in *Moragne,* and acknowledgment of the disparate actions for wrongful death and for pain and suffering in *Gaudet,* various District Courts continued to permit the general maritime law to supplement the DOHSA wrongful death action.[59]

In 1978, the Supreme Court again looked at the scope of DOHSA, in *Mobil Oil Corp. v. Higginbotham.*[60] In that case, a wrongful death action was brought by representatives of passengers killed when a helicopter involved in an oil drilling operation crashed on the high seas. As part of their action, the widows claimed damages for loss of society. The District Court denied recovery for the non-pecuniary damages of loss of society based on DOHSA's limiting recovery to pecuniary damages.[61] The Fifth Circuit Court of Appeals reversed by relying on *Moragne* to the effect that DOHSA could be supplemented by a general maritime law action for loss of society.[62]

The Supreme Court held that DOHSA was the exclusive wrongful death remedy for deaths on the high seas [63] and that DOHSA precluded supplemental claims for non-pecuniary damages for loss of society by a wrongful death action either under general maritime law or state law.[64]

Because *Higginbotham* was limited to the issue of recovery of non-pecuniary damages in a wrongful death action under DOHSA, it did not foreclose application of general maritime law to a supplemental claim for pain and suffering in survival action.

C. DOHSA Does Not Preclude a General Maritime Law Survival Action.

DOHSA, as a wrongful death statute, is silent on the issue of a survival cause of action.[65] This silence created a vacuum that general maritime law may fill.[66] In determining the Congressional intent in adopting DOHSA, there is a strong presumption against preemption of other sources of available remedies unless there is specific reference to preemption in the statute or unless the structure and purpose of DOHSA is so comprehensive that it leaves no room for supplementation.[67]

The Supreme Court has already held that there was no intention by Congress that DOHSA have any effect in Aforeclosing non-statutory federal remedies that might be found appropriate to effectuate the policies of general maritime law.[68]

The terms of DOHSA, itself, refer to recovery of pecuniary damages and do not prohibit recovery of non-pecuniary damages by a survival or any other cause of action.[69] Any limitations on the types of recovery available under DOHSA should apply only to DOHSA, and not prevent supplemental survival actions.[70]

THE DECISION

Justice Thomas, writing for the unanimous Court, held in a very brief opinion, that survival actions under general maritime law for a decedent's pain and suffering, with respect to death on the high seas, are precluded by DOHSA. The opinion is based on the reasoning that since no survival statute was included in DOHSA, Congress intended there to be no such remedy.

> DOHSA expresses Congress' judgment that there should be no such cause of action in cases of death on the high seas. By authorizing only certain survival relatives to recover damages, and by limiting damages to the pecuniary loses sustained by those relatives, Congress provided the exclusive recovery for deaths that occur on the high seas.[71]

CONCLUSION

Understandably, there has been considerable public sentiment in support of law that would afford representatives of all decedents equal remedies regardless of the place of death. Congress has voted on several version of an AAirline Disaster Relief Act.[72]

If the Supreme Court in *Dooley* allows DOHSA to be supplemented by federal general maritime law including a cause of action for survival damages including pain and suffering such legislation may not be necessary.

Logic; equity and fairness; existing general maritime law; and the legislative history of DOHSA, all support the position of Petitioners in *Dooley*. If the Supreme Court does not overrule the District Court, it seems probable that Congress shall remedy the situation.

ENDNOTES

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[1]*Philomena Dooley, Personal Representative of the Estate of Cecelio Chuapoco, et al. v. Korean Air Lines Co., Ltd.,* 524 U.S. 116, 118 S. Ct. 1890; 141 L. Ed 2d 102; 66 U.S.L.W. 4457 (1998), also known as *In re: Korean Air Lines Disaster of September 1, 1983 Philomeno Dooley, et al. v. Korean Air Lines Co., Ltd.,* (hereafter sometimes referred to as *Dooley*).

[2]See *Saavedra v. Korean Air Lines Co., Ltd.,* 93 F.3d 547 (9th Cir.), *cert.* denied, 117 S.Ct. 584 (1996); *Forman v. Korean Air Lines Co., Ltd.,* 84 F. 3d 446 (D.C. Cir.), *cert.* denied, 117 S. Ct. 582 (1996); *Gray v. Lockheed Aeronautical Sys. Co.,* 125 F 3d 1371 (11th Cir. (1997). See also*: Azzopardi v. Ocean Drilling & Exploration Co.,* 742 F.2d 890 (5th Cir. 1984); *Barbe v. Drummond,* 507 F.2d 794 (1st Cir. 1974).

[3]See *In re Korean Air Lines Disaster of September 1, 1983,* 289 U.S. App. D.C. 391, 932 F.2d 1475, at 1477.

[4]Southern District of New York (15); District of the District of Columbia (8); Northern District of California (7); Eastern District of New York (6); Eastern District of Michigan (3); Northern District of Illinois (1); District of Massachusetts (1); District of New Jersey (1).

[5]*In re Korean Air Lines Disaster September 1, 1983,* 575 F. Supp. 342 (1983).

[6]*See In re Korean Air Lines Disaster of September 1, 1983,* 932 F.2d 1475 (D.C. Cir.).

[7]The issue now before the Supreme Court on a Petition for Certiorari: whether relatives of victims of air crashes over international waters may recover under general maritime law or are they limited to remedies under the Death of the High Seas Act? See Petitioner=s Brief on the Merits, Juanita Madole, Counsel of Record, Speiser Krause, Attorney for Petitioner.

[8]See Keeton Prosser & Keeton on Torts at 126; Restatement of Torts at 924, 926; see also *Calhoun v. Yamaha Motor Corp.,* 40 F.3d 622, 737-38 (3d Cir. 1974).

[9]See *In re Korean Air Lines Disaster of September 1, 1983, Philomeno Dooley, et al. v. Korean Air Lines Co., Ltd.;*117 F.3d 1477 (1997), at 1479; *Nelson v. American Nat=l Red Cross,* 307 U.S. App. D.C. 52, 26 F.3d 193, 199 (D.C.Cir. 1994); *Calhoun v. Yamaha Motor Corp., U.S.A.*, 40 F.3d 622, 637 (3d Cir. 1994), aff=d, 133 L. Ed. 2d 578, 116 S. Ct. 619 (1996); *McInnis v. Provident Life & Accident Ins. Co.,* 21 F.3d 586, 589 (4th Cir. 1994).

[10]See *Eastern Airlines, Inc. v. Floyd,* 499 U.S. 530, 544 n. 10, 113 L. Ed. 2d 569, 111 S.

Ct. 1489 (1991); *Scarfo v. Cabletron Sys., Inc.,* 54 F.3d 931, 939 (1st Cir. 1995).

[11]See *In re Tel Aviv,* 405 F. Supp. 154 (1975).

[12]See *In re Korean Air Lines Disaster of Sept. 1, 1983*, 156 F.R.D. 18 n.1 (1994).

[13]U.S. Const. Art VI, cl. 2 A The Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land,....≅

[14]See *Husserl v. Swiss Air Transport Co.,* 351 F. Supp. 702 (1972); *Husserl v. Swiss Air Transport Co.,*388 F. Supp. 1238, (1975), disapproved on other grounds by *In Re Mexico City Air Crash,* 708 F.2d 400 (1983); *Evangelinos v. Trans World Airlines, Inc.,* 396 F. Supp. 95 (1975), rev=d on other grounds 550 F. 2d 152 (1977); *Domangue v. Eastern Air Lines, Inc.*, 722 F.2d 256 (1984), disagreed with on other grounds by *O=Rourke v. Eastern Air Lines, Inc.,* 730 F.2d 842 (1984); *Rosman v. Trans World Airlines, Inc.,* 34 N.Y. 2d 385, 314 N.E. 2d 848 (1974); *Manion v. Pan American World Airways, Inc.,* 80 App.Div. 2d 303, 439 N.Y.S. 2d 6 (1981).

[15]See 44 C.A.B. 819 (1966), reprinted in 49 U.S.C. ∋1502 note (1970).

[16]See *In re Tel Aviv*, 405 F. Supp. 154 (1975).

[17]See Kreindler, NYLJ, August 30, 1996; Shapiro, AU.S. Clears Way for IATA Agreements,≅ BUSINESS INSURANCE, January 20, 1997; ADOT Order Should Encourage Airlines to Waive Liability Limits,≅ AIR SAFETY WEEK, January 20, 1997.

[18]46 U.S.C. Appx, Sections 761-767 (1996), Death on the High Seas Act referred to herein as ADOHSA≅.

[19]A 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 ensured,≅ 46 USC, Section 761.

[20]See *Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573 (1974), at 575-76, n.2. DOHSA requires that suit be brought by the personal representative of the estate of the decedent. See 46 U.S.C. ∋762.

[21]See *Offshore Logistics, Inc. v.* Tallentire, 477 U.S. 207; 106 S.Ct. 2485 (1986); *Lacey v. L.W. Wiggins Airways, Inc.*, 95 F. Supp. 916 (1951); *Stoddard v. Ling Temco-Vought,*

Inc., 513 F. Supp. 339 (1981).

[22]46 USC, App x, Section 761. See note 19 *supra.*

[23]*Zicherman, etc., et al. v. Korean Air Lines Co.,* 116 S. Ct. 629 (1996).

[24]See Stephen J. Fearson, ARecoverable Damages in Wrongful Death Actions Governed by the Warsaw Convention,≅ 62 Def. Couns. 367, 368 (1995).

[25]*In re Korean Air Lines Disaster of Sept. 1, 1983,* 932 F.2d 1475, 1478-79 (D.C. Cir.) (1991), *cert.* denied *sub nom. Dooley v. Korean Air Lines,* 502 U.S. 994, 112 S.Ct. 616 (1991).

[26]*Zicherman v. Korean Air Lines Co., Ltd.*, 43 F.3d 18, 221-22 (2d Cir. 1994).

[27]Recovery in a DOHSA ∋776 suit Ashall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought.≅ 46 U.S.C. App. ∋762.

[28]See *In re Korean Air Lines Disaster of Sept. 1, 1983,* 932 F.2d 1475 (D.C. Cir.), *cert.* denied, 502 U.S. 994 (1991); *Zicherman v. Korean Air lines, Co., Ltd.,* 516 U.S. 217 (1996).

[29]See *Zicherman* at 230, n.4.

[30]*Bickel v. Korean Air Lines Co., Ltd.,* 83 F.3d 127 (6th Cir. 1996); amended on rehearing 96 F. 3d 151, *cert.* denied 117 S. Ct. 770 (1996).

[31]*Forman v. Korean Air Lines Co., Ltd.*, 84 F.3d 446 (D.C. Cir.) *cert.* denied, 117 S. Ct. 582 (1996).

[32]*Oldham v. Korean Air Lines Co., Ltd.,* 127 F.3d 43 (D.C. Cir. 1997), *cert.* pending Docket No. 97-1180.

[33]*Saavedra v. Korean Air Lines Co., Ltd.*,93 F.3d 547 (9th Cir.), *cert.* denied, 117 S. Ct. 584 (1996).

[34]Docket Entry 2/26/96.

[35]Docket Entry 6/4/96.

[36]Petition for interlocutory appeal granted on August 15, 1996, based on 28 U.S.C. ∋1292(b).

[37]See *Moragne v. States Marine Lines, Inc.,* 398 U.S. 375 (1970).

[38]See *Dooley*, 117 F.3d at 1480-1481. See note 1 *supra.*

[39]Citing *Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890 (5th Cir. 1984); *Barbe v. Drummond*, 507 F.2d 794 (1st Cir., 1974).

[40]*Saavedra v. Korean Air Lines., Ltd.*, 93 F.3d 547 (9th Cir.), *cert.* denied, 117 S. Ct. 584 (1996).

[41]*Gray v. Lockheed Aeronautical Sys. Co.*,125 F.3d 1371 (11th Cir. 1997).

[42]118 S. Ct. 679, 139 L. Ed 2d 628 (1998).

[43]Petitioners= brief is herein referred to as the ABrief.≅

[44]Brief, p. 40.

[45]Brief, p. 12.

[46]Brief, p. 23.

[47]See *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 106 S. Ct. 2485 (1986); *Lacey v. L.W. Wiggins Airways, Inc.*, 95 F. Supp. 916 (1951); *Stoddard v. Ling Temco-Vought, Inc.*, 513 F. Supp. 339 (1981).

[48]See Ugo Colella, The Proper Role of Special Solicitude in the General Maritime Law, 70 Tul. L.Res. 227, 246 (1995).

[49]*In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988,* 37 F.3d 804, 829 (2nd Cir. 1994), *cert.* denied, 513 U.S. 1126 (1995).

[50]See *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990).

[51]398 U.S. 375 (1970). See also *Heredia v. Davies*, 12 F.2d 500, 501 (4th Cir. 1926); *Dennis v. Central Gulf S .S. Corp.*, 453 F.2d 137, 140 (5th Cir. 1972); *Downie v. United States Lines Co.,* 359 F.2d 344, 347 (3rd Cir.), *cert.* denied, 385 U.S. 897 (1996).

[52]*Moragne*, 398 U.S. at 376. See note 37 *supra.*

[53]*Id.* at 375.

[54]*Id.* at 400.

[55]See *Sea-Land Services v. Gaudet,* 414 U.S. 573 (1974).

[56]*Id.* at 575-76, n. 2. See note 55 *supra.*

[57]*Id.* at 578-579.

[58]*Id.* at 583 n. 10.

[59]See *Barbe v. Drummond,* 507 F.2d 794 (1st Cir. 1974); *Spiller v. Thomas M. Lowe, Jr. & Assoc. Inc.,* 466 F.2d 903, (8th Cir. 1972); *Greene v. Vantage Steamship Corp.,*466 F. 2d 159 (4th Cir. 1972); *Dennis v. Central Gulf S. S. Corp.,* 453 F.2d 137 (5th Cir. 1972); *Dugas v. Nat=l Aircraft Corp.,* 438 F.2d 1386 (3rd Cir. 1971).

[60]436 U.S. 618 (1978).

[61]*Higginbotham v. Mobil Oil Corp.,* 360 F. Supp. 1140, 1150 (W.D. La. 1973).

[62]*Higginbotham v. Mobil Oil Corp.,* 452 F.2d 422 (5th Cir. 1977).

[63]*Mobil Oil Corp. v. Higginbotham,* 436 U. S. 618 (1978).

[64]*Id.,* at 623-25.

[65]*Gaudet,* 414 U.S. at 575-576, 575 n. 2. See note 55 *supra.*

[66]See cases in which DOHSA applied: Eleventh Circuit, *Gray, supra,* 125 F.3d at 1381-1386; First Circuit, *Barbe, supra,* 507 F.2d at 799-800; Fifth Circuit, *Azzopardi, supra,* 742 F.2d at 893-894; *Law v. Sea Drilling Corp.*, 523 F.2d 793, at 795 (5th Cir. 1975); Second Cir. (*Zicherman, supra*, 43 F. 3d at 23; *Preston v. Frantz,* 11 F.3d 357 (2nd Cir. 1993).

[67]See *Cipollone v. Ligget Group, Inc.,* 505 U.S. 504, 516 (1922); *Hillsborough County, Fla. v. Automated Medical Lab., Inc.,* 471 U.S. 707, 716 (1985); *California v. ARC American Corp.,* 490 U.S. 93, 101 (1989).

[68]*Moragne,* 398 U.S. at 400; *Gaudet,* 414 U.S. at 588 n. 22; *American Export Lines Inc. v. Alvez, 446 U.S. 274, 285 (1980).*

[69]*Barbe*, 507 F.2d at 800. See note 59 *supra.*

[70]46 U.S.C. App. 762 (1994) DOHSA Section 762 states that recovery is to be a fair and just compensation for the precuniary loss sustained by the person for whose benefit the suit is brought.

See H.R. 2005, A A Bill to Amend Title 49, United States Code, to clarify the application of the act popularly known as the Death on the High Seas Act to aviation accidents.≅ The bill was introduced in the House by Representative Joseph M. McDade (R-PA), whose district includes Montoursville, the home of the high school that lost its French class on TWA Flight 800. See also H.R. 603.

[71]*Dooley v. Korean*, see note 1, *supra*.

[72]*Id.* at 1894.