

Winter 2012

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Ryan Linsner

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Recommended Citation

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ENSURING ADEQUATE COMPENSATION TO THE VICTIMS OF THE DEEPWATER HORIZON EXPLOSION: WHO SAYS YOU CAN'T TEACH AN OLD DOG NEW TRICKS?

RYAN LINSNER*

I. INTRODUCTION

Please believe me; no amount of money can ever compensate us for Gordon's¹ death. We know that. But this is the only available means to make things right.²

When it rains, it pours, especially in New Orleans, Louisiana.³ First, Hurricane Katrina wreaked havoc along the Gulf Coast, and now oil companies, along with greedy lobbyists, are adding insult to injury.⁴ On April 20, 2010, eleven workers⁵

* Ryan Linsner graduated from the John Marshall Law School in May 2012.

1. Gordon Jones is one of the eleven workers who lost their lives aboard the Deepwater Horizon oil rig on April 20, 2010. Ryan Grimm, *Father of BP Victim, Gordon Jones, Lashes Out at BP CEO Tony Hayward*, HUFFINGTON POST (June 2, 2010), http://www.huffingtonpost.com/2010/06/02/father-of-bp-victim-gordo_n_598516.html.

2. *Id.*

3. See Willie Drye, *Hurricane Katrina Smashes Gulf Coast*, NAT'L GEOGRAPHIC NEWS (Aug. 29, 2005), http://news.nationalgeographic.com/news/2005/0829_050829_katrina.html (noting that in 2005, Hurricane Katrina produced 140 miles per hour wind and storm surges nearly two stories tall. This category-five storm wreaked havoc on the nearly 500,000 New Orleans residents living below sea level). See also Tina Susman & Nicole Santa Cruz, *Gulf Oil Spill: New Orleans Protesters Rage Against BP*, L.A. TIMES, May 30, 2010, <http://latimesblogs.latimes.com/greenspace/2010/05/gulf-oil-spill-new-orleans-protesters-rage-at-bp.html> (quoting a woman who has been greatly impacted by both Hurricane Katrina and now, the Gulf Oil Spill). She said the Gulf in "our life . . . [i]t is the second time that we've been trashed . . . [the] country's watching us go down." *Id.*

4. Oil companies are outraged by the moratorium placed on offshore drilling companies despite the devastating effects of the April 20, 2010, Deepwater Horizon oil rig explosion. Tim Webb, *US Gulf Oil Drilling Ban Is Destroying 'Ecosystem of Businesses'*, GUARDIAN, June 21, 2010, <http://www.guardian.co.uk/business/2010/jun/21/oil-bp-oil-spill>. The oil giants' rationale is that this ban will further impact and destroy local economies as it may result in tens of thousands of job losses. *Id.* These companies, including BP, show little remorse, as evinced by their failure to reach out to the victims' family members and pay respectful condolences. Bob Fuss, *Brother of Killed Oil Rig Worker: BP Never Called*, CBS NEWS: POLITICS (June 8, 2010),

perished following an explosion on the Deepwater Horizon oil rig, a mere fifty miles off the coast of Venice, Louisiana.⁶ In addition, seventeen other workers were injured, three of whom were listed in serious condition.⁷ This explosion was caused by a bubble of methane gas that escaped from the well and shot up the drill column, expanding while traveling through several barriers before exploding.⁸ This methane gas ignited a series of explosions aboard the oil rig that subsequently led to the eruption of oil from the Macondo well.⁹ To date, this has been the worst offshore oil spill in United States history.¹⁰

Since the onset of the oil spill, the well¹¹ has spewed over 206

http://www.cbsnews.com/8301-503544_162-20007102-503544.html. BP's chief of staff states that deepwater drilling is needed, as other sources of oil will become depleted. *BP CEOs Stand-in Heckled at Oil Meeting*, CBS NEWS: BUSINESS (June 22, 2010), <http://www.cbsnews.com/stories/2010/06/22/business/main6605662.shtml>.

5. These are the men that lost their lives on the Deepwater Horizon: Jason Anderson, Dale Burkeen, Donald Clark, Stephen Curtis, Gordon Jones, Karl Kleppinger, Blair Manuel, Wyatt Kemp, Dewey Revette, Shane Roshto, and Adam Weise. *11 Victims of Deepwater Horizon Explosion Honored at Memorial Service*, CNN (May 25, 2010), http://articles.cnn.com/2010-05-25/us/deepwater.horizon.memorial_1_rig-oil-worker-explosion?s=PM:US. The bodies of the victims were never found despite extensive efforts of search and rescue teams. *Id.*

6. *Coast Guard Calls Off Search for 11 Missing in Oil Rig Fire in Gulf of Mexico*, WASH. POST, Apr. 24, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/23/AR2010042304648.html>.

7. Bruce Nichols & Anna Driver, *Rig Sinks in Gulf of Mexico, Oil Spill Risk Looms*, REUTERS, Apr. 22, 2010, <http://uk.reuters.com/article/idUSTRE63L4UG20100422>.

8. On the rig, the first thing the workers noticed was the seawater shooting 240 feet into the air. *Bubble of Methane Gas Triggered Rig Blast*, BOS. HERALD, May 8, 2010, http://www.bostonherald.com/business/general/view/20100507bubble_of_methane_triggered_rig_blast/. As the bubble of gas moves up from the depths of the sea, the bubble increases in size and is able to pick up power to break through several safety barriers. *Id.* One worker stated, "the expanding bubble becomes like a cannon shooting the gas in your face." *Id.*

9. *Id.*

10. There was no celebration following the permanent seal of the oil well. Harry R. Weber, *BP Oil Well Near Death, but Disaster Is Not Over*, NEWSDAY (Sept. 18, 2010), <http://www.newsday.com/business/bp-s-oil-well-near-death-but-disaster-is-not-over-1.2299905>. According to Rich Robson, the offshore installation manager, "[i]t is kind of bittersweet because we lost eleven men out here, . . . there is not going to be any real celebration. To a lot of people the water out here is a cemetery." *Id.*

11. See *Offshore Field Development Projects: Macondo*, SUBSEAIQ (Sept. 20, 2010), http://www.subseaiq.com/data/Project.aspx?project_id=562&AspxAutoDetectCookieSupport=1 (reporting that the Macondo well is located 4993 feet below the surface of the Gulf on the Mississippi Canyon Block 252; following the explosion on April 20, 2010, the well leaked approximately 5000 barrels per day).

million gallons of oil into the Gulf of Mexico.¹² After months of disarray, the maxim, “avarice is the root of all evils” is certainly evident here.¹³ The damage the Gulf Coast has sustained—and will continue to sustain—is inconceivable.¹⁴ Not only have the ecosystems been damaged, but the fishing and tourism industries have also taken a devastating blow.¹⁵ But more importantly, eleven lives have been taken from loved ones at the expense of greed.¹⁶

Each of the eleven victims epitomized the traditions and principles of the working class.¹⁷ Now their families and friends are left with only memories. These were people. These were men with wives, sons and daughters, mothers and fathers, brothers and sisters, and in some fortunate instances, grandmothers and grandfathers.¹⁸ The grief and mourning will eventually subside,

12. Harry R. Weber, *Engineers: 1 More Pressure Test Needed on BP Well*, NOLA.COM (Sept. 18, 2010), http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/09/engineers_1_more_pressure_test.html.

13. Joel Achenbach, *After Gulf Coast Oil Spill, Scientists Envision Devastation for Region*, WASH. POST, May 5, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/04/AR2010050402980.html>.

14. The ripple effect of the “spill will be lasting for years, if not decades” states a senior scientist at National Wildlife Federation. Joel Achenbach & David Brown, *In Gulf Oil Spill’s Long Reach, Ecological Damage Could Last Decades*, WASH. POST, June 6, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/05/AR2010060503987.html>. The effects of oil spills are long enduring and often times the ecological damage will take years to calculate. *Id.*

15. According to a report published by Texas A&M University Press, fishing and tourism make up two of the four largest industries in the Gulf of Mexico, which all account for \$234 billion in economic activity each year. Steve Hargreaves, *Oil Spill Damage Spreads Through Gulf Economies*, CNN MONEY (June 1, 2010), http://money.cnn.com/2010/05/30/news/economy/gulf_economy/index.htm. Tourism itself is a \$100 billion industry. *Id.* Many predict the recent oil spill will cost the Gulf economies near \$14 billion and some even predict damages totaling over \$100 billion. *Id.*

16. See *Deepwater Horizon and Modern Offshore Drilling Disasters*, OFFSHORE-TECHNOLOGY.COM (May 7, 2010), <http://www.offshore-technology.com/features/feature84417/> (demonstrating through empirical evidence that offshore oil rig explosions can be more devastating than shipping incidents).

17. The eleven victims traveled long distances from three states to work on the Deepwater Horizon. *Amid Gulf Oil Spill, 11 Families Grieve*, CBS NEWS: US (May 4, 2010), <http://www.cbsnews.com/stories/2010/05/04/national/main6459199.shtml>. One young man, age twenty-four, drove ten hours every three weeks to Louisiana and when he was not working he was spending time with his girlfriend and engaged in many of his hobbies. *Id.* Many of the workers were loving fathers and caring husbands. *Id.*

18. The families of the victims grieved but also celebrated the shortened yet joyous lives of their loved ones. The grandmother of Weise stated, “[w]e celebrated his life on Saturday. At the Lutheran Church, it was standing room only. That should tell you a little about him.” *Id.*

but the love and altruism these men brought their families will forever be remembered. The loss that these families and friends have suffered is irreparable.¹⁹

As if the mourning and suffering is not enough for the victims' families, antiquated maritime laws will impede their efforts to recover damages by capping the liability of these large, sophisticated, and highly profitable companies.²⁰

This Comment will focus on the outdated maritime liability laws that limit the victims' recovery following the recent Gulf Coast tragedy, and will propose that these laws be amended. Part II will examine the current governing law and the responsible parties, and will describe past Congressional attempts to ameliorate the situation in the Gulf. Part III of this Comment will discuss the proposed amendments to existing maritime liability laws and examine the current complexities of such maritime liability laws. Part IV will propose changes that must be made to ensure the victims' families are adequately compensated for the loss of their loved ones.

II. BACKGROUND

A. *Those Responsible*

Of course, the inevitable question becomes: Who is liable to the survivors of the eleven victims? There are two main parties responsible for this disaster: (1) BP PLC (BP); and (2) Transocean, Ltd. (Transocean).²¹ The first, BP, the majority owner of the

19. The families' consternation comes from the lack of attention the victims have received. Their deaths linger in the shadow of the environmental and economic damage caused by the oil spill. *Id.*

20. See Gibson Vance, *U.S. Maritime Laws Hamper Oil Spill Settlements*, WASH. POST, Aug. 11, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/10/AR2010081006027.html>. (discussing the necessary steps that need to be taken to avoid having the tax payers, Gulf Coast residents, and small businesses pay for the Gulf Oil Spill).

21. Andarko Petroleum is one of the world's largest independent oil exploration and production companies. ANDARKO, <http://www.anadarko.com/About/Pages/Overview.aspx> (last visited Feb. 15, 2012). One of the company's core values is to operate with integrity and trust, and act as leaders in the industry by openly communicating about all of its business activities. *Id.* Ironically, in the aftermath of the explosion on the Deepwater Horizon, the CEO of Andarko Petroleum did not have time to testify in front of the United States Senate, but had time to accept the award for Oil and Gas Executive of the Year. Ryan Grim, *Partial Owner of Deepwater Horizon Declines to Testify*, HUFFINGTON POST (June 15, 2010), http://www.huffingtonpost.com/2010/06/15/partial-owner-of-deepwater_n_612974.html. Andarko Petroleum and MOEX Offshore hold a twenty-five percent and ten percent share of the Macondo well, respectively. *Id.* Both BP and Transocean sent representatives to attend. *Id.*

Macondo well, leased the oil rig from Transocean.²² Following a preliminary round of investigations, BP denied any defective design in the oil well.²³ Instead, BP pointed its finger at Transocean and two other companies: Halliburton²⁴ and Cameron International Corporation,²⁵ stating that “a complex and interlinked series of mechanical failures, human judgments, engineering design, operational implementation, and team interfaces” contributed to the accident.²⁶ As expected, this incident ignited a legal battle involving every conceivable party with an interest, as justice remains the imperative in the Gulf region.²⁷

22. Although a majority owner of the Macondo oil well, BP points fingers at other parties involved. Harry Weber, *Gulf Oil Is Dead but the Pain Will Remain*, SEATTLE TIMES, Sept. 19, 2010, http://seattletimes.nwsources.com/html/business/technology/2012938765_apugulfoilspill.html?syndication=rss.

23. *BP Report Spreads Blame Around for Oil Disaster*, CBS NEWS (Sept. 8, 2010), <http://www.cbsnews.com/stories/2010/09/08/national/main6844776.shtml>.

24. Halliburton is a company that specializes in drilling and evaluating oil wells to help optimize well construction activities. *History of Halliburton*, HALLIBURTON, <http://www.halliburton.com/AboutUs/default.aspx?navid=970&pageid=2312> (last visited Feb. 15, 2012). Again, Halliburton stresses the importance of the environment as being contingent upon the company's success. *Id.* Halliburton provided all services associated with the cement operations. BP, BP FULL INVESTIGATION REPORT: APPENDIX F 207-09 (Sept. 8, 2010), available at http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/incident_response/STAGING/local_assets/downloads_pdfs/Deepwater_Horizon_Accident_Investigation_Report_Appendices_ABFGH.pdf. Halliburton was responsible for engineering support for both onshore and offshore equipment aboard the Deepwater Horizon. *Id.* Twenty-four hours before the explosion, Halliburton used cement to seal the space between the well casing and the hole drilled at the bottom of the sea. *BP Report Spreads Blame Around for Oil Disaster*, *supra* note 23.

25. Cameron International Corporation is the worldwide provider of blowout preventers. Carl Franzen, *Oil Spill Points to Rig Fail-Safe as Utter Failure*, AOL NEWS (Apr. 30, 2010), <http://www.aolnews.com/nation/article/oil-spill-debacle-points-to-rig-fail-safe-as-utter-failure/19461009>. Mel Whitby, an engineer for Cameron International describes these blowout preventers as “the main barrier protecting human life, capital equipment and the environment.” *Id.* CEO, Jack Moore, acknowledged that Cameron International provided the blowout preventer for the Deepwater Horizon. *Id.*

26. Press Release, BP, BP Releases Report on Gulf of Mexico Tragedy (Sept. 8, 2010), <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7064893>.

27. By the end of June, BP was inundated with over 87,000 claims and requests for compensation to keep businesses running, to ensure timely payments of mortgages, and to even help families put food on the table. Kristin Choo, *The Price of Oil: Lawyers See Both Promise and Problems in the \$20 Billion Gulf Coast Compensation Fund*, 86 A.B.A. J. 34 (2010). See also Allison Torres Burtka, *Ripple Effect: Gulf Coast Oil Spill Litigation*, AM. ASS'N. JUST., Aug. 2010, <http://www.justice.org/cps/rde/xchg/justice/hs.xsl/12840.htm> (indicating that over three hundred lawsuits have been filed by plaintiffs that include the families of the decedents, injured workers on the oil

1. BP

Pursuant to the Oil Pollution Act (OPA), which Congress enacted in 2006 in response to the 1989 Exxon Valdez²⁸ Oil Spill, the responsible party's liability is capped at \$75 million plus the costs for removal.²⁹ It is limiting both in nature and effect as it precludes recovery for personal injury claims.³⁰ As the majority³¹ owner of the Macondo well, BP has voluntarily waived the OPA cap on liability and set aside a \$20 billion escrow fund for Deepwater Horizon spill claims.³² The appointed administrator of the fund states that the purpose of the fund is to "minimize the legal technicalities and maximize efficient, swift payments."³³ In addition to this escrow fund, BP continues to exhaust its resources to make things right again in the Gulf region.³⁴

rig, landowners along the Gulf, fishermen, and a plethora of environmental groups).

28. See SAMUEL K. SKINNER & WILLIAM K REILLY, *THE EXXON VALDEZ OIL SPILL* 5 (May 1989), available at <http://www.uscg.mil/history/webshipwrecks/ExxonValdezNRT1989Report.pdf> (explaining that on March 24, 1989, the Exxon Valdez struck the Bligh Reef, spilling eleven million gallons of oil into the pristine waters of the Prince William Sound, which left the wildlife, shorelines, and Alaskan markets devastated). Nearly eighteen years have passed and the effects of the Exxon Valdez still haunt and impact Alaska's environment and wildlife. Elizabeth Weise, *Damage of Exxon Valdez Endures*, USA TODAY, Feb. 2, 2007, http://www.usatoday.com/news/nation/2007-01-31-exxon-alaska_x.htm.

29. See 33 U.S.C. § 2704(a)(3) (2006) (stating, "the responsible party with respect to each incident shall not exceed—for an offshore facility except a deepwater port, the total of all removal costs plus \$75,000,000.").

30. The owner of a vessel that discharges oil is strictly liable for removal costs and damages, but is absolved from liability of damages from personal injury. *Gabrick v. Lauren Maritime, Inc.*, 623 F. Supp. 2d 741, 745 (E.D. La. 2009).

31. See Tim Webb, *BP Charged Well Partner \$1 Billion for Its Share of Oil Spill Clean Up*, GUARDIAN, Aug. 3, 2010, <http://www.guardian.co.uk/business/2010/aug/03/bp-gulf-oil-spill-costs> (stating that Anadarko Petroleum Corp., its third partner in the project, has refused to meet its share of the costs).

32. *Deepwater Horizon Oil Spill Trust - \$20 Billion Fund*, BP, <http://www.bp.com/sectiongenericarticle800.do?categoryId=9036584&contentId=7067605> (last visited Feb. 15, 2012).

33. Kenneth Feinberg was the special administrator of the September 11th Victims Compensation Fund which distributed \$7 billion. Sheryl Gay Stolberg, *Administering Fund, A Master Mediator*, N.Y. TIMES, June 16, 2010, <http://www.nytimes.com/2010/06/17/us/17feinberg.html>. Although this is only a little over one third of the \$20 billion escrow fund, President Barack Obama appointed him the independent administrator on June 16, 2010. *Id.*

34. See BP, *Sustainability Review*, 2 (2010), available at http://www.bp.com/assets/bp_internet/globalbp/STAGING/global_assets/e_s_assets/e_s_assets_2010/downloads_pdfs/bp_sustainability_review_2010.pdf (stating BP's response effort was one of unprecedented scale; deploying 48,000 people, 6500 vessels, and 125 aircrafts).

2. *Transocean*

Since its inception in 1953, Transocean, the owner of the Deepwater Horizon, has become the world's largest offshore drilling contractor.³⁵ On May 13, 2010, following the Deepwater Horizon incident, Transocean filed a claim pursuant to the Ship Owner's Limitation on Liability Act of 1851 to limit its liability to \$26.8 million.³⁶ It claims that filing the limitation claim is necessary to protect the interests of the company, its employees, and its shareholders.³⁷ Subsequently, the company has reported an expected \$270 million profit on its insurance policy because the insurance company insured the oil rig at a value higher than it's worth.³⁸

B. *Victims' Families' Right to Recover*

The families of the eleven victims are severely limited in their right to recover from BP and Transocean. These impediments stem from three federal acts: (1) the Death on High Seas Act (DOHSA);³⁹ (2) the Jones Act;⁴⁰ and (3) the Limitation of Ship Owner's Liability Act of 1851.⁴¹

1. *DOHSA*

DOHSA was passed in 1920 in an effort to provide uniformity to negligent and wrongful death actions occurring on the high seas.⁴² Since its enactment, DOHSA has been the exclusive remedy for the family members of those killed in international waters, meaning neither state wrongful death statutes nor general maritime law may supplement the provided remedies.⁴³ If death

35. *Our Company: Our History*, TRANSOCEAN, <http://www.deepwater.com/fw/main/Our-History-3.html> (last visited Feb. 15, 2012).

36. *See, e.g.*, 46 U.S.C. § 30505 (2006) (limiting the ship owner's liability to the value of the vessel to its post-accident value); *In re Complaint and Petition of Triton Asset Leasing GmbH et al.*, No. 10-01721, 2010 WL 1942950 (S.D. Tex. May 13, 2010) (initiating Transocean, Ltd.'s limitation of liability under 46 U.S.C. § 30505).

37. *In re Complaint and Petition of Triton Asset Leasing GmbH et al.*, No. 10-01721, 2010 WL 1942950.

38. *See Senators Want AG to Investigate Transocean's \$1 Billion Dividend*, 30 No. 24 WESTLAW J. ENVTL. 12, 12 (2010) (stating that pursuing claims may become more difficult now that sources allege Transocean, Ltd. plans on distributing \$1 billion to its shareholders).

39. *See* 46 U.S.C. § 30303 (2006) (allowing recovery for pecuniary damages only).

40. *See* 46 U.S.C. § 30104 (2006) (limiting recovery to the personal representatives of the seamen by only allowing recovery for pecuniary damages).

41. 46 U.S.C. § 30505 (2006).

42. S. REP. NO. 216 (1919).

43. The statute states as follows:

When the death of an individual is caused by wrongful act, neglect, or

occurs on the high seas, then DOHSA governs the recoverable wrongful death damages arising from the vessel's unseaworthiness.⁴⁴ It enables qualified relatives of the decedent to file a claim and recover for pecuniary losses, but it does not authorize recovery for non-pecuniary damages.⁴⁵ Thus, where it applies, it preempts all wrongful death actions under state law.⁴⁶ In addition, this Act prohibits relatives of the decedents from recovering punitive damages because they are classified as non-pecuniary.⁴⁷ Therefore, victims' families are limited to recover pecuniary damages, which include: loss of financial support,⁴⁸ loss of services of the decedent,⁴⁹ loss of inheritance,⁵⁰ and funeral expenses.

default occurring on the high seas beyond [three] nautical miles from the shore of the United States, the personal representatives of the decedent may bring a civil action in admiralty against the person or vessel responsible. The action shall be for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative.

46 U.S.C. § 30302 (2006).

44. Unseaworthiness arises when the vessel is either insufficiently or defectively equipped. *Waldron v. Moore-McCormack Lines, Inc.*, 386 U.S. 724, 726 (1967). A vessel is also deemed to be "unseaworthy if [it] lacks the proper equipment or devices to allow it to engage safely in the trade for which it was intended." *Doles v. Koden Intern., Inc.*, 779 So.2d 609, 612 (Fla. 5th Dist. Ct. App. 2001) (quoting *Meyers v. Scott-A-Way Corp.*, 662 So.2d 411, 413 (Fla. 3d Dist. Ct. App. 1995)).

45. 46 U.S.C. § 30303 (2006). *See also* *Dooley v. Korean Air Lines Co., Ltd.*, 524 U.S. 116, 118 (1998) (holding that when a death occurs on high seas, personal representatives may not recover decedent's pre-death pain and suffering through a survival action under general maritime law).

46. *Dooley*, 524 U.S. at 123.

47. 46 U.S.C. § 30303 (2006).

48. DOHSA allows for loss of support, which comprises all financial contributions the decedent would have made to dependents. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 584-85 (1974), *superseded by statute*, 46 U.S.C. § 30104, *as recognized in*, *Miles v. Apex Marine Corp.*, 498 U.S. 19, 31-32 (1990) (stating the holding of *Gaudet* applies only in territorial waters and it applies only to longshoremen).

49. Services include "the nurture, training, education, and guidance that a child would have received had not the parent been wrongfully killed." *Gaudet*, 414 U.S. at 584-85 (quoting *Mich. Cent. R.R. Co. v. Vreeland*, 227 U.S. 59, 71 (1913)).

50. Before a plaintiff may recover loss of inheritance damages, the decision is left to the fact-finder. *Snyder v. Whittaker Corp.*, 839 F.2d 1085, 1093 (5th Cir. 1988). It must be proven that the decedent would have accumulated property. *Id.* *See also In re Air Crash Disaster at New Orleans, La.*, 795 F.2d 1230, 1234-35 (5th Cir. 1986) (examining decedent's propensity to invest, tax rates, and consumption of income to determine amount recoverable for inheritance damages).

a. Non-pecuniary Damages

Non-pecuniary damages can include, but are not limited to, loss of consortium⁵¹ and loss of society.⁵² Loss of consortium is based on a legally protected interest in personal relationships, with marriage being the most common of these relationships.⁵³ Non-pecuniary damages also include loss of society. The Court in *Mobil Oil Corp. v. Higginbotham*⁵⁴ explicitly stated that loss of society damages are precluded from recovery under DOHSA.⁵⁵ This holding, therefore, excludes damage recovery for loss of care, comfort, and companionship.⁵⁶ Of the eleven victims, nine left behind wives.⁵⁷ As a result of this decision, the nine surviving wives will not be able to recover any damages for future suffering by the victims' wives for an inability to share life experiences with the deceased.

Furthermore, problems arise in calculating noneconomic damages due to their high variability.⁵⁸ But, in most wrongful death cases, the economic damages only comprise a small percentage of the total amount of recovery.⁵⁹ Therefore, without

51. See generally *Am. Export Lines, Inc. v. Alvez*, 446 U.S. 274, 284 (1980) (noting in wrongful death cases, a clear majority of states allow a wife to recover loss of consortium damages).

52. In a case where a helicopter crashed one hundred miles off the coast of the Louisiana shore and killed three passengers and a pilot, the Court held that the survivors are precluded from recovery for loss of society damages due to the strict limitations of DOHSA. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 624-25 (1978).

53. See *Gunning v. Gen. Motors Corp.*, 779 P.2d 64, 67 (1989) (stating damages for loss of consortium necessitates a finding of the established marital relationship of the couple prior to the accident (citing *Bain v. Gleason*, 726 P.2d 1153, 1154 (Mont. 1986)).

54. *Mobil Oil Corp.*, 436 U.S. at 624-25.

55. *Id.*

56. See Katherine J. Santon, *The Worth of a Human Life*, 85 N.D. L. REV. 123, 130-31 (2009) (finding that generally in most wrongful death cases, loss of society is a form of recoverable economic damages, but calculating loss of society has created many issues for the courts); *Id.* at 134 (noting courts examine the decedent-beneficiary relationship by considering factors such as the "closeness of the family unit, the warmth of feeling between family members, and the character of the decedent as kind and attentive or kind and loving . . .").

57. See *Amid Gulf Oil Spill*, *supra* note 17, (noting the following workers left behind wives: Jason Anderson, Aaron Dale Burkeen, Donald Clark, Stephen Curtis, Gordon Jones, Roy Wyatt Kemp, Karl Kepplinger, Dewey Revette, and Shane Roshto).

58. The measure of noneconomic damages is not explainable by objective or observable measures. James F. Blumstein, *Making the System Work Better: Improving the Process for Determination of Non-Economic Loss*, 35 N.M. L. REV. 401, 405 (2005). Rather, the subjective nature of the jury's valuation of noneconomic damages creates much speculation amongst commentators. *Id.*

59. See Kimberly A. Gershon & Barbara L. Ristow, *Quantum Survey 1997-1999*, 23 TUL. MAR. L.J. 609, 652-57 (1999) (analyzing wrongful death lawsuits

non-pecuniary damages, many families would be without any meaningful remedy.

2. *The Jones Act*

Since its enactment, the Jones Act has incorporated certain provisions of the Federal Employers Liability Act ("FELA").⁶⁰ FELA states that employers are liable for damages that result from employees' injuries or death.⁶¹ The Jones Act incorporates this provision, and thus allows qualified surviving members of seamen to file negligence claims against an employer.⁶² Analogous to DOHSA, the survivors can recover loss of financial support, any loss of services, loss of inheritance, and funeral costs.⁶³

3. *Limitation of Ship Owner's Liability Act of 1851*

This ancient maritime liability law limits the liability of a ship owner to the value of the vessel following an accident,⁶⁴ contingent upon the existence of negligence.⁶⁵ This law was enacted in 1851 for the sole purpose of encouraging shipping.⁶⁶ Today, the Act has the same effect it had 160 years ago.⁶⁷

that have been filed in state and federal courts). In a California state court, the family of a student that was killed on a boat was awarded economic damages in the amount of \$296,500 and \$1,125,000 in noneconomic damages. *Id.* at 652. In another case, where two non-seafarers were killed when their boat collided with dredging pipeline, their parents were awarded more than \$950,000 for pain and suffering. *Id.* at 655.

60. See 45 U.S.C. § 51 (1939) (stating in relevant part, "every common carrier . . . shall be liable in damages to any person suffering injury while he is employed . . . for such injury or death resulting in whole or in part from the negligence of the [employer]").

61. *Id.*

62. 46 U.S.C. § 30104 (2008).

63. *Id.*

64. The statute states as follows:

Except as provided in section 30506 of this title, the liability of the owner of a vessel for any claim, debt, or liability, described in subsection (b) shall not exceed the value of the vessel and pending freight. If the vessel has more than one owner, the proportionate share of the liability of any one owner shall not exceed that owner's proportionate interest in the vessel and pending freight.

46 U.S.C. § 30505 (2006).

65. *Id.* at § 30505(a)(1)(A).

66. This Act encouraged investments in shipping during a time when it was imperative to remain competitive in international shipping. Amie L. Medley, *A Sea of Confusion: The Shipowner's Limitation of Liability Act as an Independent Basis for Admiralty Jurisdiction*, 108 MICH. L. REV. 229, 235-36 (2009). By protecting investments, ship owners and other investors were induced to invest their money in an otherwise precarious industry. *Id.*

67. See generally Shannon A. Thornhill, Comment, *The Flotilla Doctrine: Is Liverpool Simply Outdated or Is It Time To Abandon Ship?*, 33 TUL. MAR. L.J. 261, 265 (2008) (stating today the Limitation on Liability Act is outdated and was intended for a "different time, different economy and different industry.").

C. Congressional Action⁶⁸

In an effort to protect the rights of the victims of the Deepwater Horizon explosion, in June of 2010, the House Judiciary Chairman John Conyers, Jr., introduced H.R. 5503: "Securing Protections for the Injured from the Limitations on Liability Act" (SPILL Act).⁶⁹ And on July 1, 2010, the House of Representatives passed H.R. 5503.⁷⁰ After the bill was read to the Senate twice and referred to the Committee on Commerce, Science, and Transportation, the bill has essentially disappeared.⁷¹

Supporters of the bill looked to encourage both safety and accountability.⁷² Incentives to ensure safety are minimized due to the current laws governing liability.⁷³ Senator Patrick Leahy of Vermont stated, "[t]he residents of the Gulf Coast deserve better and the American people deserve better from all big oil companies who exploit our natural resources for enormous profit."⁷⁴

68. Currently, the vast majority of bills before Congress involving the Gulf Oil Spill aim towards Gulf Coast restoration, not seeking justice for the families who have lost their loved ones aboard the Deepwater Horizon oil rig. See H.R. 1870, 112th Cong. (2011) (seeking to safely increase domestic oil and gas production); S. 1140, 112th Cong. (2011) (seeking to restore Gulf Coast areas); H.R. 832, 112th Cong. (2011) (seeking to amend the Public Health Service Act); H.R. 56, 112th Cong. (2011) (seeking to restore Gulf Coast areas).

69. This bill was introduced to examine and make necessary changes to the liability statutes governing the recent Gulf Oil Spill. Securing Protections for the Injured from Limitations on Liability Act, H.R. 5503, 111th Cong., 2d Sess. (2010), LEGISLATIVE DIGEST, <http://www.gop.gov/bill/111/2/hr5503>. Its main focus is to bring justice to the victims' families. *Id.*

70. See Am. Ass'n for Justice, *Congress Hears From Oil Spill Victims: House Expands Remedies for Rig Workers*, 46-AUG TRIAL 46 (2010) (discussing the American Association for Justice's push towards ensuring fair and adequate compensation will be provided to victims).

71. As of November 15, 2011, the last major congressional action on the bill was on July 13, 2010, where it was received in the Senate, read twice, and referred to the Committee on Commerce, Science, and Transportation. *Bill Summary & Status, 111th Congress (2009-2010), H.R. 5503*, LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:H.R.5503>: (last visited Feb. 15, 2012).

72. Press Release, Am. Ass'n for Justice, SPILL Act to Provide Justice for Oil Rig Disaster Victims (June 23, 2010), <http://www.justice.org/cps/rde/xchg/justice/hs.xsl/12646.htm>.

73. See *infra* note 74.

74. In Senator Patrick Leahy's statement to the Senate Judiciary Committee, he indicated he wished to also see the ruling of *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2634 (2008) overturned due to the arbitrary nature of its holding. In *Exxon*, the Court imposed a 1:1 ratio of punitive damages to compensatory damages. Senator Leahy asked, "[i]s anyone surprised that, after the Supreme Court effectively capped damages designed to punish corporate misconduct, oil companies cut corners and sacrificed safety?" *The Risky Business of Big Oil: Have Recent Court Decisions and Liability Caps Encouraged Irresponsible Corporate Behavior?: Hearing on H.R. 5503 Before the S. Comm. on the Judiciary*, 111th Cong. 1-3 (2010) (statement of Patrick Leahy, United States Senator).

Does justice vanish at high seas? Anachronistic maritime liability laws preclude the family members of the eleven victims from receiving proper and just compensation for the loss of their loved ones. Congress must act progressively and retroactively to avoid the injustice that has haunted families for nearly a century.

III. ANALYSIS

This section will initially examine the three major amendments to the maritime liability laws that govern the explosion on the Deepwater Horizon: (1) DOHSA; (2) The Jones Act; and (3) the Limitation of Liability Act. These three major amendments take the form of the recent SPILL Act.⁷⁵ It goes on to further discuss the troubles courts encounter in their attempt to strike a balance between congressional deference and uniformity in wrongful death actions on the high seas.

A. The SPILL Act

The SPILL Act (the Act), which never survived the scrupulous review of the United States Senate,⁷⁶ aimed to ensure adequate compensation to the families of the eleven victims.⁷⁷ The Act focused on three main amendments to be made to the maritime liability laws.⁷⁸ The Act amends both DOHSA and the Jones Act.⁷⁹ Additionally, it repeals the 1851 Limitation on Liability Act.⁸⁰ With the Act's retroactive effect,⁸¹ all of its provisions will be

75. H.R. 5503.

76. LIBRARY OF CONGRESS, *supra* note 71.

77. H.R. 5503.

78. *Id.*

79. *Id.*

80. *See id.* (amending Section 363 of Title 11 of the United States Code by prohibiting a trustee in bankruptcy from selling or leasing any property that is part of the estate of a debtor that is liable for a cause of action arising out of the Oil Protection Act of 1990, to a purchaser in a total dollar amount exceeding a specified amount delineated under the Clayton Act unless: (1) there is an agreement to the condition of sale of unsecured payment of claims arising from the incident not paid by the debtor; or (2) all classes of unsecured claims approve the sale of such assets); *see also* Press Release, U.S. H. Comm. on the Judiciary, Judiciary Panel Passes SPILL Act to Bring Liability Laws to the 21st Century (June 23, 2010), http://judiciary.house.gov/issues/issues_Gulfspill.html (last visited Feb. 15, 2012) (noting the SPILL Act seeks to prevent the responsible parties from limiting their employees' access to the media). In addition, it amends the Clean Fairness Act by allowing state attorney generals from being remedial actions in their own state courts. *Id.*

81. This retroactive bill will enforce all of its provisions against BP and Transocean. *See* H.R. 5503 (stating the natural consequence of this effect is that the victims' family members are entitled to recover non-pecuniary damages and Transocean will be precluded from limiting its liability to \$26.8 million). The Court only requires the retroactivity be rational or reasonable to the purpose of the legislation. *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). Unlike retroactive laws in the criminal context,

enforceable against BP and Transocean in the wake of the Deepwater Horizon explosion.⁸²

First to be considered are the amendments to DOHSA. Under Section 30304, as it currently stands, a decedent's spouse, parent, child, or dependent relative may only bring a civil action for the death of the decedent when the death occurs more than three nautical miles from the shore of the United States.⁸³ Next, in Section 30303, the survivors' recovery "shall be a fair compensation for the pecuniary loss sustained by the individuals for whose benefit the action is brought."⁸⁴ The SPILL Act proposes to amend both of these DOHSA sections.⁸⁵ As to the first, the Act amends it by adding "or law" after "admiralty" and by adding "survivors including" before "spouse."⁸⁶ As to the second, the Act amends it by including "non-pecuniary losses" after "pecuniary losses."⁸⁷ In addition, it adds "plus a fair compensation for the decedent's pain and suffering."⁸⁸ The second section concludes with a definition of "non-pecuniary damages," which means loss of care, comfort, and companionship.⁸⁹

Second is the discussion of the Jones Act, which enables the personal representative of a seaman to bring a lawsuit against the seaman's employer if the injury or death occurred during the course of the seaman's employment.⁹⁰ The SPILL Act seeks to amend Section 30104 by including the following clause, "[i]n addition to other amounts authorized under such laws, the

courts have been "surprisingly permissive in upholding Congress's efforts to upset settled expectations in the civil context." Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143, 2149 (1996). Although courts have been permissive in allowing retroactive lawmaking in the civil context, Professor Krent admonishes the legislature from such liberal engagement. *Id.* It allows lawmakers to "brush aside the reliance interests of those who fail to anticipate legal change." *Id.* at 2184.

82. Substantive due process imposes a highly deferential standard for retroactive statutes that qualify as economic legislation, such as H.R. 5503. *Pension Ben. Guar. Corp.*, 467 U.S. at 730. The statute must simply meet the rational basis test. *Id.* The U.S. Supreme Court has held that economic burdens between injured parties and those responsible survive rational basis scrutiny. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 14 (1976); see generally *Landgraf v. USI Film Prods.*, 511 U.S. 244, 267-68 (1994) (finding retroactive provisions often serve legitimate purposes such as an enactment in response to an emergency).

83. 46 U.S.C. § 30302.

84. 46 U.S.C. § 30303.

85. See *supra* text accompanying notes 83-84 (describing the limitations under DOHSA).

86. H.R. 5503.

87. *Id.*

88. *Id.*

89. *Id.*

90. 46 U.S.C. § 30104.

recovery for a seaman who so dies shall include recovery for loss of care, comfort, and companionship.”⁹¹

Third, the Limitation of Liability Act, promulgated in 1851, limits the liability of a ship owner to the value of the vessel at the termination of the voyage.⁹² Congress aims, through the current legislation, to repeal this Act in its entirety.⁹³

B. Wrongful Death Actions at Sea

Recovery for those killed on the high seas is clearly limited, shown by the three laws discussed above. Those killed in comparable situations, in territorial waters or on land, are afforded much greater protection.⁹⁴ Thus, these wrongful death statutes be reconciled to create consistency and uniformity with wrongful death cases occurring on the high seas.

1. Congressional Deference

Deaths occurring on the high seas continue to create complex legal situations because of inconsistent rulings. In *Miles v. Apex Marine Corp.*,⁹⁵ the mother of a seaman killed aboard a vessel brought a Jones Act claim against her son’s employer for breach of the warranty of seaworthiness under general maritime law for hiring a crew member unfit to serve.⁹⁶ In deciding whether the mother was entitled to recover loss of society, the Court deferred heavily to Congress.⁹⁷ The Court stated that “Congress remains [the] superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation.”⁹⁸ DOHSA explicitly limits recoverable damages in wrongful death suits to pecuniary losses sustained by beneficiaries,⁹⁹ while the Jones Act implicitly does.¹⁰⁰ The Court therefore held that the beneficiary of a deceased seaman could not recover non-pecuniary damages in an unseaworthiness action against the deceased seaman’s employer.¹⁰¹

91. H.R. 5503.

92. 46 U.S.C. § 30505.

93. H.R. 5503.

94. *Gaudet*, 414 U.S. at 587-88.

95. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 21 (1990).

96. *Id.*

97. *Id.* at 26.

98. *Id.* at 27.

99. 46 U.S.C. § 30303.

100. See *Mich. Cent. R.R. Co.*, 227 U.S. at 69-71 (stating that although FELA only states that employers shall be liable in damages for the injury or death of an employee, this provision is nearly identical to Lord Campbell’s Act.). This Act has therefore been interpreted as providing recovery for strictly pecuniary losses. *Id.*

101. *Miles*, 498 U.S. at 36.

In an antithetical ruling, the Court in *Yamaha Motor Corp., U.S.A. v. Calhoun*¹⁰² unanimously held a non-seaman killed in state territorial waters could recover non-pecuniary damages under properly governed state law.¹⁰³ This case involved a young girl who was killed while riding an allegedly defective jet ski.¹⁰⁴ Here, Yamaha argued that federal maritime law governs, as the Court had previously decided that all maritime laws displace all remedies afforded by state law.¹⁰⁵ Contrary to Yamaha's argument, the Court indicated that the exercise of admiralty law "does not result in automatic displacement of state law."¹⁰⁶ En route to the Court's holding, the Court interpreted Section 7 of DOHSA to preclude it from displacing state law in territorial waters.¹⁰⁷

The analysis of these two cases indicates the Court's strong deference to Congress.¹⁰⁸ These holdings accurately reflect the Court's reluctance to step in and extend the scope of maritime tort recovery in the interest of justice.¹⁰⁹ *Dooley v. Korean Air Lines Co., Ltd.*, represents a third example where the Court refused to extend a survival action to DOHSA.¹¹⁰ When DOHSA applies, neither state law,¹¹¹ nor general maritime law,¹¹² can act as a

102. *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 216 (1996).

103. *Id.*

104. *Id.* at 202.

105. *Id.* at 203. *See Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 401 (1970) (finding federal maritime wrongful death action provided the exclusive basis for recovery, displacing all remedies afforded by state law).

106. *Yamaha*, 516 U.S. at 206 (citing *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 545 (1995)).

107. *Yamaha*, 516 U.S. at 216-17; *see* 46 U.S.C. § 30308(a) (stating this section does not affect the law of a state regulating wrongful death actions).

108. *See supra* notes 95-107 (indicating courts' strong deference to Congress).

109. *Id.*

110. By considering judgment of adding a survival action, but by solely including a provision that limits recovery to pecuniary damages, the Court concluded that there could not be a contention that DOHSA intended to allow for survival actions. *Dooley*, 524 U.S. at 124. The Court analogizes the absence of the survival provision in DOHSA to the survival action explicitly stated in the Jones Act. *Id.* "Even in the exercise of our admiralty jurisdiction, we will not upset the balance struck by Congress by authorizing a cause of action with which Congress was certainly familiar but nonetheless declined to adopt." *Id.* *But see* *Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16, 20 (1963) (indicating Congress's intention of leaving the courts responsible for "fashioning the controlling rules of admiralty law").

111. *See Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 232-33 (1986) (interpreting Section 7 of DOHSA as a jurisdictional savings clause to conclude that state statutes are preempted by DOHSA where it applies). In this case, the Court refused to extend state remedies to a personal representative of a decedent that was killed in a helicopter crash thirty-five miles off the coast of Louisiana. *Id.* at 209. In its desire to maintain uniformity, the Court refused to rule otherwise because it would run afoul

supplement and provide a basis of recovery for non-pecuniary damages.¹¹³ "For deaths on high seas . . . [j]udge-made general maritime law may not override such congressional judgments, however ancient those judgments may happen to be."¹¹⁴ Admiralty courts will fill in the gaps left by Congress's silence, but will remain reluctant to rewrite Congress's specifically enacted rules.¹¹⁵ These complexities will inevitably be exacerbated in the absence of congressional activism.

2. Uniformity

The Court's principle of uniformity is based upon a fundamental requisite embedded in Article III¹¹⁶ and the Necessary and Proper Clause¹¹⁷ of the United States Constitution. Uniformity is important in admiralty because disputes on the high seas frequently encounter interstate issues,¹¹⁸ and these issues are better decided on a national and uniform basis, rather than a state basis.¹¹⁹ In 1970, a unanimous Court overturned *The Harrisburg*,¹²⁰ by creating an action for wrongful death under general maritime law.¹²¹ The Court in *The Harrisburg* did not allow a recovery for death under maritime law.¹²² But in this 1970 decision,¹²³ the Court's rationale was primarily based on the fundamental need for uniformity.¹²⁴ The uniformity concern

with the ruling of *Moragne*. *Id.* at 233.

112. *Mobil Oil Corp.*, 436 U.S. at 626.

113. *Dooley*, 524 U.S. at 124.

114. *Id.* at 120 (quoting *In Re Korean Air Lines Disaster of Sept. 1, 1983*, 117 F.3d 1477, 1481 (D.C. Cir. 1997)).

115. *Mobil Oil Corp.*, 436 U.S. at 625.

116. "The judicial power shall extend to . . . all cases of admiralty and maritime jurisdiction." U.S. CONST. art. III, § 2. "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

117. Article I, Section 8 states, "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." U.S. CONST. art. I, § 8, cl. 18.

118. *Offshore Logistics, Inc.*, 477 U.S. at 230.

119. *Id.*

120. The Court held there was no recovery for death under general maritime law. *The Harrisburg*, 119 U.S. 199, 213-14 (1986).

121. Edward Moragne was a longshoreman that was killed while working on a ship located within the territorial waters of Florida. *Moragne*, 398 U.S. at 376. Moragne's representative brought an action against the owner of the ship to recover damages for wrongful death, and for the pain and suffering of the decedent. *Id.*

122. *The Harrisburg*, 119 U.S. at 213-14.

123. *Id.* at 409.

124. See *Moragne*, 398 U.S. at 408-09 (recognizing a wrongful death action under general maritime law will assure uniformity of federal policies by removing the conflicting rules that have resulted from applying state remedial

related to the availability of an unseaworthiness claim.¹²⁵ Did Congress express an intention to forbid the application of any federal remedies that would be appropriate to effectuate the policies of general maritime law? The Court answered in the negative.¹²⁶ Justice Harlan eloquently recited, "it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules."¹²⁷

A few years later, a longshoreman's wife brought a wrongful death action against a vessel based on unseaworthiness.¹²⁸ In *Sea-Land Services, Inc. v. Gaudet*,¹²⁹ one of the questions brought before the Court was whether the decedent's wife was entitled to compensation for loss of society.¹³⁰ Justice Brennan clearly recognized the importance of allowing family members to recover for loss of society. Although acknowledging the concerns in measuring non-pecuniary losses,¹³¹ the Court still held that the decedent's wife was entitled to compensation for loss of society.¹³²

In *Mobil Oil Corp. v. Higginbotham*,¹³³ a helicopter crashed one hundred miles from the Louisiana shore killing the pilot and three passengers.¹³⁴ In reversing the Fifth Circuit's decision,¹³⁵

statutes to exclusive maritime substantive law).

125. The Court identified three anomalies that precluded adequate compensation to the representatives of workers killed at sea: (1) conduct that would create liability if a person is injured but is not applicable if the person is killed; (2) lack of seaworthy duty within territorial waters and many state statutes lacked such a duty; and (3) differences in a seaman's status might preclude recovery for a death occurring within territorial waters. *Id.* at 395-96.

126. *Id.* at 400.

127. *Id.* at 387 (quoting *The Sea Gull*, 21 F.Cas. 909, 910 (C.C. Md. 1865)).

128. Longshoreman suffered serious physical injuries following an incident arising on the S.S. Claiborne in Louisiana territorial waters. *Gaudet*, 414 U.S. at 574. Decedent recovered damages for permanent disability, physical agony, and loss of earnings based on unseaworthiness. *Id.* He died shortly after this action, in which his wife filed a wrongful death lawsuit against the vessel. *Id.* Today there is an Act called the Longshore and Harbor Workers' Compensation Act that provides compensation for the death of an employee who is employed in loading, unloading, repairing or building a vessel from an adjoining pier, dock, or other adjoining areas with similar purposes. 33 U.S.C. § 903(a) (1996).

129. *Gaudet*, 414 U.S. at 574.

130. *See id.* at 585 (stating that loss of society encompasses a broad range of benefits family members receive which include loss of love, affection, care, attention, companionship, comfort, and protection).

131. *See id.* at 588-89 (noting damages for loss of society are often speculative and will require juries to render verdicts involving "incalculable" damages).

132. By allowing recovery for loss of society, the Court found it aligns with the decision in *Moragne* and the majority of state wrongful-death statutes. *Id.* at 587-88.

133. *Mobil Oil Corp.*, 436 U.S. at 618-19.

134. *Id.*

and refusing to apply the principles outlined in *Moragne v. States Marine Lines, Inc.*, the Court held the representatives could not recover for their loss of society.¹³⁶ Justice Stevens acknowledged the impact of the Court's decision on uniformity. He stated, "[i]t is true that the measure of damages in coastal waters will differ from that on the high seas, but even if this difference proves significant, a desire for uniformity cannot override the statute."¹³⁷ This decision created a stark divide in uniformity between wrongful death actions occurring on the high seas and those that occur in territorial waters. It produces the anomaly the Court in *Moragne* once wished to abolish.¹³⁸

Not only have courts created a distinction between seamen and non-seamen, but they also have created a lack of uniformity by allowing recovery for non-pecuniary damages under state law for death of non-seafarers.¹³⁹ It is easy to pinpoint the reason for incongruity: state-law wrongful death remedies.¹⁴⁰ Because courts are reluctant to make amendments to DOHSA and the Jones Act,

135. The Fifth Circuit ruled as a matter of law that *Gaudet* applied on high seas and therefore the representative was entitled to recover non-pecuniary losses. *Higginbotham v. Mobil Oil Corp.*, 545 F.2d 422, 425 (5th Cir. 1977), *rev'd*, 436 U.S. 618 (1978).

136. *Mobil Oil Corp.*, 436 U.S. at 619.

137. *Id.* at 624. "We recognize today, as we did in *Moragne*, the value of uniformity, but a ruling that DOHSA governs wrongful-death recoveries on the high seas poses only a minor threat to the uniformity of maritime law." *Id.* But see *Mobil Oil Corp.*, 436 U.S. at 626-27 (Marshall, J., dissenting) (acknowledging the deeply rooted tradition of maritime law of recognizing those men who embark on hazardous sea voyages by offering them special solicitude). Justice Marshall cited to *Moragne* often by reiterating the notion that location should not render disparate treatment to seamen. *Id.* at 627. The drafters of the statute were concerned with providing a cause of action because prior to its enactment there was none. *Id.* "Congress was principally concerned, not with limiting recovery, but with ensuring that those suing under DOHSA were able to recover at least their pecuniary loss." *Id.* at 629.

138. *Moragne*, 398 U.S. at 395; see also Frederick W. Swaim, Jr., *Requiem for Moragne: The New Uniformity*, 7 LOY. MAR. L.J. 171 (2009) (finding a perpetual circle of purported uniformity). The new uniformity that is left following the recent decisions is described as a bifurcated and twisted concept. *Id.* This author emphasizes how the Court viewed this case in isolation. *Id.* This conclusion is clear when it is placed next to *Moragne* and *Gaudet*. *Id.* The competing policies urged by the Court prior to *Mobil Oil Corp.* vanished in making its preclusive holding). *Id.*

139. *Yamaha*, 516 U.S. at 216.

140. See Robert Frost, *Tort Reform By the Judiciary: Developments in the Law of Maritime Personal Injury and Death Damages*, 23 TUL. MAR. L.J. 351, 377 (1999) (noting when DOHSA was originally enacted, wrongful death actions were uncommon). Still relying on English common law, Congress was hesitant to allow recovery for non-pecuniary damages since England only felt pecuniary losses should be recoverable. *Id.* In 1920, DOHSA was consistent with state-law remedies. *Id.* But now that state-law has evolved and adapted to allowing recovery for non-pecuniary loss, why has this maritime wrongful death act lagged so far behind? *Id.* at 377-78.

the logical conclusion is that it is up to Congress to enact appropriate legislation.¹⁴¹

C. Limiting Ship-Owner's Liability

The Limitation of Liability Act of 1851 was passed with the original purpose of promoting shipping and creating a comparable law to England's.¹⁴² Through its enactment, its incentivizing nature promoted investment in the shipping industry at a time when our country's economic success was dependent upon the exportation of cotton and the importation of machinery, copper, iron, and luxury goods.¹⁴³ It is difficult to fathom that any Act promulgated before the Civil War is still considered modern.¹⁴⁴ Times change, technology evolves, and amenable alternatives are now available to protect and hedge against the vessel owner's liability.¹⁴⁵ Some of these alternatives include contract, charger, mortgage, separate incorporation, and bankruptcy.¹⁴⁶ Plainly and simply, the law is outdated.¹⁴⁷

Inevitably, several tragic events have left representatives

141. See 46 U.S.C. § 30307 (enacting a new provision to DOHSA following the crash of TWA Flight 800. This was Congress's attempt to remedy the disparity between DOHSA and state-law actions). If a plane crashes into the sea more than twelve miles from United States coastal waters, representatives of the decedents may recover non-pecuniary damages. 46 U.S.C. § 30307(b). If the plane crashes within twelve miles from the coast, DOHSA does not apply, thus allowing for state law recovery. 46 USC § 30307(c). See also *In re Air Crash Off Long Island, New York*, on July 17, 1996, 209 F.3d 200, 215 (2d Cir. 2000) (holding that DOHSA does not apply to the airplane crash in the United States territorial waters eight miles from the coast of the United States). But see *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217, 231 (1996) (finding that the representative of decedent killed in a plane crash in international waters could not recover loss of society damages under DOHSA). Again, the Court cited to *Tallentire* and *Mobil Oil Corp.* to conclude that the application of DOHSA precludes the representatives from recovering loss-of-society damages. *Id.* at 230.

142. Thomas L. Nummery, Note, *Environmental Salvage Law in the Ages of the Tanker*, 20 FORDHAM ENVTL. L. REV. 267, 275-76 (2009).

143. Joseph C. Sweeney, *Limitation of Shipowner Liability: Its American Roots and Some Problems Particular to Collision*, 32 J. MAR. L. & COM. 241, 246 (2001).

144. Even in 1954, the purposes of this Act were considered obsolete. *Maryland Cas. Co. v. Cushing*, 347 U.S. 409, 437 (1954) (Black, J., dissenting). Justice Black stated, "[m]any of the conditions in the shipping industry which induced the 1851 Congress to pass the Act no longer prevail." *Id.*

145. Dennis J. Stone, *The Limitation of Liability: Time to Abandon Ship?*, 32 J. MAR. L. & COM. 317, 334-35 (2001).

146. *Id.*

147. See *id.* (stating that expanding the Limitation of Liability Act would be inappropriate at this time because "if ship owners really needed a subsidy, Congress can give it to them without making injured seamen bear the cost"). See also *Cont'l Oil Co. v. Bonanza Corp.*, 706 F.2d 1365, 1376 (5th Cir. 1983) (calling the Limitation of Liability Act "hopelessly anachronistic").

nearly remediless because of this “hopelessly anachronistic” liability law,¹⁴⁸ the most notable being the sinking of the Titanic. In 1912, the Titanic set sail from England en route to New York and collided with an iceberg.¹⁴⁹ The collision caused the Titanic to sink, killing many of its passengers and losing most of its cargo and personal effects to the deep sea.¹⁵⁰ Despite the tragic ending, Justice Holmes, writing for the Court, held the Limitation of Liability Act applied,¹⁵¹ and thus, the ship owner’s liability was limited to the value of the fourteen lifeboats and their equipment.¹⁵²

Another grave example of this injustice appeared in 1966 when the Panamanian cruise ship, Yarmouth Castle, burned and sank on high seas outside of the United States’s territorial waters.¹⁵³ A total of eighty-eight people perished, and representatives of the decedents filed claims seeking economic and noneconomic damages; however, in applying the Act, the court limited the vessel owner’s liability to \$33,000.¹⁵⁴ Now, basic arithmetic reveals that the representatives of the deceased are entitled to \$375.00 per decedent, *ceteris paribus*.¹⁵⁵ Opponents of the bill feel that repealing the Limitation of Liability Act could have detrimental effects on the economies of those states along the Gulf Coast as this could essentially create an effective tax on U.S. shipping.¹⁵⁶ On paper, the law may seem necessary, but its application renders grossly unfair and undeserving results.

Between the complexities that surround wrongful death cases arising at sea and the anachronistic law that caps the liability of vessel owners, it seems to be the ideal time for Congress to take action and make the necessary changes to these unjust maritime laws, because the courts simply will not budge.

148. *Id.*

149. *Oceanic Steam Nav. Co. v. Mellor*, 233 U.S. 718, 730 (1914).

150. *Id.*

151. *Id.*

152. *See The Titanic*, 209 F. 501, 502 (S.D.N.Y. 1913) (stating the total loss of the Titanic did not exceed the sum of \$91,805.54, which included only the fourteen lifeboats and their equipment).

153. *Petition of Chadade S.S. Co.*, 266 F. Supp. 517, 518 (S.D. Fla. 1967).

154. The value of the S.S. Yarmouth Castle at the termination of its voyage equaled its pending freight, a meager \$33,000. *Id.* at 524.

155. This basic arithmetic is derived from the division of 33,000 (total value of the vessel including cargo) into the eighty-eight passengers who died on the vessel.

156. *Securing Protections for the Injured from Limitations on Liability Act*, *supra* note 69.

IV. PROPOSAL

These antiquated maritime liability laws produce unjust results in the wake of a tragedy.¹⁵⁷ Congress must act progressively and retroactively to ensure adequate compensation to the victims of the Deepwater Horizon explosion.¹⁵⁸ Last year, in Congress's most recent proposal, the SPILL Act,¹⁵⁹ it sought to ensure proper compensation to those who have suffered as a result of the Deepwater Horizon explosion. Its amendments to DOHSA¹⁶⁰ and the Jones Act¹⁶¹ are imperative, whereas the repealing of the Limitation of Liability Act is a drastic measure that would likely precipitate deleterious effects. Instead of creating a blanket rule under DOHSA, Congress should limit its scope to accidents occurring on oil rigs.¹⁶² In addition, Congress needs only to increase the limitation on liability under the Limitation of Liability Act to ensure adequate compensation in the aftermath of this tragedy. Ultimately, it is in the hands of Congress to respond to this grave injustice; failure to propose a new bill similar in effect to the SPILL Act will leave countless numbers of hard-working families without an adequate remedy.

A. DOHSA

Following the crash of TWA Flight 800 in 1996, Congress enacted a new provision to DOHSA to reconcile the disparity between DOHSA and state-law wrongful death remedies.¹⁶³ The time has come for the legislature to retract from anachronistic principles. As we have seen, courts are reluctant to amend these maritime liability laws, thus paving the way for Congress to make an emphatic statement.¹⁶⁴

As a society, we need not look hard to discover the profound impact oil has had on our country. Offshore drilling will continue to occur due to the market's significant contributions to the

157. Grimm, *supra* note 1; Vance, *supra* note 20.

158. H.R. 5503; As of July 13, 2010, the bill was passed by the House of Representatives and sent to the Senate. *H.R. 5503: Securing Protections for the Injured from Limitations on Liability Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h111-5503> (last visited Feb. 15, 2012). Once the bill reached the Senate, it was then referred to the Committee on Commerce, Science, and Transportation. *Id.*

159. H.R. 5503.

160. 46 U.S.C. §§ 30302-30303.

161. 46 U.S.C. § 30104.

162. See H.R. 5503 (proposing to amend DOHSA by allowing recovery for non-pecuniary damages in wrongful death actions occurring at high seas).

163. See 46 U.S.C. § 30307 (stating that essentially if a plane crashes in the sea, representatives of the decedent may recover non-pecuniary damages).

164. See *supra* text accompanying notes 94-106 (noting the idea that courts are not willing to amend maritime liability laws that have already been enacted by Congress).

country's gross domestic product.¹⁶⁵ It only seems logical to enhance workforce protection aboard these lucrative oil rigs. Additionally, the disparity between state-law wrongful death remedies and wrongful deaths occurring on high seas has been the root of unequal treatment.¹⁶⁶ This proposed provision would add more uniformity to wrongful death cases occurring at sea. A new provision must be added to DOHSA and this new provision should read as follows:

Definition. The term non-pecuniary damages means loss of care, comfort, and companionship, but not limited to loss of society and loss of consortium.

Beyond 15 nautical miles. Under this chapter, if death results from an oil rig accident occurring on the high seas beyond 15 nautical miles from the coast of the United States, additional compensation is recoverable for non-pecuniary damages.

Within 15 nautical miles. This chapter does not apply if the death resulted from an oil rig accident occurring on high seas 15 nautical miles or less from the shores of the United States.

Effectuation. This section shall take effect on the date of its enactment, and shall apply to cases pending on or after such date.¹⁶⁷

This proposed provision is similar to Section 30307 of DOHSA.¹⁶⁸ But unlike Section 30307, this provision contains a retroactive clause, thus allowing the victims' families to recover non-pecuniary damages following the explosion on the Deepwater Horizon.

This proposed provision does not ignore recent skepticism. Opponents such as the Cruise Line International Association (CLIA)¹⁶⁹ argue that by allowing non-pecuniary damages in all

165. The oil industry is one of this country's largest employers, employing millions of Americans in the pursuit of exploration and marketing of oil. PRICEWATERHOUSECOOPERS, THE ECONOMIC IMPACTS OF THE OIL AND NATURAL GAS INDUSTRY ON THE U.S. ECONOMY: EMPLOYMENT, LABOR INCOME AND VALUE ADDED 1 (Sept. 8, 2009), *available at* http://www.api.org/newsroom/upload/industry_economic_contributions_report.pdf. In 2007, the total contribution between oil and natural gas employment amounted to 5.2% of the entire American workforce, 9,237,381. *Id.* at 2. The state of Louisiana alone employed 330,053 employees, which was 13.4% of the state's entire workforce. *Id.* at 3. Overall, the oil and natural gas industry's total value-added contribution amounted to over \$1 trillion in 2007. *Id.* at 2. This equated to roughly 7.5 percent of the country's gross domestic product. *Id.*

166. Frost, *supra* note 140.

167. See *supra* notes 81-82 (describing the constitutionality of H.R. 5503's retroactive effect).

168. Section 30307 of Chapter 46 of the United States Code, which applies to commercial aviation accidents, consists of a similar layout to the provision, but does not include a retroactive clause. 46 U.S.C. § 30307.

169. See generally Jim Walker, *Cruise Industry Joins Forces With BP to*

deaths arising on high seas, it will have sweeping consequences, and the inherent difficulty associated with valuing non-pecuniary damages will create too many challenges during litigation.¹⁷⁰ The CLIA has already spent millions of dollars in lobbying efforts to prevent the enactment of the SPILL Act.¹⁷¹ Another concern about permitting noneconomic damage recovery is that it could open the floodgates for asbestos claims brought by those exposed to asbestos aboard a ship.¹⁷² Despite these concerns, Congress must realize that a serious loss has been suffered and the only current means of assisting the family members is to enact a provision creating recovery in the form of non-pecuniary damages.

B. *The Jones Act*

To ensure justice, the Jones Act must be amended in an identical fashion to H.R. 5503.¹⁷³ If negligence¹⁷⁴ is ever an issue, there is no doubt that these victims must be awarded non-pecuniary damages because any spouse, child, or parent, irrespective of dependency, of a relative seaman killed in a maritime disaster suffers a very serious and significant loss.¹⁷⁵

Deny Death Compensation to Grieving Families, CRUISE LAW NEWS (June 30, 2010), <http://www.cruiselawnews.com/2010/06/articles/maritime-death/cruise-industry-joins-forces-with-bp-to-deny-death-compensation-to-grieving-families/> (displaying a letter sent by the CLIA to Congressional representatives in Florida to demonstrate CLIA's concern with amending DOHSA). The letter shows empirical evidence that the cruise line industry is tantamount to the economic success of Florida. *Id.* "In 2009, the cruise industry contributed to Florida's economy with over \$5.8 billion in direct spending in the state." *Id.* Although the CLIA does not object to addressing the rights of Gulf Oil Spill victims, it is extremely concerned with its broad scope and how it will affect all people that die at sea. *Id.*

170. Another one of CLIA's concerns is that DOHSA will enable foreign workers a remedy when otherwise they would not be entitled to such. *Id.* The irony of this matter is that most cruise lines are incorporated under foreign laws and are able to benefit from avoiding U.S. taxes due to their status as a foreign corporation. *Id.* So why would a foreign corporation be so upset with allowing a foreign worker to be properly compensated under DOHSA? *Id.* See also *Securing Protections for the Injured from Limitations on Liability Act*, *supra* note 69 (posing a concern for the number of asbestos claims brought by those that have been exposed to asbestos while aboard one of the ships).

171. Jim Walker, *Congress Amends Death on High Seas Act Over Cruise Industry's Objections*, CRUISE LINE NEWS (July 1, 2010), <http://www.cruiselawnews.com/2010/07/articles/maritime-death/congress-amends-death-on-high-seas-act-over-cruise-industrys-objections/>.

172. *Securing Protections for the Injured from Limitations on Liability Act*, *supra* note 69.

173. The SPILL Act seeks to amend Section 30104 by including, "[i]n addition to other amounts authorized under such laws, the recovery for a seaman who so dies shall include recovery for loss of care, comfort, and companionship." H.R. 5503.

174. 46 U.S.C. § 30104.

175. See generally Matthew Hall Armstrong, Note, *Amending the Jones Act*

States have recognized the loss families suffer following a wrongful death,¹⁷⁶ including the State of Louisiana (the unfortunate site of the incident here),¹⁷⁷ by allowing recovery for non-pecuniary damages. If the Deepwater Horizon oil rig was located within the navigable waters of Louisiana, the victims' family members would be entitled to both pecuniary and non-pecuniary damages.¹⁷⁸

By adding non-pecuniary losses¹⁷⁹ to the Jones Act, courts can continue to defer to congressional decision making and this will provide more uniformity to maritime wrongful death remedies.¹⁸⁰ More importantly, this amendment will help bring justice to the victims' families in the aftermath of the Gulf Oil Spill.

C. *The Limitation on Liability Act*

Has the time come to ship this 1851 Act off to the abyss? Supporters of the Spill Act believe so,¹⁸¹ while challengers believe

to Provide Jones Act Seaman Full Recovery In General Maritime Negligence, 72 WASH. U. L.Q. 379, 406 (1994) (claiming that this 1920 maritime liability law needs to be amended to provide more uniformity between land-based torts and those torts that arise on sea).

176. Frost, *supra* note 140.

177. See *Trinh ex rel. Tran v. Dunfrene Boats, Inc.*, 6 So.3d 830, 844 (La. Ct. App. 2009) (holding Louisiana wrongful death statute applies in a case involving the death of a Louisiana crab fisherman in Louisiana navigable waters). The court then went on to affirm the judgment in favor of the plaintiff and the award of non-pecuniary damages. *Id.*

178. See *Kelly v. Bass Enters. Prod. Co.*, 17 F. Supp. 2d 591, 597 (E.D. La. 1998) (holding that the Louisiana statute provides for both a wrongful death and a survivorship claim). When a wrongful death occurs within the navigable waters of Louisiana, Louisiana allows for such a claim to recover for non-pecuniary damages such as loss of society. *Id.* This court does make note that the Louisiana law is inconsistent with the Jones Act and with general maritime law in terms of recoverable damages. *Id.* at n.9.

179. *But see* Santon, *supra* note 56 (finding the difficulty in placing a money tag on noneconomic damages which leads to the arbitrariness associated with calculating loss).

180. See *id.* (proposing an amendment to the Jones Act resembling that of the SPILL Act). This Comment concludes that Congress needs to address the problems of maritime wrongful death to bring equal treatment to all the victims of maritime wrongful death. *Id.* at 409. See also *Gaudet*, 414 U.S. at 587-88, n.21 (noting that the decision to allow recovery for loss of society aligns with a majority state wrongful death statutes). *But see* *Securing Protections for the Injured from Limitations on Liability Act*, *supra* note 69 (pointing out the lack of uniformity between the Federal Employer Liability Act (FELA) and allowing recovery for non-pecuniary damages at sea).

181. Representative John Conyers, Jr., and twenty-six other representatives support this bill and ultimately repealing the Limitation on Liability Act of 1851. *H.R. 5503 – Securing Protections for the Injured from Limitations on Liability Act*, OPENCONGRESS, <http://www.opencongress.org/bill/111-h5503/show> (last visited Feb. 15, 2012).

a substitute is more appropriate than a repeal.¹⁸² Therefore, instead of repealing the Act entirely, it must be amended merely to comport with today's principles of justice.

As mentioned above, the Act was originally enacted to promote shipping. Today, most shipping companies can avoid insolvency by two methods: incorporation and insurance.¹⁸³ To allow ship owners to escape liability to individuals injured or killed aboard a ship is grossly unfair and unjust.¹⁸⁴ Thus, the Act must be amended to reflect an increase in liability.

Instead of limiting the liability to the value of the vessel and cargo at the end of the voyage, Congress must amend the Act by limiting the liability to the value of the vessel and cargo at the beginning of the voyage. Section 30505,¹⁸⁵ Chapter 46, of the United States Code should read in relevant part as follows:

[T]he liability of the owner of a vessel for any claim, debt, or liability described in subsection (b) shall not exceed the value of the vessel and freight valued at the beginning of the voyage. . .

By increasing the limitation, the Act will now be more aligned with tort humanitarian policies.¹⁸⁶

V. CONCLUSION

The explosion on the Deepwater Horizon oil rig cost eleven hard-working individuals their lives, and inconsistent and incoherent maritime liability laws have left their family members

182. Securing Protections for the Injured from Limitations on Liability Act, *supra* note 69.

183. See Hyun Kim, *Shipowners' Limitation of Liability*, 6 U.S.F. MAR. L.J. 357, 363 (1994) (indicating that today, most ship owners are shareholders of a shipping company, thus protecting the ship owners' liability). In addition, ship owners retain two types of insurance policies: P & I insurance and hull insurance. *Id.* P & I insurance covers personal injury claims to the crew or property damage to cargo; whereas, hull insurance covers damage to the vessel itself. *Id.*

184. Another argument posed by litigants is that this Act runs afoul to the Fourteenth Amendment of the United States Constitution. *City of Dover v. Imperial Cas. & Indem. Co.*, 575 A.2d 1280, 1284 (N.H. 1990). Although the legislation does not create a suspect class triggering a heightened level of scrutiny, some feel that the Act could not withstand rational basis review. Mark A. White, *The Shipowners' Limitation of Liability Act: Should the Courts Deliver the Final Blow?*, 24 N. ILL. U. L. REV. 821, 844-46 (2004). Under rational basis review, a court must determine that the purpose for implementing the limitation on recovery outweighs the plaintiff's right to recover damages. *Id.* at 845. This author believes that since this Act no longer maintains a legitimate purpose, it is no longer constitutional because it impinges on a plaintiff's right to recovery. *Id.* at 846.

185. 46 U.S.C. § 30505.

186. See Kim, *supra* note 183, at 385-86 (noting the victims of maritime disasters should be given first priority and therefore they must be adequately compensated).

essentially remediless.¹⁸⁷ Sure, economic damages are recoverable; however, these damages are conditioned upon dependency. Thus, many family members are limited to recovering solely the costs of funeral expenses. Adopting new provisions to enable victims and their family members to recover non-pecuniary damages will aid them in their journey to become whole again. In the interest of justice, Congress must do what is right. Anything short of allowing for non-pecuniary damages is an insult to those that risk their lives to provide for their family. Nothing will bring back Jason, Dale, Donald, Stephen, Gordon, Karl, Blair, Wyatt, Dewey, Shane, and Adam,¹⁸⁸ but allowing their families recovery for non-pecuniary damages is a step in the direction of justice.

187. See *supra* text accompanying notes 17-20 (describing the real and significant loss these family members have suffered as result of the Deepwater Horizon explosion).

188. *11 Victims of Deepwater Horizon Explosion Honored at Memorial Service*, *supra* note 5.