RECENT DEVELOPMENTS IN MARITIME LAW

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It is a pleasure to speak again this year on recent developments in maritime law. I do not plan a littany of recent decisions but, rather, my intent is to cover broadly several new issues which have appeared in the last couple of years, and discuss case law and legislative action relating to these issues.

PUNITIVE DAMAGES

My "Recent Development" paper for this seminar last year was directed solely toward the grant of certiorari by the U.S. Supreme Court on the punitive damages award which had been the subject of a series of Ninth Circuit opinions all relating to the grounding of the *M/V Exxon Valdez* in 1989, causing a huge oil spill in Alaskan waters and substantial ecological and economic damage. The grant of certiorari was significant, not only because of the size of the punitive damage award affirmed by the Ninth Circuit ($2.5 Billion), but also because this was the first case involving the award of punitive damages in maritime law which had been accepted for review by the Supreme Court in more than one hundred ninety years.

We now have an opinion by the court in *Exxon Shipping Co. v. Baker* ___ U.S. _____, 128 S.Ct. 2605 (June 25, 2008). The Court had granted Certiorari on three issues:

> 1. May punitive damages be imposed under maritime law against a ship owner (as the Ninth Circuit held, contrary to decisions of the First, Fifth, Sixth and Seventh Circuits) for the conduct of a ship's master at sea,

> absent a finding that the owner directed, countenanced, or participated in that conduct, and even when the conduct was contrary to policies established and enforced by the owner?
>
> 2. When Congress has specified the criminal and civil penalties for maritime conduct in a controlling statute, here the Clean Water Act, but has not provided for punitive damages, may judge-made federal maritime law (as the Ninth Circuit held, contrary to decisions of the First, Second, Fifth, and Sixth Circuits) expand the penalties Congress provided by adding a punitive damages remedy?
>
> 3. Is this $2.5 billion punitive damages award . . . within the limits allowed by (1) federal maritime law . . . .
> [*Exxon* petition for writ of certiorari]

An equally divided court (with Justice Alito not participating) quickly dispatched the first issue, affirming the Ninth Circuit opinion with a pointed comment:

> "The Court is equally divided on this question and "[I]f the judges are divided, the reversal can not be had, for no order can be made." . . . We therefore leave the Ninth Circuit's opinion undisturbed in the respect, though it should go without saying that the disposition here is not precedential on the derivative liability question." [128 S. Ct. at 2616, citation omitted.]

Thus, there is still an apparent split among the federal circuit on the question of whether a corporation is responsible for punitive damages resulting from the reckless conduct of its managerial employees. Those lower court decisions are discussed at length in the paper presented at this seminar last year.

On the second issue on which certiorari had been granted, *Exxon* did not seriously dispute that punitive damages were, in general, recoverable under the general maritime law. However, Exxon urged the Supreme Court to hold that maritime punitive damages were, in this case, preempted and displaced by federal statutes, including the Clean Water Act. *Exxon* argued since the Clean Water Act did not allow for punitive damages then

neither should the maritime law, arguing that the decisions in *Miles v. Apex Marine Corp*., 498 U.S. 19 (1990), and *Mobile Oil Corp.* v. *Higginbotham,* 436 U.S. 618 (1978), should be extended to apply to the statute under consideration in this case.

The court rejected Exxon's argument, holding that the failure of the Clean Water Act to expressly preserve tort actions in pollution cases (including the right to recover compensatory and punitive damages) did not indicate a congressional intent to displace those claims:

> "All in all, we see no clear indication of congressional intent to occupy the entire field of pollution remedies, see, e.g., *United States v. Texas,* 464 U.S. 238 (1993) ('In order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law' . . . ." [128 S. Ct. at 2619]

There will be further discussion on this aspect of the opinion below.

Thus, the question became not whether punitive damages are allowed under maritime law, but rather, whether the award was excessive and, if so, what should be the rule for determining the size of a maritime punitive damage award. The court, in what has generally been considered by the plaintiff's bar outside the maritime law context to be a horrible decision, held that *in this case* the punitive damage award should be reduced to equal the amount of compensatory damages awarded.

In determining whether to reduce the size of the award, the Court initially addressed the jurisdictional foundation upon which it was considering and deciding this question. It clearly noted that while it had, in a number of recent decisions, visited the question of excessive punitive damage awards, it had done so in the context of a federal due process challenge to a state punitive damage law. See, for example, *BMW of North*

America, Inc., v. Gore, 517 U.S. 559 (1996), *Cooper Industries, Inc., v. Leatherman Tool Group, Inc*., 532 U.S. 424 (2001) and *State Farm Mutual Automobile Ins. Co., v. Campbell* 538 U.S. 408 (2003).

Here, the court specified that it was considering the question only in its capacity as a maritime court empowered under the admiralty and maritime jurisdiction grant of the United States Constitution, to make law or modify existing non-statutory maritime law. In that capacity, it did not reach the federal due process question:

> "Today's enquiry differs from due process review because the case arises under federal maritime jurisdiction, and we are reviewing a jury award for conformity with maritime law, rather than the outer limit allowed by due process; **we are examining the verdict in the exercise of federal maritime common law authority, which precedes and should obviate any application of the constitutional standard**. Our due process cases, on the contrary, have all involved awards subject in the first instance to state law." [128 S.Ct. at 2626; emphasis added.]

On that basis, at least logically, the 1:1 ratio allowed by the court in this case should not be extended to state law punitive damage awards.

However, in deciding whether the award was excessive in this case under maritime law, the court reviewed state and international laws, studies, research and empirical data, as well as anecdotal information about punitive damages. The court concluded that "American punitive damages have been the target of audible criticism in recent decades, . . . but the most recent studies tend to under cut much of it."[Id. at p.2624] Most studies show discretionary jury awards of punitive damages "have not mass-produced run away awards . . ." [Id .] The court noted that the median ratio of punitive to compensatory damages has remained at 1:1. Similarly, the research shows there has been no mark increase in the percentage of punitive damage awards. The court

concluded that "the figures show an overall restraint" among juries and rendering punitive damage awards. [Id. at pp.2624-2625]

However, the court undertook some troubling analysis in determining to reduce the punitive damage award in this case. The court concluded that one negative characteristic of discretionary punitive damage awards justified the courts' intervention, their *unpredictability*. As the court put it, "a penalty should be reasonably predictable in its severity, so that even Justice Holmes's 'bad man' can look ahead with some ability to know what the stakes are in choosing one course of action or another." [Id. at p. 2627] The court looked to "available data" and "anecdotal evidence" and found that the spread between high and low punitive awards (even in the essentially identical case) was not acceptable.

In its discussion of the alternative rules to be applied to the reduction of the award, the court characterized the nature of *Exxon's* conduct given rise to the punitive damage award as ". . . tortious action . . . worse than negligent but less than malicious, exposing the tort-feasor to certain regulatory sanctions and inevitable damage actions," and " . . . a case of reckless action, profitless to the tort feasor, resulting in substantial recovery for substantial injury." [Id. at pp. 2631-2632]

The court ultimately adopted the 1:1 ration as the multiple punitive damage award in this case, reasoning that its research showed that this is the median ratio of the awards studied and reflects "what juries and judges have considered reasonable across many hundreds of punitive awards." [Id. at p. 2632] The court then applied that ratio in this case, reducing the already reduced award of $2.5 billion to $507.5 million, the amount of

the compensatory damages.

Obviously, a number of lingering questions were left by this opinion, which often happens in a case of this complexity and importance. One, obviously, is whether the 1:1 ratio is to be applied in all maritime punitive damage cases. I think not, based on the carefully crafted wording of the opinion of the court indicating an intent to apply the 1:1 ratio in cases involving the least blame-worthy conduct triggering punitive damage liability:

> We think it is fair to assume that the greater share of the verdicts studied in these comprehensive collections reflect reasonable judgments about the economic penalties appropriate in their particular cases.
>
> These studies cover cases of the most as well as the least blameworthy conduct triggering punitive liability, from malice and avarice, down to recklessness, and even gross negligence in some jurisdictions. The data put the median ratio for the entire gamut of circumstances at less than 1:1, see *supra,* at 2624 - 2625, and n. 14, meaning that the compensatory award exceeds the punitive award in most cases. **In a well-functioning system, we would expect that awards at the median or lower would roughly express jurors' sense of reasonable penalties in cases with no earmarks of exceptional blameworthiness within the punishable spectrum (cases like this one, without intentional or malicious conduct, and without behavior driven primarily by desire for gain, for example) and cases (again like this one) without the modest economic harm or odds of detection that have opened the door to higher awards** . . . . Accordingly, given the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution, we consider that a 1:1 ratio, which is above the median award, is a fair upper limit **in such maritime cases**. [Id. at p. 2632-2633; emphasis added.]

The fact that the court attempted to distinguish the conduct of *Exxon* from "the most egregious conduct, including malicious behavior and dangerous activity carried on for the purpose of increasing a tort-feasor's financial gain . . ." and/or where the conduct of the defendant does not "result in substantial recovery for substantial injury", the court seems to

suggest that, in those circumstances, a hirer ratio might be appropriate.

We do see the prospect of a "silver lining" on a couple of issues, behind the substantial reduction of the punitive damage award in this case. The first is on the subject of the award of punitive damages in maritime cases, where many lower courts had proposed that punitive damages are not recoverable under maritime law. With this decision, the first maritime case in which the U.S. Supreme Court has ever approved the award of punitive damages, we can say at least that "the camel's nose is inside the tent."

One field of maritime litigation ripe for correction is the question of damages recoverable by a seaman for the failure of his employer to provide maintenance and cure. This is the oldest common law remedy available to seaman, requiring the employer, when a seaman becomes disabled due to illness or injury, to provide him with maintenance, a daily living allowance to cover the cost of his food and lodging while disabled, and cure, the obligation to pay his medical expenses until he reaches maximum medical improvement. For some number of years, the cases had held that where the employer acts with reckless disregard for the rights of the injured seaman to maintenance and cure, punitive damages could be awarded. See *Harper v. Zapata Offshore Co.*, 741 F.2d 87 (5th Cir. 1984). However, that changed in many circuits when the Fifth Circuit issued its opinion in *Guevara v. Maritime Overseas Corp.,* 59 F.3d 1496 (5th Cir. 1995) holding that punitive damages could not be awarded for even a willful failure to pay maintenance and cure. The basis for that opinion was an overly broad reading of *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), where the court denied loss of society damages to the mother of the deceased seaman because the Jones Act death remedy allowed only the recovery of pecuniary losses. If and when this

issue reaches the Supreme Court, the court may reject *Guevara*, based on the decision in the *Exxon* case and the fact that there is no federal statute governing the seaman's claim for maintenance and cure.

The issue may reach the court soon, because of the Eleventh Circuit has never adopted or followed the *Guevara* opinion. In *Atlantic Sounding Co., v. Townsend*, 496 F. 3d 1282 (11th Cir. 2007), the court held that it was bound by the former Fifth Circuit decisions holding that punitive damages could be awarded for wanton failure to provide maintenance and cure. The Eleventh Circuit rejected *Guevara*, holding that the decision in *Miles* did not effect the earlier cases because *Miles* did not deal with punitive damages. A petition for rehearing *en banc* was denied by the Eleventh Circuit and a petition for certiorari has been filed and briefed, but has not been acted upon by the Supreme Court.

Another "silver lining" which should in all rights come from this decision is a much more narrow reading of the *Miles* decision as to other non-pecuniary damages, such loss of consortion or society. In *Miles*, the Supreme Court held only that because damages recoverable for wrongful death under the Jones Act were limited to pecuniary losses sustained by dependent family members, the courts could not add damages for loss of society under the concurrent remedy for injury or death based on the warranty of seaworthiness. Unfortunately, a number of courts had read the Miles decision in an extremely broad fashion, approaching a position that damages for loss of society are not recoverable in any type of maritime injury or death case. For example, in *Scarborough v*. Clemco *Industry*, 391 F. 3d 660 (5th Cir. 2004), the court held that the "logic" of *Miles* dictated a decision that the family of a seaman killed by a defective product could not recover damages for loss of society in a

products liability case, not governed at all by the Jones Act, simply because such damages were not available against the seaman's employer (who was not a party to the case). Similarly, in *Tucker v. Fearn*, 333 F. 3d 1216 (11th Cir. 2003), our Eleventh Circuit held that the parents of a teenage boy killed in a boating accident could not recover damages for loss of society, where no statute governed the cause of action.

While the *Baker* court cited *Miles* with favor, its rationale suggests that, when confronted with an opportunity to consider the reach of *Miles*, the Supreme Court will follow that line of cases giving *Miles* a narrow interpretation limiting its application to cases where the cause of action is governed by a federal statute establishing the damages to be recovered. In its consideration of whether the Clean Water Act "displaced" or "pre-empted" the recovery of punitive damages in maritime law, the court did not follow the *Miles* methodology of looking to Clean Water Act for "policy guidance." Instead, it looked to the Clean Water Act to determine whether the statute evidenced a ". . . clear indication of congressional intent to occupy the entire field of pollution remedy. . . ."[128 S. Ct. 2620]

The same question asked in a post-*Baker* context should be: Do The Jones Act and Death on the High Seas Act evidence clear congressional intent to occupy the entire field of general maritime law personal injury, death and other maritime tort remedies? I think that the answer is clear, that the decisions in *Scarborough v. Clemco Industries* and *Tucker v. Fearn* should not survive after *Baker v. Exxon*.

JONES ACT AMENDMENT

The Jones Act (formerly 46 U.S.C. §688) was re-codified in October, 2006, as 46 U.S.C.§§ 30104-30106. As some may have learned, a revision of the Jones Act has recently

passed and become law, which eliminated subsection (b) of the Jones Act as it was re-codified in 2006. Both the reason why subsection (b) was deleted from the statute and the potential effect of this change are interesting.

In the Fall of 2007, we learned that the House Judiciary Committee was considering a "Technical Corrections" bill which was intended to revise and correct wording errors found in several sections of Title 46 as it was re-codified in 2006. A technical corrections bill merely cleans up legislative mistakes. A true technical corrections bill is easy to pass because it's not controversial and thus, there is no threat of a filibuster in the Senate.

We reviewed the Technical Corrections bill and found that the vast majority of the wording changes were correct statements of existing law. However, we became concerned that the language additions suggested for the Jones Act might cause confusion as to the well established venue provisions which have been applied since the original adoption of the Jones Act in 1920, even though the bill recited that "The amendments made by this title make no substantive change in existing law and may not be construed as making a substantive change in existing law".

By way of background, the Jones Act, as originally adopted in 1920, and codified at 46 U.S.C. §688, provided as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action fo damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the

> district in which the defendant employer resides or in which his principal office is located."

From the adoption of the Jones Act, the cases uniformly followed the venue provisions contained in the Federal Employer's Liability Act, 45 U.S.C. §51 et seq. FELA section 56 allowed the injured employee to file his action in any state or federal court in which the defendant railroad was doing business.

When the Jones Act was re-codified in 2006, the liability provisions were placed into section 30104, by which the wording of the original section 688 was changed to read as follows:

> (a) Cause of Action. A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.
>
> (b) Venue. An action under this section shall be brought in the judicial district in which the employer resides or the employer's principal office is located.

This wording of subsection (a) is essentially a shortened restatement of the Jones Act as originally adopted and formerly codified as 46 U.S.C. §688.

In the 2006 recodification of the Jones Act into §30104, the authors of the revision wording interpreted the case law under the original statute as holding that the last sentence provided for venue, and not jurisdiction, which is reflected in the 2006 wording of subsection (b). This revision was made with a clear statement of Congressional intent that it would make no substantive change in existing law and may not be construed as making a substantive change in existing law. In spite of this statement of Congressional intent, an argument had been made in some cases that the change in wording from "Jurisdiction" in the

original statute to "Venue" in the recodification actually created a requirement that the Jones Act case could only be brought where the employer's principal office is located.

The 2007 draft of the Technical Correction to Subpart (a) of section 30104 would have read as follows:

> "*(a) CAUSE OF ACTION.-- A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may bring an action against the employer. In such an action, the laws of the United States regulating recovery for personal injury to, or death of, a railway employee shall apply. Such an action may be maintained in admiralty or, at the plaintiff's election, as an action at law, with the right of trial by jury.*
>
> *(b) VENUE–When the plaintiff elects to maintain an action at law, venue shall be in the judicial district in which the employer resides or the employer's principal office is located."*

The committee staff apparently thought that this wording change was necessary in order for laymen to read the statute and understand that the seaman's case could be filed in federal court under admiralty jurisdiction or at law in state or federal court. There was also some thought that the wording of the 2006 recodification of the Jones Act might be read as disconnecting the statute from the case law following the Supreme Court decision in *Panama R.R. Co.*, 264 U.S. 748 (1924), which eliminated any venue distinction between Jones Act suits filed in Admiralty and those filed at law.

There was additional problematic wording proposed for subsection (b) in the original draft of the Technical Corrections. As originally worded, the proposal for the venue provision could have been read as creating a distinction between venue in admiralty suits and venue in action at law.

We in the Admiralty section of the American Association of Justice were able to

submit a position paper on the proposed Technical Corrections, in which we agreed that the proposed re-wording of subsection (a) was a correct statement of the case law interpreting the Jones Act since it was adopted in 1920. However, it was not necessary to revise the statute simply to state that an action under this statute may be maintained in admiralty, since all courts and litigants dealing with this statute have correctly assumed that a Jones Act case may be brought within the admiralty jurisdiction of the federal courts under 28 U.S.C. §1333.

Based on the case law discussed below, we took the position that the wording of the proposed subsection (b) indicated a misunderstanding of the decisions under the Jones Act which have permitted an injured seaman to pursue his cause of action in the courts of a state or federal district in which the vessel owner does business and is subject to the jurisdiction of the court. As worded, the draft might have been read as changing the venue rules of the Jones Act, and certainly could have created confusion.

The leading Supreme Court case is *Pure Oil Co. v. Suarez*, 384 U.S. 202 (1966). The Court clearly held that, when read in conjunction with 28 U.S.C. §1391, the Jones Act permits the seaman to pursue his claim against his employer wherever the employer does business. In so holding, the Court stated:

> "The Jones Act, which ultimately governs the venue issue before us, contains the following provision: '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.' *46 U. S. C. § 688*.
>
> Preliminarily it should be noted that although this provision is framed in jurisdictional terms, the Court has held that it refers only to venue, *Panama R. Co. v. Johnson, 264 U.S. 375*. It is conceded that as enacted and originally interpreted the statute would not authorize Florida venue in this instance, for corporate residence traditionally meant place of incorporation, in this case Ohio, and Pure Oil's principal office is in Illinois. The Court of Appeals held, however, that residence had been redefined by the expanded general venue

> statute, *28 U. S. C. § 1391 (c) (1964 ed.)*, passed in 1948. That statute provides:
>
> 'A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the *residence* of such corporation for venue purposes.' (Emphasis added.)
>
> If this definition of residence is applicable to the Jones Act venue provision, it is conceded that the action was properly brought in Florida, where Pure Oil has transacted a substantial amount of business. We hold that this definition does so apply and that venue in Florida was proper." [Id. at 203-204]

There has been no case to the contrary. *Suarez* has been uniformly followed in many cases, including *Penrod Drilling Co. v. Johnson*, 414 F.2d 1217 (5th Cir. 1969), an opinion written by Chief Judge John R. Brown, where the court held that the seaman could pursue his Jones Act case wherever the employer does business, regardless of whether the employer is a corporation or a partnership.

The Chair of the Maritime Law Association Code Revision Committee had also submitted a position paper on a number sections of the Title 46 Technical Corrections. His position on the Jones Act revision was that since the decision in *Pure Oil Co. v Suarez, supra,* the "jurisdiction" provision in the original Jones Act, 46 U.S.C. 688, had been a nullity, and that to correct the recodification of the act subsection (b) should be deleted in its entirety. We agreed with the position expressed by the MLA committee, on basis that *Suarez* is the law of the land.

The draft revision to 30104 (b) could have been mis-interpreted as a deviation from the provisions of the Federal Employer's Liability Act, 45 U.S.C. §51, et seq., on venue and jurisdiction. The F.E.L.A. is incorporated into the Jones Act in its entirety. When that statute was first passed in 1908, it did not contain a venue section, and the only venue for a

suit against a railroad was in federal court in the state that had issued its charter. By 1910, the Congress realized that it was far too restrictive and onerous for railroad workers to be so limited in their venue for their suits for injury. Section 56 of the F.E.L.A. was therefore amended in 1910 and now provides, in applicable part, as follows:

> "Under this act an action may be brought in a circuit [district] court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several States."

It is without question that, since the above amendment to section 56, the injured railroad worker can file suit on his F.E.L.A. claim against the railroad in the courts of any state or federal district in which the railroad does business. See, for example, *Miles v. Illinois Central R.R. Co.,* 315 U.S.698 (1942); and *Pope v. Atlantic Coastline R.R.* Co., 345 U.S. 379 (1953). By incorporation of the F.E.L.A. into the Jones Act, seamen clearly have the jurisdiction and venue rights of railroad workers under F.E.L.A. section 56, and for that reason subsection (b) of section 30104 in the 2006 recodification had no meaning.

In the Technical Corrections bill as enacted into law on January 28, 2008, and retroactive to the October, 2006, recodification of Title 46, section 30104 now reads:

> "Cause of Action. A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section."

In addition to resolving any question about where the injured seaman could file his suit, this change to the Jones Act should have the effect of protecting injured seamen from an over-reaching tactic attempted by some employers in recent years. Some less-than-

scrupulous Jones Act employers have forced and/or cajoled their injured employees to sign agreements to the effect that, in exchange for payment of some part of their earnings while they were unable to work, they agreed to submit any remaining claims to arbitration. Nearly all of these agreements have called for arbitration in New York under the rules of the American Arbitration Association, a procedure which is prohibitively expensive for an injured seaman and is far more suited to the resolution of commercial disputes.

The Jones Act obviously incorporates all of the provisions of the FELA. One of those is contained at 45 U.S.C. §55, which provides in pertinent part as follows:

> "Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void. . . ."

In *Boyd v. Grand Truck W.R. Co.*, 338 U.S. 263 (1949) the Supreme Court held that forum provisions contained in FELA section 56 were statutory rights that were part of the remedy available to injured railway employees. The court held that an agreement executed by an injured railway worker which restricted the forum in which he could file suit on his claim was void, as a "device" prohibited by section 55.

However, a number of recent decisions on the validity of post-injury arbitration agreements signed by injured seamen, lead by the Fifth Circuit decisions in *Terrebonne v. K-Sea Transportation Corp.,* 477 F. 3d 271 (5th Cir. 2007), have declined to follow the Supreme Court decision in *Boyd*, and held that such agreements are enforceable. The basis of the decision in *Terrebonne* and its progeny was that since the Jones Act (before the 2008 technical correction) had its own venue provisions, the Supreme Court decision in *Boyd v. Grand Truck W. R. Co.*, supra, was not binding precedent on cases involving injured seamen.

Since the Jones Act no longer has a venue provisions, the effect is to undermine the reasoning of the *Terrebonne* case and leave post-injury arbitration agreements void as a "device" prohibited by the FELA.

DEATH ON THE HIGH SEAS ACT

Finally, we will turn to a potential future development concerning the Death on the High Seas Act. That statute has also been re-codified, moving from 46 U.S.C. §761, et seq., to 46 U.S.C. §§30301 through 30308.

The statute, in terms of damages recoverable for seafarers and vessel passengers, provides as follows:

> **§ 30302. Cause of action**
> When the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. The action shall be for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative.

> **§ 30303. Amount and apportionment of recovery**
> The recovery in an action under this chapter shall be a fair compensation for the pecuniary loss sustained by the individuals for whose benefit the action is brought. The court shall apportion the recovery among those individuals in proportion to the loss each has sustained.

> **§ 30305. Death of plaintiff in pending action**
> If a civil action in admiralty is pending in a court of the United States to recover for personal injury caused by wrongful act, neglect, or default described in section 30302 of this title and the individual dies during the action as a result of the wrongful act, neglect, or default, the personal representative of the decedent may be substituted as the plaintiff and the action may proceed under this chapter for the recovery authorized by this chapter.

The statute, for seafarers and vessel passengers, has been uniformly interpreted as allowing only the recovery of pecuniary losses sustained by family members. *Mobile Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978). The most common element of pecuniary damages allowed is loss of support the deceased would have made to dependent family if he or she had survived. See, for example, the District Court opinion in *Higginbotham v. Mobile Oil Corp.,* 360 F. Supp. 1140 (W.D. La. 1973); and *Martinez v. Porta Rico Marine Management, Inc.*, 755 F. Supp. 1001 (S.D. Ala. 1990). Loss of inheritance can also be recovered by spouses and children, where they have a reasonable expectation of benefitting from any continued accumulation of the decedent's estate. *Matter of Adventure Bound Sports, Inc.,* 858 F. Supp. 1192 (S.D. Ga. 1994), and *Rohan v. Exxon Corp.,* 896 F. Supp. 666 (S.D. Tex. 1996).

The value of the loss of the household services performed by the decedent is also recoverable. *Tallentire v. Offshore Logistics, Inc.,* 754 F. 2d. 1274, 1287 (5th Cir. 1985), reversed on other grounds 477 U.S. 207 (1986), and *Ivy v. Security Barge Lines*, 585 F. 2d. 732, 740 (5th Cir. 1978).

The loss to children of the nurture and guidance of the deceased constitutes a pecuniary loss recoverable under DOHSA. Finally, funeral expenses are allowed as pecuniary loss if paid by the decedent's dependents. *Wilhelm Seafoods, Inc. v. Moore*, 328 F. 2d. 868 (5th Cir. 1964).

Non-seamen do not have a survival remedy under DOHSA for pre-death pain and suffering of the deceased because such damages were not included by Congress in the statute.

Dooley v. Korean Airlines Co., 524 U.S. 116 (1998) Further, state wrongful death statutes cannot be used to supplement damages in cases where DOHSA applies. *Offshore Logistics, Inc., v. Tallentire*, 477 U.S. 207 (1986).

Commercial Aviation Amendment

The Death On the High Seas Act was crafted to provide a remedy to the families of bread-winners who had been lost at sea, where no general remedy had existed. There was no such thing as overseas commercial aviation when DOHSA was adopted in 1920. However, the deaths of commercial aircraft passengers at sea come within the maritime law and the coverage of the Death on the High Seas Act. See *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217 (1996), rejecting claims for loss of society damages based on DOHSA, and *Dooley v. Korean Air Lines Co., Ltd.,* 524 U.S. 116 (1998) denying recovery of damages for pre-death pain and suffering on the basis that the survival section of DOHSA, 46 U.S.C. §30305, permitted the personal representative of the decedent to pursue only the remedies provided by the Act.

It took a major disaster to motivate Congress to make a partial change in the Death on the High Seas Act. On July 17, 1996, TWA Flight 800 departed New York for Europe. Shortly after takeoff, the plane exploded in mid air and crashed approximately eight nautical miles south of the shore of Long Island, New York. Everyone on board died, including a large number of high school students from Pennsylvania. Their families were shocked to learn that the Death on the High Seas Act would allow them no damages for their losses, and persuaded Republican Senator Arlen Specter to take the lead on an amendment to the Death

on the High Seas Act to eliminate this draconian result under DOHSA. In 2000 both houses of Congress passed a bill to amend the Act, calling it to be retroactive to commercial aviation crashes occurring on or after July 16, 1996.

That amendment is now found in 46 U.S.C. §30307, which provides as follows:

> (a) Definition. In this section, the term "nonpecuniary damages" means damages for loss of care, comfort, and companionship.
>
> (b) Beyond 12 nautical miles. In an action under this chapter, if the death resulted from a commercial aviation accident occurring on the high seas beyond 12 nautical miles from the shore of the United States, additional compensation is recoverable for nonpecuniary damages, but punitive damages are not recoverable.
>
> (c) Within 12 nautical miles. This chapter does not apply if the death resulted from a commercial aviation accident occurring on the high seas 12 nautical miles or less from the shore of the United States.

Therefore, for commercial aviation accidents only, the amendment made three major changes. One was allowing the recovery of damages for loss of care, comforting and companionship, as nonpecuniary damages; another was extending the boundary line for DOHSA to apply to aviation accidents to twelve nautical miles offshore, and extend the operation of state wrongful death statutes out to twelve nautical miles for aviation accidents; leaving the demarcation line for vessel casualties at three nautical miles.

This amendment to DOHSA applies to all types of aviation accidents more than 12 miles offshore, including not only commercial airliners, but also commercial helicopter operation in the offshore oil industry. *Brown v. Eurocopter, S*.A., 111 F.Supp.2d 859 (S.D. Tex. 2001). See, also, Flying And Crashing On The Wings Of Fortuosity: The Case For Applying Admiralty Jurisdiction To Aviation Accidents Over Navigable Waters, 68 J. Air

L.& Com. 283 (2003).

Recent aviation cases have looked to the *Gaudet* line of cases for a definition of the terms "loss of care, comfort, and companionship" in the Aviation Amendment. In *Freeman v. Egypt Air,* 2002 U.S. Dist. Lexis 26913 (E.D. N.Y. 2002) the court stated:

> "Care, comfort and companionship" are not defined in DOHSA and no court has yet construed the scope of these terms. In maritime wrongful death actions, the term "society" has been defined to include "the range of mutual benefits each family member receives from the other's continued existence, including love, affection, care, attention, companionship, comfort, and protection." *Gaudet*; 414 U.S. at 585, *see Giglio v. Farrell,* 424 F. Supp. 927, 929 (S.D.N.Y. 1977), ("Loss of society" defined as "including love, affection, care, attention, companionship, comfort and protection."); *cf. Peterson v. United New York Sandy Hook Pilots Ass'n,* 17 F. Supp. 676, ("Pecuniary loss" does not include "grief … [or] loss of society and companionship.").

Does this change in DOHSA make a difference? Yes, and it can be substantial. One example can be found in *Makary v. EgyptAir (In Re Air Crash Near Nantucket Island, Massachusetts)*, 462 F.Supp.2d 360 (E.D.N.Y. 2006).

We now have the Death on the High Seas Act in a form which is not only illogical, but now provides remedies for air crash victims which are so disparate from the remedies allowed to victims of vessel causalities as to have *equal protection* implications.

Fortunately, there is a glimmer of hope that this may be corrected in bills which have recently been introduced in the House and the Senate, the "Cruise Vessel Security and Safety Act of 2008", H.R. 6408 and S. 3204. These identical bills would bring protection to cruise vessel passengers, particularly from rape and other assaults, requiring security measures, medicines and medical care by physicians licensed in the United States, and full reporting

of such incidents. The last section of the bills would also amend the Death On the High Seas Act to provide the same remedies to seafarers, vessel passengers and aviation passengers:

> **SEC. 6. AMENDMENT OF THE DEATH ON THE HIGH SEAS ACT.**
>
> (a) APPLICATION OF ACT.—Section 30302 of title 46, United States Code, is amended by striking ''3 nautical miles'' and inserting ''12 nautical miles''.
>
> (b) NONAPPLICATION TO INCIDENTS WITHIN 12- MILE LIMIT.—
>
> Section 30308 of title 46, United States Code, is amended by adding at the end thereof the following:
>
> ''(c) INCIDENTS OCCURRING WITHIN 12-MILE 2 LIMIT.—
>
> This chapter does not apply if the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas 12 nautical miles or less from the shore of the United States.''.
>
> (c) DAMAGES.—Section 30303 of title 46, United States Code, is amended—
>
> (1) by inserting ''and nonpecuniary'' after ''pecuniary''; and
>
> (2) by adding at the end ''In this section, the term 'nonpecuniary loss' means loss of care, comfort, and companionship. The individuals for whose benefit the action is brought may also recover damages for the decedent's pre-death pain and suffering.''.
>
> (d) CONFORMING AMENDMENT.—
>
> (1) Chapter 303 of title 46, United States Code, is amended by striking section 30307.
>
> (2) The chapter analysis for such chapter is amended by striking the item relating to section 30307.

It should not take a major disaster, such as the crash of an airliner into a cruise ship, for Congress to take action and do what is right. The statute is now grossly unfair and Congress

should act immediately to amend DOHSA so as to allow the recovery of nonpecuniary damages for loss of society to the victims of all marine causalities, whether by air or by sea.