THE TUMULTUOUS HIGH SEAS:
The Impact of Recent Changes to *The Death on the High Seas Act*
by
Alan H. Collier[1]

On 16 March 2000, following intense lobbying by air disaster victim survivor groups, the United States Congress enacted an historic amendment to the 80 year old *Death on the High Seas Act* (□DOHSA□).[2] Commercial aviation accidents that occur less than twelve nautical miles from the U.S. coastline are no longer covered by the *Act*.[3] Furthermore, even where the *Act* controls under the new limit, the range of damages has been expanded to include compensation for the loss of □care, comfort, and companionship□ to the victim□s family which were previously unavailable under DOHSA. This article will consider the events leading up to this dramatic change in the law, together with an analysis of its impact on aviation products manufacturers in the commercial and general aviation markets.

An Historical Look At DOHSA

The *Death on the High Seas Act* was enacted in 1920 to partially fill a void in general U.S. maritime law, which did not recognize a cause of action for wrongful maritime death.[4] The *Act* was passed by the United States Congress to protect the widows of sailors lost at sea. By its terms, DOHSA provides a cause of action for wrongful death occurring on □the high seas beyond a marine league from the U.S. territorial shores.□[5]

However, DOHSA limits the kind of damages that plaintiffs can receive. The relevant section reads, □[T]he recovery in such suits shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought.□[6] Thus, plaintiffs could not

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[2]President Clinton signed the amendment into law on April 5, 2000.

[3]Nautical miles equal approximately 1.15 land or statute miles.

[4] See The Harrisburg v. Richards, 119 U.S. 199 (1886) [holding that absent statutory authority, the general maritime law did not recognize a cause of action for maritime deaths].

[5] See 46 U.S.C. 761. □[W]henever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States.□

[6] 46 U.S.C. 762 [emphasis added].

recover for nonpecuniary losses (i.e., losses which can't be estimated in and compensated by money), such as loss of society (e.g., love, affection and companionship), pain and suffering, and mental anguish. The *Act* also bars punitive damages. The only recovery allowed under the statute was for past and future lost earnings, loss of inheritance, and funeral expenses. Over the years, United States courts eventually began applying DOHSA to aviation losses, concluding that aircraft were now performing traditionally maritime functions previously reserved solely for seafaring vessels.

"High Seas Beyond A Marine League"

There has been much debate in recent years with respect to the DOHSA requirement that the death occur "on the high seas beyond a marine league from the shore." At the time DOHSA was enacted, the "high seas" and "beyond a marine league" were defined by the same distance - three nautical miles from the U.S. shoreline.

"Beyond a marine league" was inserted to specifically exclude the application of DOHSA to state territorial waters, which traditionally lay at three nautical miles from shore. As to "High Seas", or non-territorial waters, then Secretary of State Thomas Jefferson suggested the distance of three nautical miles as the U.S. territorial sea boundary in 1793 relying on "the utmost range of a cannon ball" in an attempt to remain neutral in the war in the Atlantic Ocean between France, Britain and Spain, seeking to claim the "smallest distance" for the extent of American territorial seas.[7] Although *ad hoc* in its creation, this distance remained the dividing line between territorial and international waters until President Reagan issued *Proclamation No. 5928* in 1988. However, the fact that the line for "high seas" and "a marine league" were coterminous in 1920, did not necessarily mean that this would always be the case.

As a result of the litigation arising out of the TWA Flight 800 disaster, DOHSA was interpreted for the first time by a U.S. court to be directly impacted by President Reagan's *Proclamation No. 5928*.[8] By its terms, DOHSA allows recovery for wrongful death when it occurs "on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States...."[9] However, Reagan's *Proclamation No. 5928* provided that "the territorial sea of the United States henceforth extends to 12 nautical miles from the baselines of the United States determined in accordance with international

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[7]See Douglas W. Kmiec, Office of Legal Counsel, Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea, 1 Terr. Sea J. 1, 9-10 (1990) [OLC Opinion].

[8] In Re Air Crash off Long Island, 209 F.3d 200 (2d Cir. NY 2000). The only other district court to deal with this issue concluded that Reagan's proclamation did not alter DOHSA's application. Francis v. Hornbeck Offshore, 1997 U.S. Dist. LEXIS 526 (E.D. La. 1997).

[9] 46 U.S.C. app.. 761.

law.[10]

The dispute, therefore, centered around whether, after the *Proclamation* was issued, DOHSA applied to the waters between 3 and 12 nautical miles from the shore. The crash of TWA Flight 800 occurred in this gray area, 8 miles from the U.S. coast. Affirming the New York district court, the Second Circuit Court of Appeal determined that pursuant to the *Proclamation*, DOHSA applied to waters at least 12 nautical miles from the coast. As the court concluded that the 1920 U.S. legislature intended "high seas" to mean non-territorial or international waters, DOHSA did not apply because the deaths occurred in the "federal" territorial waters between 3 and 12 nautical miles.

The court could not see "why Congress would have retained two geographical boundaries in the statute when one - beyond a marine league - subsumes the other."[11] The court further concluded that "applying DOHSA to federal territorial waters would subvert DOHSA's purpose of creating a remedy where none existed before, rather than displacing preexisting state or federal remedies."[12]

Judge Sotomayer, in his dissent to the decision, found the majority view of Congressional intent misplaced by arguing that,

"Congress, by using the phrase "high seas beyond one marine league from the shore of any State," intended both to define and to indicate the geographical boundary line at which the high seas began - three nautical miles from the U.S. coast - because that boundary line coincided with the outer border of the states' territorial seas ... [in order to] preserve state remedies in state waters, and to provide a separate remedy."[13]

Judge Sotomayer further criticized the majority for creating "four maritime zones governed by different law [zero to three miles offshore; three to twelve miles offshore; more than twelve; and foreign territorial waters]" while espousing the goal of uniformity of maritime law.[14]

Developments Leading To The Recent Amendment To DOHSA

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[10] 54 Fed.Reg. 774 (1988) [emphasis added]. [note: The international standard for high seas is also twelve nautical miles from shore.]

[11] In Re Air Crash off Long Island, 209 F.3d at 207 (2d. Cir. 2000).

[12] Id. at 209.

[13] Id. at 216 [dissent].

[14] Id. at 217 [dissent].

On January 16, 1996, the United States Supreme Court decided Zicherman v. Korean Air Lines[15] arising out of KAL 007 being shot down over the Sea of Japan as it strayed into Soviet airspace. In this high profile decision, the Court reaffirmed the power of DOHSA over aviation accidents that occur on the high seas. As the Warsaw Convention did not address the question at hand (i.e., whether survivors can collect loss of society type damages), it merely acted as a pass-through to the applicable law absent Warsaw: DOHSA. Applying DOHSA, the Court barred the claim for recovery of loss of society damages sought by a decedent s sister and mother.

At the same time as the Supreme Court was reaffirming the application of DOHSA beyond a marine league, aviation accidents occurring within the 3 nautical mile limit were still treated as if they had occurred over land, with the application of state wrongful death law. Due to DOHSA s limitation on damages (particularly accidents involving the death of a child or non-wage earner), the disparity created by the dividing line (brought back to the public eye by the decision in Zicherman) prompted aviation disaster survivor groups to push for legislation limiting DOHSA s application to aviation accidents over water.

The U.S. Congress responded in 1997 with *House Bill H.R. 2005*, which would have precluded the application of DOHSA to all aviation accidents. The bill passed the House of Representatives, but died in the Senate at the hands of Senator Slade Gorton of Washington State due to a battle over tort reform going on at the time.

The bill was given new life, however, as a result of the defense s argument in the TWA Flight 800 disaster litigation that DOHSA applied to substantially limit (and in some cases, eliminate) the plaintiffs damages. In February 1999, *H.R. 2005* was restructured as *H.R. 603* and introduced by Senator Arlan Spector. Senator Spector s home state of Pennsylvania lost 21 students and chaperones on a French Club trip in the TWA disaster. During the course of considering the bill, the House conducted hearings and took testimony from interested parties, including the TWA Flight 800 surviving family members. Much of the emphasis at the hearings dealt with the fact that the victims' families could recover little under DOHSA. One of the fathers of a victim aboard TWA Flight 800 stated that to this date no one can explain to me in any rational terms, why an individual who perishes in an aviation disaster less than three miles from our shore has value, while an individual who perished 3.1 miles from our shore has no value.[16]

Representative Sherwood of Pennsylvania (who represents the county where the lost students and chaperones lived) added that,

because of this arbitrary line, legislatively drawn in the ocean, the surviving family members in

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[15] Zicherman v. Korean Airlines, 516 U.S. 217 (1996).

[16] Frank Carven III, director of the Families of TWA Flight 800 Association, at Senate Hearing on DOHSA.

this case are being dealt a cruel blow. No parent should be told by our nation□s legal system that longitude and latitude will determine the value of their child or determine their rights in a court of law.□[17]

In the wave of emotion over Flight 800, the bill passed the House on March 3, 1999 by an overwhelming majority. The language of *H.R. 603*, like its predecessor, would have made DOHSA inapplicable to all airline accidents.

In April 2000, Congress, in a compromise move to assure passage in the Senate, utilized the Second Circuit□s recent holdings on DOHSA, and incorporated *H.R. 603* into the new *H.R. 1000* generally accepting the opinion in the Flight 800 case, but adding some further concessions to the air disaster survivor groups. Instead of entirely wiping out DOHSA, the reworded statute continued to apply DOHSA to certain air disasters that occur over navigable waters beyond the 12 nautical mile limit. The new section reads,

□In the case of a commercial aviation accident, whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas 12 nautical miles or closer to the shore ... this Act shall not apply.□[18]

Congress stated that the *Act* shall be retroactively applicable to any death that occurred after July 16, 1996 (the date of the TWA Flight 800 tragedy occurred on July 17th). Congress also amended the Act such that □additional compensation for nonpecuniary damages for wrongful death of a decedent is recoverable□ for commercial aviation accidents occurring beyond 12 nautical miles from shore. This additional compensation includes □care, comfort, and companionship□ but does not alter case law that holds that DOHSA does not allow punitive damages or damages for conscious pain and suffering.

Congress□ clear intent was to increase the likelihood that victims□ relatives could recover for nonpecuniary damages in □high seas□ disasters. Prior to the amendment, family members could only recover for lost wages of the victim, leaving out recovery for the families of victims like the group of students who perished on TWA Flight 800. Representative Sherwood argued to the House committee that without the amendment, the Act would unjustly fail to □recognize compensation for
pain and suffering or for loss of companionship - or for children, retired workers, or others who are not wage earners.□[19]

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[17] 106 H. Rpt. 32, 106th Congress, 1st Session.

[18] Aviation Investment and Reform Act (H.R. 1000), amendment to 46 U.S.C. 761-762 (April 5, 2000).

[19] 106 H. Rpt. 32, 106th Congress, 1st Session.

The language of the recent amendment to Title 46 of the United States Code, sections 761 and 762, however, continues to apply the 1920 version of DOHSA to non-commercial (or "general") aviation accidents that occur at least 3 nautical miles from the coastline. Thus, despite the recent amendment, accidents involving general aviation aircraft over three miles offshore continue to be governed by DOHSA, including its restriction of damages to only "pecuniary" loss.

Current Status Of DOHSA

Currently, DOHSA does not apply to commercial airline accidents occurring within 12 nautical miles from the coast of the United States. However, for crashes outside the 12-mile limit, families can recover pecuniary as well as certain non-pecuniary damages under the new statute. If the crash occurs twelve miles or less from shore, the Act now reads that "rules applicable under Federal, State, and other appropriate law shall apply."[20] Thus, the decision as to what law applies has been left up to the courts. As to accidents occurring within the 3 nautical mile limit, the law of the U.S. state off whose coast the crash occurs will apply in conjunction with federal common law. If the crash is between 3 and 12 nautical miles, general maritime law will apply.[21]

As an example, the Alaska Airlines 261 crash 10 miles off Southern California would be governed by general maritime law, while the Egyptair 990 crash 60 miles off of Nantucket Island, Massachusetts would be governed by DOHSA. Whether DOHSA will apply in U.S. litigation arising out of crashes such as the Swissair 111 crash in Canadian territorial waters is still in dispute.[22] As discussed above, the amendment also leaves DOHSA (with its pecuniary damage limitation) applicable to non-commercial accidents that occur more than 3 nautical miles from the shore.

There has been some opposition to this law as it continues to draw an arbitrary line between accidents which fall under DOHSA and those that do not. There is also uncertainty as to the applicable law for accidents not involving DOHSA.

One aviation plaintiffs' attorney, in opposition to this amendment argued that, "damages will vary from crash to crash and maybe from claimant to claimant.... The problem is that this

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[20] 46 U.S.C. 762.

[21] In 1970, the United States Supreme Court overruled the Harrisburg decision and established for the first time a general maritime cause of action for wrongful deaths in U.S. territorial waters. Moragne v. State Marine Lines, 398 U.S. 375, 397-403 (1970). A *Moragne* cause of action has been interpreted to include the right to collect non-pecuniary damages.

[22] The majority view in U.S. Courts prior to the amendment was to apply DOHSA to foreign territorial waters.

legislation creates, in some instances, more uncertainty than the law it replaced. That's unfortunate because in this day when even the Warsaw Convention has no limits, the need for DOHSA in airplane crashes is absent."[23]

Impact On Aviation Products Manufacturers

Although the law has now changed to the benefit of plaintiffs in commercial airline disasters, DOHSA was very close to being wiped out entirely from the aviation context if *HR 1000*'s predecessors had become law. Even though the limit has been extended 9 nautical miles, and plaintiffs can seek more than they could have under the old DOHSA, there are still limits (i.e., conscious pain and suffering and punitive damages) which are beneficial to the defense.[24]

Furthermore, for those manufacturers in the general aviation market, non-commercial accidents over water more than 3 nautical miles off shore are still apparently covered under the traditional DOHSA standard, including the restriction to only pecuniary loss. The Second Circuit's decision in TWA Flight 800 arguably covered all aviation accidents, and would have raised the issue of what law covered general aviation accidents between 3 and 12 miles off shore. Other U.S. Circuits continued to apply the traditional DOHSA limit even after Reagan's proclamation. As the new law on its face amends DOHSA only as to "commercial" aviation, the defense will argue that even in light of the Second Circuit decision, the legislature has spoken and specifically excluded "general" aviation accidents from the amendment. This is a discrepancy, which will undoubtedly be addressed by the courts, and possibly the U.S. legislature, in the next few years.

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[23] Wolk & Genter, Death on the High Seas Act - Dead or Alive. www.airlaw.com/egyptair_2.html, March 17, 2000.

[24] In the past, Plaintiffs' attorneys have attempted to seek recovery for a decedent's pre-impact pain and suffering by seeking these damages through a separate "survival" action. Although the U.S. districts were split on this issue, it was resolved by the Supreme Court in another case arising out of KAL 007, Dooley v. Korean Air Lines, 524 U.S. 116 (1998), which held DOHSA to be the sole and exclusive remedy for deaths occurring on the high seas.