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CHOAT V. KAWASAKI MOTORS CORP.: THE ALABAMA SUPREME COURT'S JOURNEY THROUGH THE MURKY WATERS OF MARITIME WRONGFUL DEATH REMEDIES

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I. Introduction

In Choat v. Kawasaki Motors Corp., [FN1] the Alabama Supreme Court established its position regarding damages recoverable under general maritime law for a wrongful death occurring within a state's territorial waters. [FN2] Choat involved a death resulting from the collision of a jet ski with an inflatable raft. The plaintiff, the mother of the decedent, sought damages under the Alabama Wrongful Death Act. However, initially on appeal, the Alabama Supreme Court, in an opinion released on May 24, 1994, denied all recovery except reimbursement of funeral expenses [FN3] by setting forth the following three positions: (1) an accident involving a jet ski is subject to admiralty jurisdiction; [FN4] (2) once admiralty jurisdiction is established, state law is inapplicable; [FN5] and (3) remedies available under general maritime law do not include loss of society, which is a nonpecuniary remedy. [FN6]

The Choat I court focused primarily on whether admiralty ***930** jurisdiction is invoked by an accident involving a jet ski and whether loss of society is recoverable under general maritime law. [FN7] The court's holding that state law cannot apply in territorial waters when admiralty jurisdiction is invoked received little discussion, [FN8] yet that very question constituted the subject of a heated debate involving practitioners, judges, and commentators.

The United States Supreme Court's decision in Yamaha Motor Corp., U.S.A. v. Calhoun, [FN9] rendered on January 9, 1996, gave the Alabama Supreme Court reason to reconsider its decision. While not specifically addressing the issues of admiralty jurisdiction and the availability of loss of society as a remedy, the U.S. Supreme Court held that state law can apply when the death of a “nonseafarer” [FN10] occurs in the territorial waters of a state. [FN11] This holding prompted the Alabama Supreme Court, on February 26, 1996, to change its position on the availability of state wrongful death remedies. [FN12] However, the Alabama Supreme Court stood by its original opinion regarding the application of admiralty jurisdiction [FN13] and removed all

discussion of loss of society from the opinion.

This Note first addresses the facts of the case and the authority upon which the court rested its decision in Choat I (part II). The Note then examines the propriety of the court's holding that admiralty jurisdiction is invoked by an accident involving a jet ski (part III); the importance of the court's change in its stance on the applicability of state law to wrongful deaths in territorial waters and the implications therefrom (part IV); and the ramifications of the court's holding that general maritime law does not provide recovery for loss of society (part V).

***931** II. The Facts and Holding of Choat I

In July 1991, Connie Johnson, who was eighteen years of age, was relaxing on an inflatable float with her friend Lania Moore. The floats were approximately fifty feet from the shoreline of a slough in Wilson Lake, an impoundment of the Tennessee River (which flows through the State of Alabama). Thirteen- year-old Michael Fields was operating a Kawasaki Jet Ski in the same location. He made a number of “playful” passes close to the floats, attempting to splash the girls. On one pass, the jet ski struck Connie in the head, causing her to fall from her float and disappear beneath the surface of the water. Divers subsequently located her body in twenty-two feet of water and retrieved it from the bottom of the slough. At the time of her death, Connie was unmarried and had no dependents.

In April 1992, Thomasine Choat, Connie's mother, filed a wrongful death action against Kawasaki Motors Corporation, Kawasaki Heavy Industries, Ltd., and Kawasaki Motors Manufacturing Corporation, U.S.A. (hereinafter collectively referred to as “ Kawasaki”), [FN14] along with a number of other individuals who were subsequently released pursuant to a settlement. [FN15] Choat alleged, inter alia, negligence and violation of the Alabama Extended Manufacturer's Liability Doctrine (AEMLD). [FN16] The trial court entered summary judgment in favor of Kawasaki, apparently holding that the claims were subject to admiralty and that, under maritime law, nondependents cannot recover punitive damages or damages for loss of society in an action for wrongful death. [FN17] Thus, the only issues before the supreme court were whether maritime law applied to Choat's action and, if so, whether damages for loss of society and punitive damages were then recoverable.

Before engaging in its analysis of the case, the court made short work of the plaintiff's contention that maritime law could ***932** be supplemented by Alabama law. [FN18] The court stated that “maritime law, whether or not it conflicts with state law, applies to actions for wrongful death in state territorial waters brought under the admiralty jurisdiction of the federal courts.” [FN19] With no discussion of the issue, the court simply concluded that “if federal courts could properly exercise admiralty jurisdiction, we must apply the substantive body of maritime law.” [FN20]

The court then divided its opinion into two parts: "Jurisdiction" [FN21] and "Maritime Remedy." [FN22] Under "Jurisdiction," the court found that admiralty jurisdiction is proper when two criteria are met. [FN23] First, the incident involved must potentially affect maritime commerce. [FN24] Second, the type of activity involved must bear "a substantial relationship to traditional maritime activity." [FN25]

The court noted that to determine the potential effect on maritime commerce, it had to imagine an incident of the same general character as having occurred not in the location in which it actually occurred, but in the busiest conceivable sea lane. [FN26] Then, it must postulate the possible effect of the occurrence in the busiest conceivable sea lane. [FN27] Thus, the court imagined the jet ski accident occurring at the mouth of the St. Lawrence Seaway and noted that the attendant rescue activities, which would include divers searching for the body, could interrupt commercial shipping. [FN28]

The court based its finding that traditional maritime activities***933** were involved on the question of whether a jet ski is a "vessel." [FN29] The court first found that operating a vessel is itself a traditional maritime activity. [FN30] In finding that a jet ski is a vessel for purposes of jurisdiction, the court relied on prior case law [FN31] and the broad definition of "vessel" propounded by Congress: The word "vessel" includes "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." [FN32] Also instructive to the court was the manner in which the owner's manual and similar materials provided with the jet ski characterized the machine: "The Jet Ski is not a toy; it is a high performance class A power boat." [FN33] The court refused to deny maritime jurisdiction because the jet ski was not a "conventional boat," stating that it was a "self-propelled device without nonaquatic function or capacity." [FN34] The court was also influenced by the fact that improper navigation was itself the basis of the products liability claim against Kawasaki. [FN35]

With its decision that maritime jurisdiction was properly invoked, the court then looked to possible remedies. The court outlined the history of Supreme Court cases dealing with maritime wrongful death remedies. [FN36] The court noted that while the Supreme Court had not yet precisely stated the types of damages***934** available for nonseamen killed within a state's territorial waters, the Court's holdings and subsequent decisions by lower federal courts strongly suggested that only pecuniary damages are available. [FN37] The court relied on a decision by the Supreme Court of Texas in holding that "(l)oss of society is not recoverable under general maritime law." [FN38] Therefore, the court held that the only damages recoverable by Choat were the expenses of Connie's funeral, which are pecuniary, and not punitive damages or damages for loss of society. [FN39]

III. Admiralty Jurisdiction

The court's holding that admiralty jurisdiction was invoked when a jet ski collided with an inflatable float was not surprising. The general rule for admiralty jurisdiction began as a simple locality test: if the wrong occurred on "navigable waters," [FN40] the action was within admi-

ralty jurisdiction. [FN41] However, recognizing that in many instances this test would lead to ridiculous results, [FN42] the Supreme Court held in Executive Jet that admiralty jurisdiction is only invoked when the wrong bears a significant relationship to traditional maritime activity. [FN43] Even if the activity itself is not traditionally maritime, the relationship test is satisfied if the contemplated activity is capable of disrupting traditional maritime activity. [FN44]

***935** It is therefore vital to define "traditional" maritime activity. Obviously, commercial shipping is a traditional maritime activity; however, it is questionable whether noncommercial activities (such as the use of vessels simply for local recreation, not for interstate trade or travel) are "traditionally" maritime within the meaning ascribed to that phrase in Executive Jet. The Fourth Circuit addressed this question with respect to the use of pleasure craft:

> The admiralty jurisdiction in England and in this country was born of a felt need to protect the domestic shipping industry in its competition with foreign shipping, and to provide a uniform body of law for the governance of domestic and foreign shipping, engaged in the movement of commercial vessels from state to state and to and from foreign states. The operation of small pleasure craft on inland waters which happen to be navigable has no more apparent relation to that kind of concern than the operation of the same kind of craft on artificial inland lakes which are not navigable waters. [FN45]

Likewise, the local operation of a jet ski simply for pleasure seems to have little to do with traditional maritime activity. [FN46]

***936** However, at least in regard to "pleasure craft," the Supreme Court subsequently addressed the question of whether admiralty jurisdiction was proper, and answered in the affirmative. In Foremost Insurance Co. v Richardson, [FN47] the Court affirmed a Fifth Circuit decision holding that a collision involving a boat used for skiing and a boat used for bass fishing properly invoked admiralty jurisdiction. [FN48] The Court specifically held that the required potential maritime activity need not be exclusively commercial. [FN49] If the wrong involves the negligent operation of a vessel on navigable waters, the Court held that "(the wrong) has a sufficient nexus to traditional maritime activity to sustain admiralty jurisdiction." [FN50] The Court stated that, "(a)lthough the primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce," admiralty is not solely concerned with those "actually engaged in commerce"; admiralty is also concerned with the potential disruptive effect of collisions on those engaged in commerce, and is therefore interested in the navigation of vessels of any kind, commercial or not. [FN51] Thus, if a jet ski is a "•pleasure' boat," as it appears to be, admiralty jurisdiction is proper according to the Court. [FN52]

Yet the dissent in Foremost Insurance is compelling. Justice Powell, with whom Chief Justice Rehnquist and Justice O'Connor joined in dissent, recognized that the Court in Executive Jet required that the wrong bear a "significant relationship to traditional maritime activity." [FN53] Powell noted that admiralty "is a specialized area of law that, since its ancient inception, has been concerned with the problems of seafaring commercial activity." [FN54] In addition, Powell

recognized the comments of Professor***937** Stolz, who stated that "(t)here can be no doubt that historically the civil jurisdiction of admiralty was exclusively concerned with matters arising from maritime commerce." [FN55]

Therefore, the use of pleasure craft, including jet skis, cannot be "traditional" as required by Executive Jet. [FN56] As Powell realized, "(i)n centuries past--long before modern means of transportation by land and air existed--rivers and oceans were the basic means of commerce, and the vessels that used the waterways were limited primarily to commercial and naval purposes." [FN57] On the other hand, "(p)leasure boating is basically a new phenomenon, the product of a technology that can produce small boats at modest cost and of an economy that puts such craft within the means of almost everyone." [FN58] The use of jet skis today presents entirely new technology, not known under traditional admiralty, and a type of recreational craft available to many because of the relatively low cost. [FN59]

In addition, the claim that jurisdiction is proper because of the potentially disruptive effect on traditional maritime activity does not follow from the Executive Jet decision. If a mere potential disruptive effect on maritime commerce bears a sufficient relation to traditional maritime activity, then the crash of an airplane in navigable waters and the subsequent rescue activities would seem to support admiralty jurisdiction. However, "(t)he holding of Executive Jet is precisely to the contrary." [FN60] Allowing any potential disruptive effect to suffice would result in ***938** a resurrection of the old locality test, specifically rejected by the Court in Executive Jet, "for any accident 'located' on navigable waters has a 'potential disruptive impact' on traffic there." [FN61]

Consider the following hypothetical: a young boy is operating a small motorbike at a lakeside park. A few feet away, another young boy is operating a jet ski, essentially an "aquatic motorbike," [FN62] in the lake itself. Each boy is involved in an accident which results in a death, and each accident spawns a lawsuit. Because the boy on the jet ski happens to be in water, a court could imaginatively relocate the accident to the mouth of the St. Lawrence Seaway, theorize that enough rescue activities would ensue to substantially affect maritime commerce, and apply maritime law. [FN63] Meanwhile, the lawsuit resulting from the motorbike accident occurring a few feet away on land and having nothing to do with traditional maritime activity is decided under state law. This situation effectively resurrects the locality test: the jet ski accident is governed by admiralty simply because it occurred on water. [FN64] Although Executive Jet clearly guarded against such a result, such results continue to flow from decisions like Choat. [FN65]

Yet another danger arises when maritime jurisdiction is invoked by accidents involving jet skis: the Limitation of Vessel Owner's Liability Act. [FN66] Under the Act, the liability of the owner of a vessel for any loss or damage caused by the vessel can be limited to the value of the owner's interest in the vessel. [FN67] The ***939** purpose of the Act "was plainly to promote American commercial shipping by protecting private investment against financially staggering claims arising out of shipboard disasters." [FN68] Although the Act originally applied only to

commercial vessels, since Congressional amendments in 1886 [FN69] many courts have applied the Act to pleasure craft as well. [FN70] The arguments against such results are obvious: as small boat traffic increases, so will the number of accidents and number of situations in which injured parties will receive inadequate compensation, thus allowing liability insurance companies to become the true beneficiaries.

The argument against applying the Act to jet skis is even more compelling. Inadequate compensation to victims of pleasure boat accidents can be "particularly shocking . . . where the post accident value of (a) WaveJammer, (a type of jet ski), and thus the liability limitation of the owner, if allowed, is a paltry $2,500 and the cost to the potential claimants (is) the loss of the life of an individual." [FN71] As a result, one court has, for the purposes of the Act, refused to characterize a jet ski as a "vessel," ***940** instead labelling it a "vehicle" or "aquatic motorbike." [FN72] However, other courts have found the Act applicable to jet skis and have allowed the owner to limit liability to the rather inexpensive cost of the jet ski. [FN73] Therefore, the holding in Choat I that a jet ski is a "vessel" [FN74] opens the door for responsible parties to unfairly limit their liability arising from jet ski accidents in a similar manner. [FN75]

Despite such concerns, the court's subsequent holding in Choat II concluded that admiralty jurisdiction was proper. [FN76] The court did not withdraw any part of the original decision concerning jurisdiction; instead, it added a paragraph citing Calhoun II. [FN77] Calhoun II involved the death of a child resulting from the collision of a WaveJammer with a vessel that was anchored in the water before a beachfront hotel in Puerto Rico. The Alabama Supreme Court noted that, before discussing the issue of remedies, the United States Supreme Court "summarily concluded" that "(b)ecause (the) case involve(d) a watercraft collision on navigable waters, it (fell) within admiralty's domain." [FN78] The court concluded that such language rendered admiralty jurisdiction appropriate for Choat's claims against Kawasaki. [FN79]

However, the court's use of this language in finding that admiralty jurisdiction applied in Choat may have been improper. The United States Supreme Court's specific holding in Calhoun II was that state remedies remain applicable when a ***941** nonseafarer dies in the territorial waters of a state. [FN80] The Court's comment concerning admiralty jurisdiction was, on the other hand, merely obiter dictum. The Court itself has recently stated that "(i)t is to the holdings of our cases, rather than their dicta, that (courts) must attend." [FN81] Because the Court did not provide a holding on the issue of admiralty jurisdiction, its decision in Calhoun II should not be inferred to stand for the proposition that admiralty jurisdiction is proper.

In addition, the Court gave no explanation as to why the case before it involved a "watercraft" collision. Instead, the Court simply cited its previous decisions in Sisson and Foremost Insurance. [FN82] However, neither of those decisions involved a jet ski. The specific issue before the Court in Sisson was whether the owner of a 56-foot pleasure boat could invoke admiralty jurisdiction, and therefore invoke the Limitation of Liability Act, when a fire on his boat spread through a marina and damaged other boats. The specific issue before the Court in Foremost Insurance was whether admiralty jurisdiction applied when a bass boat collided with a skiing boat.

By stating that the facts of Calhoun II involved "a watercraft collision," it is unclear whether the Court was referring to the collision of the jet ski with the docked "watercraft," or to the collision of the jet ski "watercraft" with the docked "watercraft." The Court's reference to Foremost Insurance, however, likely indicates the latter. On the page cited by the Court in Calhoun II, the Court in Foremost Insurance held that "a complaint alleging a collision between two vessels on navigable waters properly states a claim within the admiralty jurisdiction of the federal courts." [FN83] By stating that the case in Calhoun II involved a collision of watercraft, the Court apparently assumed that a jet ski constituted a "vessel," although the issue was never specifically addressed.

The facts of Choat, however, are arguably distinguishable from both the facts in Calhoun II and Foremost Insurance. Choat involved the collision of a jet ski "vessel" with an inflatable raft. ***942** An inflatable raft is arguably not a "vessel" for purposes of admiralty jurisdiction, so a collision of watercraft did not occur as in Calhoun II and Foremost. Nevertheless, the Alabama Supreme Court would likely be unwilling to accept this argument because the court specifically found that it did not have to reach the decision of whether an inflatable raft is a vessel after it had found that a jet ski was a vessel. [FN84]

IV. State or Federal Law?

A. The Pre-Calhoun Confusion: Choat I

The court in Choat I concluded that the principles of admiralty govern a death occurring in the territorial waters of a state and that maritime law cannot be supplemented with the Alabama Wrongful Death Act. [FN85] For the proposition that only federal maritime law controls in such wrongful death actions, the court simply cited a decision from the Second Circuit and a decision from the Supreme Court of Texas. [FN86] However, whether state law continues to apply concurrently with federal maritime law in state territorial waters constituted a much debated question.

Had Ms. Choat been able to recover under state law, she likely would have received more than compensation for funeral expenses. The Alabama Code allows the father or mother of a deceased minor to commence an action for wrongful death. [FN87] Damages recoverable under this action are entirely punitive, not compensatory, with the sole purpose of punishing the wrongful conduct causing the death and discouraging others from engaging***943** in such conduct. [FN88] Because the action is punitive in nature, its paramount purpose is the preservation of human life. [FN89] In determining the amount of damages, the jury is given complete discretion as long as that discretion is sound and honest and not unbridled or arbitrary. [FN90] However, under federal maritime law, Choat was relegated to mere compensatory damages (which only amounted to funeral expenses) and not damages intended to punish Kawasaki. [FN91]

The court's choice in Choat I to ignore state law was logical and quite possibly necessary

once it found admiralty jurisdiction. [FN92] Ever since the U.S. Supreme Court handed down the Jensen [FN93] decision, it has been recognized that federal maritime law is supreme in the admiralty arena. The Court in Jensen noted that the Constitution extended the judicial power of the United States "(t)o all cases of admiralty and maritime jurisdiction," [FN94] and that Congress was given paramount power to determine the maritime law. [FN95] The Court went on to note that "the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country" and that to allow state law to control "would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other." [FN96] Therefore, if admiralty applies, federal maritime law controls.

However, state law has encroached upon some areas within ***944** admiralty jurisdiction. In the nineteenth century, courts enforced state law liens for supplies and repairs furnished to a vessel in her home port. [FN97] State law fixed pilotage fees in territorial waters. [FN98] Even in this "heyday" of federal maritime supremacy, states could give workmen's compensation to workers injured on water "when the facts were so 'local' that the policy of uniformity was not threatened," [FN99] and states could apply state law to arbitration clauses in maritime contracts. [FN100] States could also apply a smoke-abatement code to interstate ships [FN101] and regulate oil spills in their territorial waters, even in the face of a congressional oil spill statute. [FN102] State statutes of limitation have also been referred to in determining the period of laches in maritime suits. [FN103] Finally, states have been allowed to regulate the terms and conditions of marine insurance contracts. [FN104]

The application of state versus federal law in wrongful deaths occurring in state territorial waters has only added to the confusion of whether admiralty is truly uniform and dominated by federal law. Originally, the U.S. Supreme Court in The Harrisburg [FN105] held that admiralty afforded no remedy for wrongful death in the absence of an applicable state or federal statute. [FN106] Subsequently, the Court recognized in The Hamilton [FN107] that, since no such federal statutes existed, suits arising out of maritime deaths were founded by necessity on state wrongful ***945** death statutes. [FN108] When relying on a state statute, a plaintiff had to take the statute cum onere, with no interference by maritime law concepts. [FN109]

In 1920 Congress created a federal statute covering wrongful deaths, the Death on the High Seas Act (the DOHSA). [FN110] The DOHSA, which only allows compensation for pecuniary loss, [FN111] expressly applies only to "the high seas beyond a marine league from the shore of any State"; [FN112] therefore, the DOHSA does not apply to deaths occurring in state territorial waters. [FN113] Also in 1920, Congress enacted into law the Jones Act, [FN114] which in part created a wrongful death remedy for the death of a seaman. [FN115] In addition, in 1927 Congress passed the Longshore and Harbor Workers' Compensation Act (the LHWCA), [FN116] which provided a wrongful death remedy for longshoremen. [FN117] These developments ensured that a remedy "would be available for most people killed in maritime accidents." [FN118]

However, The Harrisburg still presented problems. Seamen could recover under two theo-

ries: negligence (under the Jones Act) [FN119] and unseaworthiness. [FN120] The doctrine of unseaworthiness "imposes on a shipowner a nondelegable duty to provide ***946** seamen a vessel that is reasonably fit for its purpose," [FN121] a type of liability without fault. [FN122] Although the DOHSA allowed recovery based on seaworthiness [FN123] (which is not a basis of recovery under the Jones Act), the DOHSA did not apply to territorial waters. [FN124] Because The Harrisburg stated that general maritime law provided no wrongful death remedy, [FN125] survivors of a seaman killed in territorial waters could only recover under a theory of unseaworthiness if the applicable state statute allowed recovery on such a theory.

For this reason, the Supreme Court in Moragne v. States Marine Lines, Inc. [FN126] overruled The Harrisburg and held that there is a general maritime remedy for wrongful death. [FN127] In Moragne, the widow of a longshoreman brought suit against a vessel owner to recover damages for wrongful death, predicating her claims upon the unseaworthiness of the vessel. [FN128] The applicable state law, however, did not encompass unseaworthiness as a basis of liability. [FN129] The Court therefore held that an action for wrongful death in territorial waters did lie in admiralty. [FN130] However, the Court did not set forth the boundaries of this new cause of action. [FN131] Instead, the Court left the parameters of the general maritime cause of action for wrongful death to be developed through "further sifting through the lower (federal) courts in future litigation." [FN132]

Four Supreme Court cases following Moragne are generally cited as adding to the Moragne definition of the general maritime wrongful death cause of action. The first was Sea-Land Services, Inc. v. Gaudet, [FN133] which held that damages for loss of ***947** society are available in a general maritime wrongful death action. [FN134] The second was Mobil Oil Corp. v. Higginbotham, [FN135] which held that damages for loss of society are not allowed in actions resulting from death on the high seas, the domain of the DOHSA. [FN136] The third was Offshore Logistics, Inc. v. Tallentire, [FN137] which held that damages available under state law are not allowed in wrongful death actions which are under the domain of the DOHSA. [FN138] And the fourth was Miles v. Apex Marine Corp., [FN139] which held that the Jones Act (providing pecuniary damages) is the exclusive remedy for Jones Act seamen, regardless of whether the claim is based on Moragne's general maritime action. [FN140] Prior to 1996, [FN141] no Supreme Court case had confronted the issue before the Choat court: what damages are available, and under what law, where the deceased is not a maritime worker and where the death occurs in a state's territorial waters?

Although some courts have interpreted Moragne as ending any application of state law to deaths occurring in territorial waters, [FN142] compelling arguments in favor of the applicability of state law exist. [FN143] First, the Supreme Court has consistently allowed***948** state laws to apply as gap fillers in admiralty in the absence of a conflict with federal statutes. [FN144] One justification is that states often have a "local" interest in these gap-filler areas that overrides insignificant federal interests. For example, a state can force incoming vessels to hire local harbor pilots to guide them through troubling waters, which protects the vessel itself as well as other vessels in the harbor. [FN145] Or, a state can stop and board a vessel to check for equipment

needed to prevent oil spills and can impose strict liability for any local damages caused by an oil spill. [FN146] Because states have no such "local" interest in the high seas, the DOHSA represented "the negation of any •local' interest in high seas deaths and the affirmation of the federal interest." [FN147]

***949** Second, Congress has legislated in the field of wrongful deaths [FN148] and has chosen specifically to leave state remedies in territorial waters intact. Section 1 of the DOHSA shows that it only applies to deaths occurring "on the high seas beyond a marine league from the shore of any State." [FN149] Also, in section 7 of the DOHSA, Congress apparently saved the application of state law where the DOHSA does not apply: "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 . . . any waters within the territorial limits of any State . . . ." [FN150]

The legislative history of the DOHSA clearly indicates a congressional intent to defer to state law with regard to territorial waters. [FN151] In reaction to The Harrisburg, [FN152] which caused many to be without remedy if the applicable state statute did not provide recovery for death on the high seas, the Senate stated as follows:

> There is no reason why the admiralty law of the United States ***950** should longer depend on the statute laws of the States. . . . Congress can now bring our maritime law into line with the laws of those enlightened nations which confer a right of action for death at sea. (The Act will accomplish that result) for deaths on the high seas, leaving unimpaired the rights under State statutes as to deaths on waters within the territorial jurisdiction of the States . . . . This is for the purpose of uniformity, as the States can not(sic) properly legislate for the high seas. [FN153]

In the House, it was stated that a cause of action should be created "in cases where there is now no remedy" [FN154] and that the Representatives were deeply concerned that "the power of the States to create actions for wrongful death in no way be affected by enactment of the federal law." [FN155] Therefore, the only logical conclusion from the statute itself and its legislative history is that Congress at least thought it wise to preserve the applicability of state law in state waters. [FN156]

Third, the language of Moragne indicates the Court's intent that state law continue to apply in territorial waters. [FN157] The Court in Moragne responded to a claim that Congress, by creating legislation only for the high seas in the DOHSA, intended that there be no recovery for maritime deaths occurring in territorial waters. [FN158] The Court, looking at the relevant legislative history, [FN159] concluded that Congress "intended to ensure the ***951** continued availability of a remedy, historically provided by the States, for deaths in territorial waters." [FN160] The Court held that Congress's failure to extend the DOHSA "primarily reflected the lack of necessity for coverage by a federal statute, rather than an affirmative desire to insulate such deaths from the benefits of any federal remedy that might be available independently of the Act."

[FN161]

The lack of necessity for a federal statute encompassing territorial waters was indicated by the fact that, at the time the DOHSA was enacted, the beneficiaries of persons dying on territorial waters were not disadvantaged by exclusion from remedies provided by the DOHSA. [FN162] Rather, the state remedies generally afforded larger potential recovery than the remedies provided by the DOHSA. [FN163] The primary basis of recovery under these state statutes was negligence. [FN164] On the other hand, a seaman's right to recovery based on unseaworthiness was an obscure and rarely used remedy because of the rather unimposing duty owed by the shipowners. [FN165] Therefore, state law often imposed a stricter standard of care than that imposed by federal maritime law. [FN166]

However, the Court noted that "(t)he unseaworthiness doctrine has today become the principal vehicle for recovery by seamen for injury or death, overshadowing the negligence (remedy provided) by the Jones Act." [FN167] The Court felt that Congress could have foreseen neither this result nor the fact that the relatively generous state remedies would become useless because they did not encompass unseaworthiness. [FN168] Therefore, the Court could not find that, by legislating only to the high seas, Congress had instructed the courts "that deaths in territorial waters, caused by breaches of the evolving duty of seaworthiness, must be damnum absque injuria unless the States expand their remedies to match the scope of the federal ***952** duty." [FN169]

Consequently, the Court seemed concerned with the potential inability of longshoremen and seamen to recover based on an unseaworthiness remedy. [FN170] Although the facts of Moragne involved a longshoreman, the Court's discussion largely focused on seamen. [FN171] The Court wanted to ensure that seamen, for whom admiralty had always shown a "special solicitude," [FN172] would be afforded a remedy based on unseaworthiness [FN173] notwithstanding the fact that no state statute supplies such a remedy. The Court seemed satisfied that if current state law afforded such remedies, there would be no need for the application of federal maritime law, just as there was no need for congressional legislation in territorial waters in 1920. [FN174] When a person who is not a longshoreman or seaman dies within territorial waters today, there is likewise no need for federal maritime law because state statutes provide remedies for such persons. [FN175]

***953** Finally, Moragne does not preclude the application of state law in territorial waters because the uniformity requirement does not necessitate such a result. [FN176] The Court in Moragne stated that the recognition of a right to recover under general maritime law "will assure uniform vindication of federal policies." [FN177] The idea of uniformity arose under the Lottawanna and Jensen cases, [FN178] yet the Court in 1959 noted that Jensen and its progeny marked isolated instances where "state law must yield to the needs of a uniform federal maritime law when th(e) Court finds inroads on a harmonious system." [FN179] The Court additionally stated that "this limitation still leaves the States a wide scope." [FN180] Moreover, three years after the Moragne decision, the Court stated that Jensen and its progeny "have been confined to their facts, viz., to suits relating to the relationship of vessels . . . and to their crews." [FN181]

The Court ***954** went on to note that "(t)he fact that a whole system of liabilities was established on the basis of (Jensen and its progeny) led (the Court) years ago to establish the • twilight zone' where state regulation was permissible." [FN182] Thus, the application of state law in territorial waters is not prevented by admiralty's uniformity doctrine, though that exact reasoning was used in Choat I as the basis for reaching the opposite conclusion. [FN183]

Although these arguments seem to compel the application of state law in territorial waters, courts have disagreed on whether Moragne effectively replaced all state law with federal maritime law. [FN184] The Choat I court, among those that have held that ***955** state law is preempted by federal maritime law, relied primarily on the Wahlstrom case, [FN185] where a jet ski collided with a power boat. [FN186] The Second Circuit held in Wahlstrom that "the Supreme Court's creation in Moragne of a federal wrongful death action under general maritime law precludes the use of state wrongful death statutes in maritime claims." [FN187] For authority, the court cited eight decisions that had so held. [FN188] However, half of the cases cited involved seamen killed in territorial waters, not a nonseafarer as presented to the Wahlstrom (and Choat) courts. [FN189] Also, another case cited came from the U.S. District Court for the District of Connecticut, the same court from which the Wahlstrom decision originated. [FN190] Therefore, the precedents relied on by the court either dealt with an entirely different fact situation or came from the Wahlstrom district court itself.

A more carefully crafted decision was handed down by the Third Circuit in Calhoun v. Yamaha Motor Corp. [FN191] Calhoun I involved a suit brought by the parents of a twelve-year-old girl who was killed in an accident occurring in territorial waters while using a jet ski for recreational purposes. [FN192] The court ***956** focused primarily on Moragne and the ensuing Supreme Court cases. [FN193]

The court noted that, in Gaudet, the Supreme Court appeared to approve of the application of state statutes in maritime death cases. [FN194] As for the other three post-Moragne cases, the court recognized that the Supreme Court was simply denying the application of state law or damages not included in federal statutes to situations in which Congress had already legislated. [FN195] The Court went on to state that admiralty law simply had not spoken to the application of state versus federal law in territorial waters. [FN196] The main thrust of the post-Moragne cases is therefore clear: when Congress has spoken directly to the question of damages, courts are not free to supplement the statutory scheme with state law. [FN197]

Based on the history of Supreme Court admiralty cases, the Third Circuit concluded that "(u)nless applying state law would be inconsistent with, or would frustrate the operation of, a particular federal maritime rule of decision in this area, Moragne should not displace state law rules of decision for deaths of non- seamen in territorial waters." [FN198] The court also stated that "even where states impose liability beyond that imposed under federal law (such as in Alabama), there is not necessarily a ***957** conflict, particularly in the absence of a statement from Congress to the contrary." [FN199]

Yamaha's argument in the case was that since both the DOHSA and the Jones Act preempt state law, Moragne should be applied so as to preempt state law as well. [FN200] The court, though finding this argument "seductive" on its face, [FN201] responded that

> unlike the situations in Tallentire, Higginbotham, and Miles, each of which implicated clearly articulated federal statutory schemes, the Moragne cause of action in this context reflects anything but a clearly articulated scheme. Not only has Congress said nothing about the applicability of particular remedies, but the Court's common law has not either. And since Moragne explicitly left open a number of questions about remedies, application of state remedies remains permissible to the extent they do not conflict with whatever settled principles exist. This proposition is true whether state laws operate to plaintiffs' or defendants' benefit. [FN202]

Furthermore, the court recognized that "Moragne itself showed no hostility to concurrent application of state wrongful death statutes." [FN203]

In addition, the court held that even though Moragne recognized the importance of federal statutory commands in shaping the general maritime remedy, state wrongful death statutes should not be displaced. [FN204] The Supreme Court in Tallentire interpreted section 7 of the DOHSA, stating that the Act "saved to survivors of those killed on territorial waters the ability to ***958** pursue a state wrongful death remedy in state court." [FN205] Therefore, the Third Circuit concluded that the "intent to preserve state wrongful death remedies in state territorial waters should not be lightly disregarded, particularly since Moragne and its progeny say nothing explicit about abrogating state remedies." [FN206]

As a result, the application of state law to deaths in territorial waters therefore seemed very possible. However, the Supreme Court has had a history of "missed opportunities" to define the boundaries of maritime wrongful death actions. [FN207] Curiously, although the Court in Moragne advocated the "uniform vindication of federal policies" and the removal of "tensions and discrepancies" in the wrongful death context, [FN208] the Court continued to refuse to outline the parameters of the general maritime cause of action that it created. [FN209] By failing to resolve this dispute, courts like the Calhoun I court continued to apply state law, and courts like the Choat I court continued to apply federal law. The Supreme Court finally made a stand in Yamaha Motor Corp., U.S.A. v. Calhoun, [FN210] holding that state law still has room to operate in the admiralty arena.

B. The Resolution: Yamaha Motor Corp., U.S.A. v. Calhoun

In the landmark decision of Yamaha Motor Corp., U.S.A. v. Calhoun, [FN211] the Supreme Court held for the first time that state remedies remain available when persons other than seamen or longshoremen are killed in the territorial waters of a ***959** state. [FN212] Natalie Calhoun, a twelve-year-old, was on vacation with her family at a resort hotel in Puerto Rico. She had rented a "WaveJammer" jet ski manufactured and distributed by Yamaha Motor Corporation. While

operating the jet ski, she collided with a vessel anchored in the waters before the hotel, and was killed. Her parents, alleging defective design and manufacture, sued Yamaha in the United States District Court for the Eastern District of Pennsylvania, invoking Pennsylvania's wrongful death and survival statutes. [FN213] Yamaha claimed that the federal maritime wrongful death action created in Moragne provided the exclusive basis for recovery, displacing any remedy available under state law. Yamaha contended that, under such a maritime remedy, the Calhouns could only recover funeral expenses as pecuniary damages.

The Court began its opinion by stating that "(t)raditionally, state remedies have been applied in accident cases of this order--maritime wrongful death cases in which no federal statute specifies the appropriate relief and the decedent was not a seaman, longshore worker, or person otherwise engaged in a maritime trade." [FN214] The Court went on to state that "prior to Moragne, federal admiralty courts routinely applied state wrongful death and survival statutes in maritime accident cases." [FN215] Therefore, the Court concluded that the question before it was "whether Moragne should be read to stop that practice." [FN216]

First, the Court acknowledged that Yamaha's reading of Moragne as creating a uniform maritime remedy was not without force, since the Court itself had recognized in several contexts that "vindication of maritime policies demanded uniform adherence to a federal rule of decision, with no leeway for variation or supplementation by state law." [FN217] However, the Court went on to state that the uniformity concerns that prompted it to overrule The Harrisburg "were of a different order than those ***960** invoked by Yamaha." [FN218] The Court stated that Moragne did not overrule The Harrisburg out of concern that state remedies in maritime deaths were excessive, or that variations in state remedies threatened to interfere with the "harmonious operation of maritime law." [FN219] Instead, the uniformity concern driving the decision in Moragne related to the availability of unseaworthiness as a remedy. Because of the condition of federal statutory law concerning maritime injury and death, [FN220] the survivors of longshoremen who were killed in territorial waters could recover under an unseaworthiness theory, whereas survivors of a similarly situated seaman could not. The Court in Calhoun II thus recognized that the true uniformity sought in Moragne was in the remedies available to the workers who served ships, including longshoremen and seamen. [FN221]

In addition, the Court recognized that Moragne "centered on the extension of relief, not on the contraction of remedies," [FN222] recalling that admiralty seeks to "give rather than to withhold the remedy." [FN223] The Court also pointed out that the Court in Moragne, while creating a remedy under the general maritime law, "notably left in place the negligence claim (that Moragne) had stated under Florida's law." [FN224]

Finally, the Court recognized that it had in the past deferred to Congress when Congress had prescribed a comprehensive tort recovery scheme to be uniformly applied. [FN225] The Court noted, however, that Congress had not prescribed remedies for ***961** wrongful deaths of nonseafarers in territorial waters. [FN226] As a result, the Court chose to preserve the application of state statutes to deaths in territorial waters. [FN227]

An interesting question remains unanswered after the decision in Calhoun II: can there be recovery both under state law and a general maritime law claim? The Court used conflicting language in Calhoun II. The Court first held that state remedies "remain applicable" in territorial water deaths and have not been displaced by the federal maritime wrongful death action recognized in Moragne. [FN228] This language seems to indicate that both state remedies and general maritime remedies can be sought concurrently. However, the Court also later stated that damages available for a territorial water death "are properly governed by state law." [FN229] This language seems to indicate that only state law provides the remedy. Perhaps in a future case the Court will once again recall that "it better becomes the humane and liberal character of proceedings in admiralty to give rather than to withhold the remedy" [FN230] and allow actions under both state law and general maritime law. If so, claimants could possibly recover for loss of society even if state law does not specifically provide such recovery. [FN231]

C. The Post-Calhoun Regime: Choat II

Because of the obvious variance between its May 27, 1994 decision and the opinion of the U.S. Supreme Court in Calhoun II, the Alabama Supreme Court withdrew its original opinion and inserted a new opinion in accord with the holding of ***962** Calhoun II. [FN232] Whereas the part of the original opinion discussing remedies was divided into "Loss of Society," "Punitive Damages," and "Funeral Expenses," [FN233] the substituted opinion simply discusses Calhoun II under the heading of "Remedy." [FN234]

The court noted the Supreme Court's holding that "the application of maritime law in a case involving the death of a nonseaman in state territorial waters does not displace remedies available under that state's wrongful death statute." [FN235] Because the Supreme Court's holding was controlling in the case, the Alabama Supreme Court held that "Choat may recover such damages as are provided by S 6-5-391, Ala. Code 1975, notwithstanding the fact that (the) dispute is subject to admiralty jurisdiction." [FN236] The court expressed no views on the merits of Choat's case, [FN237] instead simply remanding the case for further proceedings. [FN238] As a result of this decision, the survivors of any nonseafarers killed in the territorial waters of Alabama or any other state will be able to recover under the applicable state statute.

V. Loss of Society

The award of damages for loss of society in a general maritime wrongful death action has been clouded under a debate similar to that regarding the application of state law. "Loss of society" includes "a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection." [FN239] The question of whether loss of society is recoverable under general maritime law was vital in Choat I, since ***963** the court held that federal maritime law applied. [FN240]

Because loss of society is nonpecuniary, it is not recoverable under the DOHSA, [FN241]

the Jones Act, [FN242] or the LHWCA. [FN243] It is clear that in these areas, loss of society is not recoverable because Congress has already spoken as to the damages recoverable. [FN244] However, courts have disagreed as to whether loss of society is recoverable under the general maritime law where the federal statutes do not apply. [FN245]

The history of Supreme Court cases addressing the issue is rather short. In Gaudet, the Court allowed loss of society damages for the death of a longshoreman killed in territorial waters. [FN246] In Higginbotham, the Court limited the application of Gaudet to situations involving territorial waters, and noted that the DOHSA, which allows only pecuniary damages, applied to occurrences on the high seas. [FN247] Finally, in Miles, the Court further emphasized its limitation of the holding in Gaudet by expressly restricting its application to incidents involving longshoremen in territorial waters. [FN248] The Court refused to allow the survivors of a seaman to recover for loss of society because Congress, in the Jones Act, had allowed only pecuniary losses; the Court stated that it could not "sanction more expansive remedies in a judicially created cause of action (the doctrine of seaworthiness) in which liability is without fault than Congress has allowed in cases of death resulting from negligence." [FN249] With these cases, the Court established that deference was to be shown to Congress; if Congress had spoken on the type of damages available, the federal courts were not free to supplement ***964** congressional intent with their own. [FN250] However, neither Congress nor the Court has spoken to the ability of persons other than maritime workers to recover for loss of society due to a wrongful death in territorial waters.

The Choat I court cited a number of cases for the proposition that loss of society damages are not recoverable. [FN251] However, by the court's own admission, all of the cases cited held that loss of society is not recoverable by the survivors of seamen, the exact holding of Miles. [FN252] The court cited only one case that held that the representatives of nonseamen could not recover for loss of society. [FN253]

Nevertheless, the Choat I court's decision that loss of society damages are not recoverable under the general maritime law seems to be in line with the "current trend . . . to deny such recovery." [FN254] Many of these decisions hold that damages for loss of society are not recoverable by survivors who were not dependent on the decedent, such as the decedent's parents. [FN255] The cases requiring dependency justify this position by emphasizing***965** that Moragne and Gaudet continually referred to the beneficiaries as "dependents." [FN256] This theory has also been supported by the belief that "somewhere a line must be drawn between those who may recover for loss of society and those who may not," and that the dependency line "appears to be the most rational, efficient and fair." [FN257]

"Dependency," however, should have no place in determining whether loss of society damages are recoverable. Loss of society is clearly a nonpecuniary remedy. There is no reason that a person not financially dependent on another family member would miss the love, affection, care, attention, companionship, and comfort of that family member any more or any less than if he or she was dependent on that family member. For example, suppose a parent dies and the child re-

covers for loss of society. Why should the same court then deny recovery if instead the child died and the parent brought suit? Since loss of society is clearly nonpecuniary, and its availability logically does not depend upon financial dependency, [FN258] the Choat I court was correct in declining to base its conclusion on the fact that "Choat was not financially dependent on her daughter." [FN259]

The Choat I court chose instead to deny recovery altogether for loss of society based on Miles. [FN260] The court interpreted Miles as "precluding recovery of nonpecuniary damages, such as the damages for loss of society." [FN261] In its holding, the court quoted the language of Miles stating that the Court was establishing a "uniform rule applicable to all actions for . . . wrongful death." [FN262] However, this quote was not complete: Miles stated that it was establishing a uniform rule "for the wrongful death of a seaman." [FN263] Earlier in its decision, the Choat I court set forth the entire quote; [FN264] yet in its holding, the court simply ***966** ignored the fact that Miles was intended to create a uniform rule for seamen only. Miles recognized the "humane and liberal character of proceedings in admiralty to give (rather) than to withhold the remedy." [FN265] However, the Court recognized that it "sail(ed) in occupied waters." [FN266] The Court denied recovery for the following reason: "Because (the) case involve(d) the death of a seaman, (the Court must) look to the Jones Act." [FN267] Conversely, where Congress had not spoken, the Court seemed to indicate that it might allow recovery for damages such as loss of society. [FN268] Thus it is clear that the Court was not addressing nonseamen.

The Supreme Court has continuously failed to give proper guidance in the area of damages for loss of society. First, the Court in Gaudet established that loss of society could be recovered under a general maritime claim. [FN269] The Court then limited the application of Gaudet to longshoremen who die in territorial waters. [FN270] However, the Court did this while recognizing that Gaudet had become "inapplicable on its facts." [FN271] The Court has therefore limited the application of Gaudet to a set of facts upon which it can never operate, but still refuses to overrule the case. As a result, many courts, including the Choat I court, have simply held that damages for loss of society can ***967** never be recovered in admiralty. [FN272] However, the intentions of the Court remain unclear because the Court has at times allowed such recovery and has yet to expressly change its mind. [FN273]

Instead of focusing on whether uniformity is being served, which does not seem to be as large a concern in admiralty as some believe, [FN274] the courts should perhaps consider what is the appropriate remedy in a given situation. The most appropriate remedy for the death of a child seems to be the recovery of damages for loss of society. The damages incurred by parents of a deceased child include the loss of the benefits received from the child's continued existence, such as love, affection, and care for the child. These damages are not pecuniary, as parents generally do not suffer pecuniary damages from the death of a child. However, instead of applying the appropriate remedy, courts often invoke admiralty jurisdiction under strained reasoning and limit damages to pecuniary loss based upon a false pretense of uniformity. [FN275] This leaves the parents with barely enough to ***968** bury their deceased child, a completely senseless result.

The Supreme Court has recently cleared the waters, to an extent, concerning loss of society. Although the Court did not specifically address the issue of loss of society, it did hold in Calhoun II that damages available for the death of a nonseafarer in territorial waters "are properly governed by state law." [FN276] Thus, if state law allows for recovery of loss of society, such damages can be awarded for the death of a nonseafarer who dies in a state's territorial waters. Choat, however, will likely not be able to recover such damages under state law because Alabama only allows recovery for punitive damages. [FN277] An interesting question that still remains is whether admiralty jurisprudence, in its zeal to give rather than withhold a remedy, [FN278] will allow a general maritime action to supplement an action under state law and provide recovery for loss of society.

VI. Conclusion

In Choat I, the Alabama Supreme Court originally held that admiralty jurisdiction was invoked when a jet ski collided with an inflatable raft and that under such maritime law the parents of the deceased child could recover only for funeral expenses. Although this decision may seem harsh, its underlying logic was grounded in ambiguous decisions of the U.S. Supreme Court and on case law from the lower courts. The Supreme Court has, through inconsistent decisions, allowed admiralty jurisdiction to be invoked in obviously nonmaritime situations where the Court had previously indicated that admiralty jurisdiction was not ***969** proper. The Court has also refused in the past to establish workable guidelines to direct the lower courts in augmenting the parameters of the maritime wrongful death action. With the Court's landmark decision in Calhoun II, the time has finally arrived when courts such as the Alabama Supreme Court will apply the appropriate law to deaths in territorial waters, instead of abandoning state law for "uniform" federal law where it is not needed.

[FN1]. No. 1920544, 1996 WL 77601 (Ala. Feb. 21, 1996), 1996 Ala. LEXIS 37 (Feb. 21, 1996) (hereinafter Choat II). This decision was substituted for the Court's original opinion, located at No. 1920544, 1994 WL 221417 (Ala. May 27, 1994), 1994 Ala. LEXIS 321 (May 27, 1994), 1994 AMC 2626 (Ala. 1994) (hereinafter Choat I). The original opinion was withdrawn in light of the United States Supreme Court's decision in Yamaha Motors Corp., U.S.A., v. Calhoun, 116 S. Ct. 619 (1996). See Choat II, 1996 WL 77601, at *5, *7; 1996 Ala. LEXIS 37, at *19, *23. The text of the original, withdrawn opinion can still be found at No. 1920544, 1994 Ala. LEXIS 321 (May 27, 1994); 1994 AMC 2626 (Ala. 1994).

[FN2]. "Territorial waters" refers to waters within the boundaries of a state, such as rivers, streams, or lakes, as well as "the coastal waters less than three nautical miles from the shore of a state." William C. Brown, III, Problems Arising from the Intersection of Traditional Maritime Law and Aviation Death and Personal Injury Liability, 68 Tul. L. Rev. 577, 581 (1994).

[FN3]. Choat I, 1994 AMC at 2642.

[FN4]. Id. at 2633.

[FN5]. Id. at 2628.

[FN6]. Id. at 2639-40.

[FN7]. See id. at 2628-40.

[FN8]. The court's discussion of the application of state law versus general maritime law was limited to one paragraph. See Choat I, 1994 AMC at 2628.

[FN9]. 116 S. Ct. 619 (1996) (hereinafter Calhoun II).

[FN10]. The Court referred to persons who are neither seamen nor longshore workers as “nonseafarers.” See Calhoun II, 116 S. Ct. at 623 n.2.

[FN11]. Id. at 628-29.

[FN12]. See Choat II, 1996 WL 77601, at *7.

[FN13]. Id. at *4.

[FN14]. Id.

[FN15]. Id. at *1 n.1.

[FN16]. Id. at *1. The AEMLD provides for recovery in a products liability action through a modified version of the Restatement (Second) of Torts S 402A (1979) strict liability theory. See Sears, Roebuck & Co. v. Haven Hills Farm, Inc., 395 So. 2d 991 (Ala. 1981) (analyzing the AEMLD).

[FN17]. Choat II, 1996 WL 77601, at *1.

[FN18]. Choat I, 1994 AMC at 2628.

[FN19]. Id. (quoting Wahlstrom v. Kawasaki Heavy Indus., Ltd., 4 F.3d 1084, 1087 (2d Cir. 1993), cert. denied, 114 S. Ct. 1060 (1994)).

[FN20]. Id.; see also Sheffield v. Owens-Corning Fiberglass Corp., 595 So. 2d 443, 447 (Ala. 1992) (mandating the application of federal law); Kennedy Engine Co. v. Dog River Marina & Boatworks, Inc., 432 So. 2d 1214, 1215 (Ala. 1983) (same).

[FN21]. Choat I, 1994 AMC at 2628.

[FN22]. Id. at 2633.

[FN23]. Id. at 2628.

[FN24]. See Sisson v. Ruby, 497 U.S. 358, 363 (1990).

[FN25]. Sisson, 497 U.S. at 362 (quoting Foremost Ins. Co. v. Richardson, 457 U.S. 668, 675 n.5 (1982)).

[FN26]. Choat I, 1994 AMC at 2629.

[FN27]. Id. (citing Sisson, 497 U.S. at 363).

[FN28]. Id. at 2629-30. The court drew its example from the Foremost case, in which the U.S. Supreme Court supported its finding of potential disruption with a description of the likely effects of a similar collision at the mouth of the St. Lawrence Seaway. See Foremost Ins., 457 U.S. at 675.

[FN29]. Choat I, 1994 AMC at 2630-33.

[FN30]. Id. at 2630 (citing Lipworth v. Kawasaki Motors Corp., U.S.A., 592 So. 2d 1151, 1153 (Fla. Dist. Ct. App.) ("(o)perating a vessel is a traditional maritime activity"), cert. denied, 113 S. Ct. 465 (1992)).

[FN31]. See id. at 2631 (relying on Wahlstrom v. Kawasaki Heavy Indus., Ltd., 800 F. Supp. 1061, 1062 (D. Conn. 1992) (involving a collision between a jet ski and a motorboat), vacated on other grounds, 4 F.3d 1084 (2d Cir. 1993), cert. denied, 114 S. Ct. 1060 (1994)), and Lipworth, 592 So. 2d at 1153 (involving a collision of a jet ski with a dock)).

[FN32]. 1 U.S.C. S 3 (1994). The court also noted that this broad definition could well include "the three men in a tub" or "Jonah inside the whale." Choat I, 1994 WL 221417, at *4 (citing McCarthy v. The Bark Peking, 716 F.2d 130, 135 (2d Cir. 1983), cert. denied, 465 U.S. 1078 (1984)).

[FN33]. Choat I, 1994 AMC at 2631.

[FN34]. Id. at 2632.

[FN35]. The complaint alleged that the jet ski was defective because "of its unreasonably dangerous operating and handling characteristics," and "because of its lack of warning that it (would) not turn without engaging (the) throttle and that when (the) throttle (was) disengaged it (would) tend to go straight even when the operator attempt(ed) a turn." Id. at 2632-33.

[FN36]. Id. at 2634-39.

[FN37]. Id. at 2638-39.

[FN38]. Choat I, 1994 AMC at 2639 (quoting Texaco Ref. & Mktg., Inc. v. Estate of Dau Van Tran, 808 S.W.2d 61, 63 (Tex.), cert. denied, 502 U.S. 908 (1991)).

[FN39]. Id. at 2642.

[FN40]. "Navigable waters" refers to waters that "are used, or are susceptible of being used, . . . as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870) (emphasis added). Therefore, any river or lake that could possibly be used for commerce or travel between states would be considered a navigable waterway.

[FN41]. See Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 253 (1972); see also The Plymouth, 70 U.S. (3 Wall.) 20, 36 (1865) ("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.")

[FN42]. One such ridiculous result would have been the application of admiralty jurisdiction when an airplane's en-

gines engulfed a seagull, causing the plane to hit a fence, hit a truck, and then by chance to crash in a lake. This was the precise fact situation before the Court in Executive Jet.

[FN43]. Executive Jet, 409 U.S. at 268.

[FN44]. Choat I, 1994 AMC at 2628-30. As shown in Part II supra, the Choat I court divided the test into two parts: the incident must potentially affect maritime commerce and must bear a substantial relationship to traditional maritime activity. Id. at 2628-30. However, the potential effect requirement is a subset of the substantial relation requirement such that either may suffice.

[FN45]. Crosson v. Vance, 484 F.2d 840, 840 (4th Cir. 1973). See generally David P. Currie, The Choice Among State Laws in Maritime Death Cases, 21 Vand. L. Rev. 297, 297 (1968) ("The justification for the federal admiralty jurisdiction is, or ought to be, an interest in promoting the shipping industry.") (citing G. Gilmore & C. Black, Admiralty 27 (1957)).

[FN46]. The Supreme Court also seemed hesitant to draw obviously non-maritime activities into the "traditionally maritime" scheme. In rejecting the pure locality test, the Court stated that "(i)n cases such as these, some courts have adhered to a mechanical application of the strict locality rule and have sustained admiralty jurisdiction despite the lack of any connection between the wrong and traditional forms of maritime commerce and navigation." Executive Jet, 409 U.S. at 255-56. The statement referred to a case involving an injury to a swimmer by a surfboard and to a case in which a water skier sustained injuries due to the negligence of the boat operator. The Choat I court held that traditional maritime activity was involved in the navigation of a "vessel," and that a jet ski could be classified as a "vessel" under its broad definition. Choat I, 1994 AMC at 2630-33. However, a surfboard could also theoretically be considered an artificial contrivance capable of being used for transportation on water, as could the three men in a tub and Jonah inside the whale. See supra note 32 and accompanying text. It is just these kinds of ridiculous results that the Court in Executive Jet apparently wished to preclude.

[FN47]. 457 U.S. 668 (1992).

[FN48]. Foremost Ins., 457 U.S. at 677.

[FN49]. Id. at 674.

[FN50]. Id.

[FN51]. Id. at 674-75.

[FN52]. See id.

[FN53]. Foremost Ins., 457 U.S. at 679 (Powell, J., dissenting) (quoting Executive Jet, 409 U.S. at 268).

[FN54]. Id; see also Randall Bridwell & Ralph U. Whitten, Admiralty Jurisdiction: The Outlook for the Doctrine of Executive Jet, 1974 Duke L.J. 757, 793 ("The maritime character of the defendant in classic situations would be defined by the presence of a commercial maritime vessel or its instrumentalities as the tortfeasor."); Frederick Swaim, Jr., Yes, Virginia, There Is an Admiralty: The Rodrigue Case, 16 Loy. L. Rev. 43, 44 (1969) ("Maritime commerce--and nothing more--is the raison d'etre for the courts and rules of admiralty."); May Kay DePoy, Comment, Pleasure Boat Torts in Admiralty Jurisdiction: Satisfying the Maritime Nexus Standard, 34 Wash. & Lee L. Rev. 121, 139-40 (1977) ("Those pleasure craft torts occurring on commercially navigable waters must be considered in light of the historical design of admiralty jurisdiction to determine whether the exercise of jurisdiction fur-

thers the commercial interests which admiralty courts were created to serve.”).

[FN55]. Foremost Ins., 457 U.S. at 680 (Powell, J., dissenting) (quoting Preble Stolz, Pleasure Boating and Admiralty: Erie at Sea, 51 Cal. L. Rev. 661, 667 (1963)); see also 7A James W. Moore et al., Moore's Federal Practice ¶ 325(5) (2d ed. 1993) (“The only valid criterion of the admiralty jurisdiction is the relation of the matter--whether it be tortious or contractual in nature--to maritime commerce.”).

[FN56]. See supra note 43 and accompanying text.

[FN57]. Foremost Ins., 457 U.S. at 680 (Powell, J., dissenting).

[FN58]. See Stolz, supra note 55, at 661.

[FN59]. Even though some types of jet skis may cost thousands of dollars, they are often available for hourly rent at recreational areas such as lakes or beaches.

[FN60]. Foremost Ins., 457 U.S. at 683 (Powell, J., dissenting).

[FN61]. Id.

[FN62]. In re Roffe, 724 F. Supp. 9, 10 n.2 (D.P.R. 1989) (characterizing a jet ski not as a “vessel” but as a “vehicle” or “a new breed of aquatic motorbikes”).

[FN63]. See Foremost Ins., 457 U.S. at 675.

[FN64]. See Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 267-68 (1972).

[FN65]. The author does not suggest that the Supreme Court of Alabama in Choat had no basis upon which to hold that admiralty jurisdiction was proper. The Foremost decision made it clear that commercial activity is not required. See Foremost Ins., 457 U.S. at 674-75. However, holding that a jet ski invokes admiralty requires strained reasoning. In nonmaritime areas, there must be concrete evidence of a need for federal intervention in order for federal law to control. See United States v. Kimbell Foods, Inc., 440 U.S. 715, 730 (1979). Why admiralty is treated differently, in that it is found to be controlling on the basis of mere generalized pleas for uniform federal law rather than concrete evidence of such a need, remains unclear. Cases like Foremost and Choat result in the application of federal jurisdiction without good reason.

[FN66]. 46 U.S.C. app. SS 181-196 (1994).

[FN67]. The Act provides:

> The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

46 U.S.C. app. S 183(a) (1994).

[FN68]. In re Porter, 272 F. Supp. 282, 283-84 (S.D. Tex. 1967).

[FN69]. Section 188 of the Act now provides that the Act applies, in addition to seagoing vessels, to "all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters." 46 U.S.C. app. S 188 (1994).

[FN70]. See In re Reading, 169 F. Supp. 165 (N.D.N.Y. 1958), aff'd, 271 F.2d 959 (2d Cir. 1959); In re Colonial Trust, 124 F. Supp. 73 (D. Conn. 1954); The Trillora II, 76 F. Supp. 50 (E.D.S.C. 1947); In re Liebler, 19 F. Supp. 829, 832 (W.D.N.Y. 1937) ("(I)t has uniformly been held by the courts that the question of the right to limitation of liability is not based upon the engagement of the vessel in maritime commerce, and further it is not based upon the question of the size of the craft."). But see In re Young, 872 F.2d 176 (6th Cir. 1989), cert. denied, 497 U.S. 1024 (1990); Richards v. Blake Builders, 528 F.2d 745 (4th Cir. 1975); In re Roffe, 724 F. Supp. 9, 10 (D.P.R. 1989) ("Although the courts are split in their positions, . . . the recent trend . . . has been to hold that the Act does not apply to pleasure crafts."); Complaint of Brown, 536 F. Supp. 750 (N.D. Ohio 1982).

[FN71]. In re Roffe, 724 F. Supp. at 10.

[FN72]. Id. at 10 n.2.

[FN73]. See Keys Jet Ski, Inc. v. Kays, 893 F.2d 1225, 1230 (11th Cir. 1990) (finding that the Act applies to pleasure craft and that there is no distinction between small motor boats and jet skis).

[FN74]. Choat I, 1994 AMC at 2633.

[FN75]. The court in Choat I failed to address whether it would allow limitation of liability to the cost of a jet ski.

[FN76]. See Choat II, 1996 WL 77601, at *4.

[FN77]. Id.

[FN78]. Id. (quoting Calhoun II, 116 S. Ct. at 623). The Court in Calhoun II gave no discussion to the issue of jurisdiction. The decision of the Third Circuit in Calhoun I, which the Supreme Court affirmed, relegated its entire discussion of jurisdiction to a simple footnote. See Calhoun v. Yamaha Motor Corp., 40 F. 3d 622, 627 n.5 (3d Cir. 1994) (hereinafter Calhoun I), aff'd, 116 S. Ct. 619 (1996). The court only stated that admiralty jurisdiction "appears to be appropriate," and even doubted whether the existence or nonexistence of admiralty jurisdiction matters in dealing with the question of remedies. Calhoun I, 40 F. 3d at 627 n.5.

[FN79]. Choat II, 1996 WL 77601, at *4.

[FN80]. See Calhoun II, 116 S. Ct. at 622.

[FN81]. Kokkonen v. Guardian Life Ins. Co., 114 S. Ct. 1673, 1676 (1994).

[FN82]. Calhoun II, 116 S. Ct. at 623.

[FN83]. Foremost Ins. Co. v. Richardson, 457 U.S. 668, 677 (1982).

[FN84]. See Choat II, 1996 WL 77601, at *4 (citing cases applying maritime law to the collision of a vessel with a swimmer and with a stationary piling).

[FN85]. Choat I, 1994 AMC at 2628 (applying a two-prong test to determine whether admiralty jurisdiction was

properly invoked).

[FN86]. Id. In a brief reference to the issue of state versus federal law, the court cited Wahlstrom v. **Kawasaki** Heavy Indus., Ltd., 4 F.3d 1084 (2d Cir. 1993), cert. denied, 114 S. Ct. 1060 (1994), and Texaco Refining & Marketing, Inc. v. Estate of Dau Van Tran, 808 S.W.2d 61 (Tex.), cert. denied, 502 U.S. 908 (1991).

[FN87]. Ala. Code S 6-5-391 (1993). If the deceased is not a minor, only the personal representative is authorized to commence an action. Id. S 6-5-410.

[FN88]. Nettles v. Bishop, 266 So. 2d 260, 263 (Ala. 1972).

[FN89]. Eich v. Town of Gulf Shores, 300 So. 2d 354, 356 (Ala. 1974).

[FN90]. Magnusson v. Swan, 279 So. 2d 422, 425 (Ala. 1973).

[FN91]. Choat I, 1994 AMC at 2640-42.

[FN92]. U.S. Const. art. 3, S 2, cl. 1; see Wahlstrom v. Kawasaki Heavy Indus., Ltd., 4 F.3d 1084, 1087 (2d Cir. 1993) (holding that federal maritime law applies exclusively to actions brought under proper admiralty jurisdiction), cert. denied, 114 S. Ct. 1060 (1994).

[FN93]. Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917).

[FN94]. U.S. Const. art. III, S 2, cl. 1.

[FN95]. U.S. Const. art. I, S 8.

[FN96]. Jensen, 244 U.S. at 215 (quoting The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1874)). Note that when the Court established the uniformity doctrine in The Lottawanna and Jensen, it recognized that the Constitution mandated such a result because of the commercial nature of admiralty. This seems to be in direct conflict with later decisions such as Foremost, in which the commercial nature of admiralty is no longer emphasized. See supra notes 47-61 and accompanying text.

[FN97]. See The Planter, 32 U.S. (7 Pet.) 324, 340-41 (1833).

[FN98]. See Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).

[FN99]. David P. Currie, The Choice Among State Laws in Maritime Death Cases, 21 Vand. L. Rev. 297, 298 (1968) (citing Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922)).

[FN100]. Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109 (1924).

[FN101]. Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960).

[FN102]. Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973). A Florida statute established strict liability for any damages incurred by the state as a result of oil spills, and subjected any ships entering its territory to being stopped and inspected for safety equipment. Askew, 411 U.S. at 327-28. These requirements were more stringent that those of the analogous federal statute. Although this would seem to disrupt commercial maritime activity,

the Act was allowed to stand.

[FN103]. Czaplicki v. The Hoegh Silvercloud, 351 U.S. 525, 533-34 (1956).

[FN104]. Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 313-21 (1955).

[FN105]. 119 U.S. 199, 213 (1886).

[FN106]. The Harrisburg, 119 U.S. at 213.

[FN107]. 207 U.S. 398 (1907).

[FN108]. The Hamilton, 207 U.S. at 404-05.

[FN109]. See The Tungus v. Skovgaard, 358 U.S. 588, 591-93 (1959).

[FN110]. 46 U.S.C. app. SS 761-767 (1994).

[FN111]. 46 U.S.C. app. S 762 (1994).

[FN112]. 46 U.S.C. app. S 761 (1994).

[FN113]. See id.

[FN114]. 46 U.S.C. app. S 688 (1994).

[FN115]. The Jones Act basically makes applicable to seamen the recovery provisions of the Federal Employees' Liability Act, which simply states that employers are liable in "damages" for the death of an employee. See 45 U.S.C. S 51 (1994). The Supreme Court has interpreted this provision to allow recovery for pecuniary loss only. See Michigan Cent. R.R. v. Vreeland, 227 U.S. 59 (1913).

[FN116]. 33 U.S.C. SS 901-950 (1994).

[FN117]. Id.

[FN118]. Calhoun v. Yamaha Motor Corp., U.S.A., 40 F.3d 622, 631 (3d Cir. 1994), ("(B)etween 1920 and 1970, deaths on the high seas were remedied by DOHSA, deaths in territorial waters were remedied by state wrongful death statutes, and deaths of seamen (whether on the high seas or in territorial waters) were remedied by the Jones Act.") (hereinafter referred to as Calhoun I), aff'd, 116 S. Ct. 619 (1996).

[FN119]. 46 U.S.C. app. S 688 (1994).

[FN120]. Calhoun I, 40 F.3d at 631; see infra notes 166-74 and accompanying text.

[FN121]. Calhoun I, 40 F.3d at 631.

[FN122]. Id. Note that for nonseamen the only duty owed by a shipowner is that of due care under the negligence theory. Kermarec v. Compagnie Gernerale Transatlantique, 358 U.S. 625 (1959).

[FN123]. Miles v. Apex Marine Corp., 498 U.S. 19, 24-25 (1990).

[FN124]. Calhoun I, 40 F.3d at 632.

[FN125]. The Harrisburg, 119 U.S. 199, 213 (1886).

[FN126]. 398 U.S. 375 (1970).

[FN127]. Moragne, 398 U.S. at 409.

[FN128]. Id. at 376.

[FN129]. Id.

[FN130]. Id. at 409.

[FN131]. Id. at 408.

[FN132]. Moragne, 398 U.S. at 408.

[FN133]. 414 U.S. 573 (1974).

[FN134]. Gaudet, 414 U.S. at 587-88. The Court expressly ignored the example of damages provided by Congress in the DOHSA by allowing more than mere pecuniary damages in keeping with the "humanitarian policy of the maritime law" that favored recovery for loss of society. Id. at 588. However, the holding in Gaudet is no longer applicable on its facts. The plaintiff, the representative of a longshoreman, brought suit based upon a theory of unseaworthiness. The 1972 amendments to the LHWCA effectively eliminated the right of longshoremen to sue upon an unseaworthiness claim. See 33 U.S.C. S 905(b) (1994). As a result, the Court, although never expressly overruling Gaudet, has limited its holding over the years "to the point that it is virtually meaningless." Miller v. American President Lines, Ltd., 989 F.2d 1450, 1458 (6th Cir.), cert. denied, 114 S. Ct. 304 (1993).

[FN135]. 436 U.S. 618 (1978).

[FN136]. Higginbotham, 436 U.S. at 618-19. The Court found that Congress had already spoken to the issue of damages on the high seas and had only provided for pecuniary damages. Thus, it was not open for the Court to supplement relief already provided by Congress. Id. at 625-26.

[FN137]. 477 U.S. 207 (1986).

[FN138]. Tallentire, 477 U.S. at 233.

[FN139]. 498 U.S. 19 (1990).

[FN140]. Miles, 498 U.S. at 32.

[FN141]. See Yamaha Motor Corp., U.S.A. v. Calhoun, 116 S. Ct. 619 (1996).

[FN142]. See infra text accompanying note 184.

[FN143]. Prior to Moragne, Alabama's wrongful death cause of action clearly would have applied. Cf. First Nat'l Bank v. National Airlines, Inc., 288 F.2d 621, 622 (2d Cir.), cert. denied, 368 U.S. 859 (1961) (holding that the applicable law depended on "whether (the accident occurred) within the territorial jurisdiction of Alabama, in which case the Alabama Wrongful Death Act, 7 Alabama Code S 123, was applicable"); Mooney v. Carter, 152 F. 147 (5th Cir. 1907) (applying Alabama law to the death of a fisherman who drowned in the Tennessee River, the same river involved in Choat).

[FN144]. See supra notes 97-104 and accompanying text.

[FN145]. Such state action was allowed in Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).

[FN146]. Askew v. American Waterways Operators, Inc., 411 U.S. 325, 342 (1973).

[FN147]. J.B. Ruhl, Finding Federalism in the Admiralty: "The Devil's Own Mess" Revisited, 12 Tul. Mar. L.J. 263, 286 (1988). The article argues that the geographical limits of a state's regulatory interests are appropriately defined by the territorial line. One reason is the problem of manageability:

> [A] Maine citizen's death in the far South Pacific would have less immediate impact on Maine than it would have if the citizen had died off of Maine's coast. It would be unwieldy at best if each citizen were to carry along the remedies and responsibilities of her state's wrongful death law around the globe.

Id. at 291-92. Thus, federal regulation on the high seas seems appropriate. The same cannot be said, however, for a state's territorial waters.

A state's "local" interest in governing wrongful deaths occurring in its own waters has been recognized to an extent by the application of state law to survival actions. While a wrongful death action allows recovery by beneficiaries resulting from the decedent's death, a survival action allows beneficiaries to recover what the decedent could have recovered but for death (such as pain and suffering occurring after the injury but before death). See Azzopardi v. Ocean Drilling & Exploration Co., 742 F.2d 890, 893 (5th Cir. 1984). The Supreme Court has allowed, at least by implication, the application of state law to survival actions:

> Most States have survival statutes applicable to tort actions generally, and admiralty courts have applied these state statutes in many instances to preserve suits for injury at sea. Where these state statutes do not apply, however, or where there is no state survival statute, there is no survival of unseaworthiness claims absent a change in the traditional maritime rule.

Miles v. Apex Marine Corp., 498 U.S. 19, 33-34 (1990) (citations and footnotes omitted) (emphasis added). The Court stated that in Tallentire it had "declined to approve or disapprove the practice of some courts of applying state survival statutes to cases involving death on the high seas." Miles, 498 U.S. at 34 n.2 (citing Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 215 n.1 (1986)). By declining to disapprove of this practice on the high seas, where the states have little interest, and by stating that there is no survival action in general maritime law "where there is no state survival statute," it is relatively clear that the Court would approve of a survival statute applying in territorial waters, where the states do have an interest. See id. at 34. It should logically follow, then, that state law should apply to wrongful death actions in territorial waters.

[FN148]. Congress created the Jones Act to provide for deaths of seamen, the LHWCA to provide for deaths of longshoremen, and the DOHSA to provide for deaths on the high seas. See supra notes 109-16 and accompanying

text.

[FN149]. 46 U.S.C. app. S 761 (1994).

[FN150]. 46 U.S.C. app. S 767 (1994). Although the Court held that S 7 was nothing more than a savings clause, i.e., it allowed DOHSA cases to be brought in state court, that holding was in reaction to a split among the circuits as to whether S 7 saved the application of state law upon the high seas. See Tallentire, 477 U.S. at 221. It should have been obvious to the courts that state law did not apply on the high seas, since that is what the DOHSA was intended for, and that S 7 simply saved state remedies in territorial waters.

[FN151]. See S. Rep. No. 216, 66th Cong., 1st Sess. 3-4 (1919); H.R. Rep. No. 674, 66th Cong., 2d Sess. 3-4 (1920).

[FN152]. 119 U.S. 199 (1886); see supra notes 105, 118-27 and accompanying text.

[FN153]. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 397 (1970) (quoting S. Rep. No. 216, 66th Cong., 1st Sess. 3-4 (1919); H.R. Rep. No. 674, 66th Cong. 2d Sess. 3-4 (1920)).

[FN154]. Moragne, 398 U.S. at 397 (quoting 59 Cong. Rec. 4486 (1920)).

[FN155]. The Tungus v. Skovgaard, 358 U.S. 588, 593 (1959) (citing 59 Cong. Rec. 4482-86 (1920)).

[FN156]. Compare the situation of wrongful death to the situation before the Fourth Circuit in United States v. Allied Towing Corp., 602 F.2d 612 (4th Cir. 1979). The court was confronted with a conviction under a federal statute which provided criminal penalties against shipowners whose violation of the law caused the death of any person. See Allied Towing, 602 F.2d at 613. The defendant claimed that the statute's provisions were only applicable to deaths occurring on the high seas. Id. However, the court found that the legislative history of the statute revealed that Congress intended it to apply universally, including a state's territorial waters. Id. at 615. This is diametrically opposed to the DOHSA, where Congress clearly intended the Act to apply only on the high seas. See supra notes 148-55 and accompanying text.

[FN157]. Moragne, 398 U.S. at 397.

[FN158]. Id. at 396-97.

[FN159]. See supra notes 151-55 and accompanying text.

[FN160]. Moragne, 398 U.S. at 397.

[FN161]. Id. at 397-98.

[FN162]. Id. at 398.

[FN163]. Id.

[FN164]. Id.

[FN165]. Moragne, 398 U.S. at 398-99.

[FN166]. Id. at 399.

[FN167]. Id.

[FN168]. Id.

[FN169]. Id. at 399-400.

[FN170]. Note that Moragne, like Gaudet, would today be inapplicable on its facts because longshoremen can no longer recover under an unseaworthiness remedy. See supra text accompanying note 134.

[FN171]. See Moragne, 398 U.S. at 395.

[FN172]. Id. at 387 (citing Gilmore & Black, supra note 45, at 1-11, 253).

[FN173]. Id. at 401.

[FN174]. See id.

[FN175]. If the survivors of a person who died in territorial waters could only bring a claim under an unseaworthiness theory, the need for maritime law to apply would be apparent; as Moragne stated, it is "the humane and liberal character of proceedings in admiralty to give (rather) than to withhold the remedy, when not required to withhold it by established and inflexible rules." Moragne, 398 U.S. at 387 (quoting The Sea Gull, 21 F. Cas. 909, 910 (C.C. Md. 1865) (No. 12,578)). In cases such as Choat, where a claim could be brought under state law, there is no need to apply federal maritime law.

In addition, the argument that Moragne replaced all state law in territorial waters is simply not compelling. First, Moragne was largely concerned with allowing remedies for violations of maritime duties. The Court provided a remedy "to effectuate the substantive duties imposed by general maritime law" by creating relief for deaths "caused by breaches of the evolving duty of seaworthiness." Moragne, 398 U.S. at 399-400 (emphasis added). The Court then simply made the logical conclusion that "(f)ederal law, rather than state, is the more appropriate source of a remedy for violation of the federally imposed duties of maritime law." Id. at 401 n.15 (emphasis added). In Choat and other such cases, federal maritime duties are not even involved or alleged. Second, the language of the Court clearly shows that it did not intend to completely abrogate the application of state law. Consider the following language:

> The incongruity of forcing the States to provide the sole remedy to effectuate duties that have no basis in state policy is highlighted in this case. The Florida Supreme Court ruled that the state wrongful-death act was concerned only with "traditional common-law concepts," and not with "concepts peculiar to maritime law such as 'unseaworthiness' and the comparative negligence rule." It found no reason to believe that the Florida Legislature intended to cover, or even considered, the "completely foreign" maritime duty of seaworthiness.

Moragne, 398 U.S. at 401 n.15 (emphasis added). In addition to those strictly maritime duties, there are other bases of recovery, such as the products liability claim discussed in Choat, under which state law seems appropriate. The thrust of Moragne is that such state remedies cannot be the "sole" remedies for violations of federal maritime duties when the former would not provide relief. See Moragne, 398 U.S. at 398-400.

[FN176]. An emerging trend in admiralty is the weakness with which the principle of uniformity is applied in admiralty cases. See supra note 82 and accompanying text.

[FN177]. Moragne, 398 U.S. at 401.

[FN178]. See supra notes 93-96 and accompanying text.

[FN179]. See Romero v. International Terminal Operating Co., 358 U.S. 354, 373 (1959). In addition, the Jensen case itself recognized that uniformity was not offended by "the right given to recover in death cases." See Southern Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917).

[FN180]. Romero, 358 U.S. at 373 (emphasis added). Among other available remedies, the Court noted the application of state wrongful death statutes. Id. at 373-74.

[FN181]. Askew v. American Waterways Operators, Inc., 411 U.S. 325, 344 (1973). In Askew, the Court gave deference to the congressional desire to refrain from a total preemption of state law. Florida passed an oil spill statute even though a federal oil spill statute already existed. The Court noted that "sea-to-shore pollution--historically within the reach of the police power of States--is not silently taken away from the States by the Admiralty Extension Act, which does not purport to supply the exclusive remedy." Askew, 411 U.S. at 343. Likewise, Congress does not purport to supply the exclusive remedy for wrongful death in the Jones Act, the LHWCA, or the DOHSA (which specifically provides that state law can still control in territorial waters); thus the application of state law should not be "silently" taken away. See Wahlstrom v. Kawasaki Heavy Indus. Ltd., 4 F.3d 1084, 1088 (2d Cir. 1994), cert. denied, 114 S. Ct. 1060 (1995).

[FN182]. Askew, 411 U.S. at 344. Where there is no hearing and conclusion by a federal agency that maritime law controls, the Court presumes that the application of state law is constitutional. Id.

[FN183]. See Choat I, 1994 AMC at 2628.

[FN184]. For post-Moragne cases holding that federal maritime law controls when a nonseaman is killed in territorial waters, see Wahlstrom v. Kawasaki Heavy Industries, Ltd., 4 F.3d 1084 (2d Cir. 1993), cert. denied, 114 S. Ct. 1060 (1994) (involving a products liability action against the manufacturer of a jet ski); In re DFDS Seaways (Bahamas) Ltd., 684 F. Supp. 1160, 1162 (S.D.N.Y. 1987) ("It is well settled that federal maritime law is to be applied to the exclusion of conflicting state law even in state courts."); Gilmore v. Witschorek, 411 F. Supp. 491 (E.D. Ill. 1976) (involving a death resulting from the collision of pleasure boats); and Texaco Ref. & Mktg., Inc. v. Estate of Dau Van Tran, 808 S.W.2d 61 (Tex.) (holding that Moragne displaces state wrongful death statutes), cert. denied, 502 U.S. 908 (1991).

For cases holding that state law can be applied in such situations, see Ellenwood v. Exxon Shipping Co., 984 F.2d 1270, 1280 n.12 (1st Cir.), cert. denied, 113 S. Ct. 2987 (1993) ("Even today, plaintiffs may invoke state wrongful death statutes under the saving clause insofar as they involve accidents in territorial waters and do not conflict with the substantive principles developed under the maritime wrongful death doctrine."); Lyon v. Ranger III, 858 F.2d 22, 27 (1st Cir. 1988) (holding that "because the accident (claiming the lives of the scuba divers) took place in Massachusetts waters only (one-quarter) mile from the coast, we should turn to Massachusetts law"); and Marcum v. United States, 452 F.2d 36, 37-38 (5th Cir. 1971) (holding that the conduct giving rise to liability in a wrongful death action is to be measured by the standards imposed by state law). See also Wright et al., 14 Federal Practice & Procedure S 3672 (2d. ed. Supp. 1994) ("If (an) accident occurs within a marine league from shore, where the (DOHSA) has no effect, the survivors can recover damages under the state wrongful death statute, including, when provided, reimbursement for non-economic losses.").

It is important to note that many of the cases applying federal law do so only if state law would impair uniformity or would not provide a remedy. Cf. Byrd v. Byrd, 657 F.2d 615, 617 (4th Cir. 1981) ("A state law . . . will . . . not be applied where its adoption would impair the uniformity and simplicity which is a basic principle of the federal admiralty law, or where its application would defeat an otherwise meritorious maritime cause of action."). The fact that a state cause of action may provide better remedies for a plaintiff, as Alabama's wrongful death action likely would, is not sufficient to show that the uniformity concern has been impaired. See supra note 183 and accompanying text.

[FN185]. Choat I, 1994 AMC at 2628, 2631.

[FN186]. See Wahlstrom v. Kawasaki Heavy Industries, Ltd., 4 F.3d 1084 (2d Cir. 1993), cert. denied, 114 S. Ct. 1060 (1994).

[FN187]. Wahlstrom, 4 F.3d at 1089.

[FN188]. Id.

[FN189]. See Nelson v. United States, 639 F.2d 469 (9th Cir. 1980) (involving a decedent injured in the course of his employment as a seaman); In re S/S Helena, 529 F.2d 744, 746 (5th Cir. 1976) (involving the collision of vessels on the Mississippi River resulting in the death of seventeen "crewmen"); In re Cambria S.S. Co., 505 F.2d 517 (6th Cir. 1974), cert. denied, 420 U.S. 975 (1975) (involving the death of the captain and a crewmember of a vessel); Neal v. Barisich, Inc., 707 F. Supp. 862 (E.D. La.), aff'd, 889 F.2d 273 (5th Cir. 1989) (involving the death of a seaman who was thrown overboard following a collision of ships on the Mississippi River).

[FN190]. See Shield v. Bayliner Marine Corp., 822 F. Supp. 81 (D. Conn. 1993). The court, instead of providing its own reasoning, simply relied on the Wahlstrom case. Shield, 822 F. Supp. at 82.

[FN191]. 40 F.3d 622 (3d Cir. 1994), aff'd, 116 S. Ct. 619 (1996).

[FN192]. Calhoun I, 40 F.3d at 624. Although the court decided that admiralty jurisdiction was proper, it decided to apply state law. The court stated that the general maritime law often incorporates state law, and "the Supreme Court has begun to view the distinction between federal law incorporating state law as a rule of decision and state law operating of its own force as of theoretical importance only." Id. at 628 (citing O'Melveny & Meyers v. FDIC, 114 S. Ct. 2048, 2048 (1994)); see also supra notes 97-104 and accompanying text (discussing state gap fillers). Consequently, just because admiralty is invoked does not mean that state law is completely abandoned.

[FN193]. Calhoun I, 40 F.3d at 633-37.

[FN194]. Id. at 634 (citing Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 587-88 (1974)).

[FN195]. Id. For example, the Higginbotham Court did not allow loss of society damages on the high seas where Congress had already stated in the DOHSA that pecuniary damages alone were available. Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 626 (1978). In Tallentire, the Court held that Louisiana law was not applicable on the high seas because Congress had legislated in that area. Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 233 (1986). And in Miles, the Court held that damages recoverable for the death of a seaman are determined exclusively by the Jones Act, in which Congress provided wrongful death remedies for the survivors of seamen. Miles v. Apex Marine Corp., 498 U.S. 19, 32-33 (1990).

[FN196]. Calhoun I, 40 F.3d. at 628 n.7.

[FN197]. Id.

[FN198]. Id. at 639-40.

[FN199]. Id. at 640 n.33 (citing California v. ARC Am. Corp., 490 U.S. 93, 105 (1989) ("Ordinarily, state (law) causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law, . . . and no clear purpose of Congress indicates that we should decide otherwise in this case.")).

[FN200]. Id. at 640.

[FN201]. Calhoun I, 40 F.3d at 640.

[FN202]. Id.

[FN203]. Id. at 641-42. The court stated that "to read into Moragne the idea that it was placing a ceiling on recovery for wrongful death, rather than a floor, is somewhat ahistorical. The Moragne cause of action was in many respects a gap-filling measure to ensure that seamen (and their survivors) would all be treated alike." Id. at 642 (citing Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 597, 608 n.19 (1974) (Powell, J., dissenting)).

[FN204]. Id. at 642.

[FN205]. Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 225 (1986).

[FN206]. Calhoun I, 40 F.3d at 642. The court maintained that the incorporation of the provisions of the DOHSA in state territorial cases was illogical. If this is what Moragne is to stand for, it would in effect transform a statute designed to save state remedies into one that displaces state remedies. Id.
As for admiralty's uniformity requirement, the court noted that state gap-fillers already exist, allowing variation, such as the existing difference in remedies available to seamen and longshoremen. Id. at 643-44.

[FN207]. See Ruhl, supra note 147, at 265.

[FN208]. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 401 (1970).

[FN209]. Moragne, 398 U.S. at 400.

[FN210]. 116 S. Ct. 619 (1996).

[FN211]. 116 S. Ct. 619 (1996).

[FN212]. Calhoun II, 116 S. Ct. at 622, 629.

[FN213]. The Supreme Court expressly refused to give an opinion on which state law, Pennsylvanian or Puerto Rican, was to apply in the case. Id. at 629 n.14. The Court left that determination for the district court on remand. Id.

[FN214]. Id. at 621-22.

[FN215]. Id. at 623-24.

[FN216]. Id. at 624.

[FN217]. Calhoun II, 116 S. Ct. at 625-26.

[FN218]. Id. at 626.

[FN219]. Id.

[FN220]. At the time of the Moragne decision, seamen were afforded recovery under the Jones Act. Under the Jones Act, seamen could only recover under a negligence theory, and not under any state remedy, including seaworthiness. Longshoremen had no such statute at the time, and were allowed to recover under a seaworthiness cause of action. As a result, the survivors of a longshoreman killed in the territorial waters of a state could sue under a seaworthiness theory, while survivors of a similarly situated seaman could not. Unseaworthiness as a basis of recovery for longshoremen was ultimately terminated by Congress in its 1972 amendments to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. SS 901-950 (1994).

[FN221]. Calhoun II, 116 S. Ct. at 627.

[FN222]. Id. at 627.

[FN223]. Id.

[FN224]. Id. at 627-28.

[FN225]. Id. at 628.

[FN226]. Calhoun II, 116 S. Ct. at 628.

[FN227]. Id. It is important to note that a state rule that specifically conflicts with an established federal maritime rule of decision may be displaced by the federal rule. See Calhoun I, 40 F.3d at 627 n.5. The Supreme Court did not specifically address this issue in Calhoun II.

[FN228]. Calhoun II, 116 S. Ct. at 622.

[FN229]. Id. at 629.

[FN230]. Id. at 627 (quoting Moragne, 398 U.S. at 387).

[FN231]. Alabama only allows recovery via punitive damages. See supra notes 88-90 and accompanying text. If claimants were allowed to seek recovery under general maritime law as well, even Alabama claimants would have the possibility of recovering for loss of society, provided that such a remedy is still supplied by the general maritime law.

[FN232]. See Choat II, 1996 WL 77601, at *1.

[FN233]. See Choat I, 1994 AMC at 2639-42.

[FN234]. Choat II, 1996 WL 77601, at *5-*7.

[FN235]. Id. at *7.

[FN236]. Id. For a discussion of recovery under the Alabama Wrongful Death Act, see supra notes 87-90 and accompanying text.

[FN237]. Choat II, 1996 WL 77601, at *7 n.4.

[FN238]. Id. at *7.

[FN239]. Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 585 (1974); see also Levinge Corp. v. Ledezma, 752 S.W.2d 641, 646 (Tex. Ct. App. 1988) (defining "loss of society").

[FN240]. Choat I, 1994 AMC at 2628.

[FN241]. See 46 U.S.C. app. S 762 (1994) (allowing only "compensation for the pecuniary loss" sustained by a beneficiary).

[FN242]. See Miles v. Apex Marine Corp., 498 U.S. 19, 33 (1990) (holding that damages for loss of society are not recoverable in a Jones Act cause of action because the Act only provides for recovery of pecuniary loss).

[FN243]. See 33 U.S.C. SS 904, 907-909 (1994).

[FN244]. See Miles, 498 U.S. at 32 ("It would be inconsistent with (the Court's) place in the constitutional scheme were we to sanction more expansive remedies . . . than Congress has allowed . . . .").

[FN245]. See infra note 254 and accompanying text.

[FN246]. Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 587-88 (1974).

[FN247]. Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 623-24 (1978).

[FN248]. Miles, 498 U.S. at 31.

[FN249]. Id. at 32-33.

[FN250]. See supra notes 246-49 and accompanying text.

[FN251]. Choat I, 1994 AMC at 2639-40.

[FN252]. Id.

[FN253]. Id. at 2639 (citing Texaco Ref. & Mktg., Inc. v. Estate of Dau Van Tran, 808 S.W.2d 61 (Tex.) (involving the death of a "good Samaritan" who was killed while attempting to help a shrimper free his boat's propeller), cert. denied, 502 U.S. 908 (1991)).

[FN254]. See Cantore v. Blue Lagoon Water Sports, Inc., 799 F. Supp. 1151, 1152 (S.D. Fla. 1992) (involving a

death arising from the collision of two jet skis); see also Walker v. Braus, 995 F.2d 77, 80 (5th Cir. 1993) ("(R)ecent case law developments indicate that the trend is to eliminate (loss of society) damages across the board in maritime cases."). But see Palmer v. Ribax, Inc., 407 F. Supp. 974, 979 (M.D. Fla. 1976) (involving the death of a nonseaman on a navigable inland lake in Florida, in which the court held that "the parents may bring a Moragne-type wrongful death action to recover for loss of society actually caused by the death of their child"); In re Farrel Lines, Inc., 378 F. Supp. 1354, 1358 (S.D. Ga. 1974) (involving the death of nonseamen in the territorial waters of Georgia, in which the court held that survivors "may recover damages for loss of . . . society"), rev'd on other grounds, 530 F.2d 7 (5th Cir. 1976).

[FN255]. See Cantore, 799 F. Supp. at 1155 ("Plaintiff will not be entitled to recover on behalf of decedent's parents damages for loss of society unless actual financial dependency is proven."); Truehart v. Blandon, 672 F. Supp. 929, 938 (E.D. La. 1987) (stating that a line must be drawn somewhere, and drawing the line at dependency); Lipworth v. Kawasaki Motors Corp., U.S.A., 592 So. 2d 1151 (Fla. Dist. Ct. App.), cert. denied, 113 S. Ct. 465 (1992) (involving suit by parents of eleven-year-old killed when his jet ski collided with a dock).

[FN256]. See Truehart, 672 F. Supp. at 932-33.

[FN257]. Id. at 938.

[FN258]. Not all courts state dependency as a prerequisite to recovery; some simply state that damages for loss of society are not recoverable at all. See Walker, 995 F.2d at 81-82.

[FN259]. See Choat I, 1994 AMC at 2640.

[FN260]. Id. at 2640.

[FN261]. Id.

[FN262]. Id. at 2639 (quoting Miles v. Apex Marine Corp., 498 U.S. 19, 33 (1990)).

[FN263]. Miles, 498 U.S. at 33 (emphasis added).

[FN264]. Choat I, 1994 AMC at 2639.

[FN265]. Miles, 498 U.S. at 36 (quoting Moragne v. States Marine Lines, Inc., 398 U.S. 375, 387 (1970)).

[FN266]. Id.

[FN267]. Id.

[FN268]. The Choat court failed to recognize that Miles was primarily concerned with establishing a rule for the survivors of seamen by which their recovery did not depend upon whether a seaman died on one side of the state territorial line or the other. See id. at 33. The precise holding of Miles was that the Court "restore(d) a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law." Id. (emphasis added).

Whether admiralty is even concerned with uniformity when a nonseaman is killed is unclear. The death of seamen is clearly a maritime concern, because seamen are the traditional wards of admiralty. There appears to be no similar federal interest in the death of nonseamen, who are governed in all other respects by state law. The uniform

application of federal law to the deaths of seamen may be justified, but the demand for uniformity in applying federal law to persons to whom the application of federal law seems unnecessary is not.

[FN269]. Sea Land Servs., Inc. v. Gaudet, 414 U.S. 573, 587-88 (1974).

[FN270]. Miles, 498 U.S. at 31.

[FN271]. Id. at 30 n.1. For an explanation of why Gaudet had become inapplicable on its facts, see supra note 134.

[FN272]. Choat I, 1994 AMC at 2640.

[FN273]. See Gaudet, 414 U.S. at 587-88.

[FN274]. See supra notes 97-104 and accompanying text (discussing state gap-fillers). Contrary to the claim that uniformity reigns in admiralty, a trend that has developed through the years is

> the weakness with which the principle of uniformity, i.e., the notion that Moragne initiated a trend in the case law to make recovery for maritime deaths more uniform--which permeates the rhetoric of the case law--has actually been applied in these cases. For, although the cases often mention uniformity as a guiding principle, the Court's actions belie its importance. Higginbotham, for example, quite consciously created an anomaly (the unavailability of non-pecuniary damages for wrongful death at high sea where such damages were available to longshoremen killed in territorial waters), stating that "a desire for uniformity cannot override the statute (DOHSA)." Similarly, Tallentire rejected a rule that would make DOHSA recoveries consistent with those available under Moragne for deaths on territorial waters. And Miles viewed the variety of survival actions under state law without alarm, declining to fashion a uniform federal rule on the matter that would cover all plaintiffs . . . . (T)he thrust of these cases suggests that the concept of uniformity has a good deal less weight than has been thought . . . .

Calhoun I, 40 F.3d at 636-37.

[FN275]. One argument for uniformity is for the protection of the shipping industry, since admiralty has traditionally been concerned with shipping. See supra note 54 and accompanying text. However, providing uniform rules for defendants such as Kawasaki, which largely produces motorbikes and aquatic motorbikes, does nothing to promote the shipping industry.

[FN276]. Calhoun II, 116 S. Ct. at 629. The Third Circuit's decision in the same case, which was affirmed, concluded that "whether loss of society . . . (is) available for the death of a non-seaman in territorial waters is a question to be decided in accordance with state law." Calhoun I, 40 F.3d at 644. The Alabama Supreme Court apparently reached the same conclusion--in Choat II all discussion on the issue of loss of society was removed from the court's original decision in Choat I. See Choat II, 1996 WL 77601, at *5-*7.

[FN277]. See Eich v. Town of Gulf Shores, 300 So. 2d 354 (Ala. 1974) (holding that damages recoverable for the death of a minor child are entirely punitive); see also Shirley v. Shirley, 261 Ala. 100, 73 So. 2d 77 (Ala. 1954) (holding that the proper view of the nature of the damages claimed is the fixation of a sum which will have a tendency to prevent similar wrongful deaths).

[FN278]. See Moragne v. States Marine Lines, Inc., 398 U.S. 375, 387 (1970).