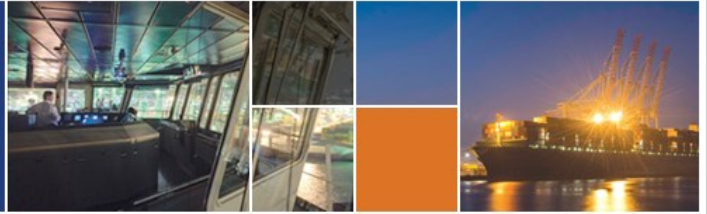




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The Cruise Passenger Protection Act: An Emotional Challenge to the Death on the High Seas Act and the Uniform Application of American Maritime Wrongful Death Law

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At approximately 8:19 p.m. on the evening of July 7, 1996, TWA Flight 800 took off from New York's JFK Airport, bound for Charles De Gaulle in Paris. But moments later the fuel and oxygen mixture in one of the Boeing 747's wing fuel tanks ignited, causing the plane to explode and crash into the Atlantic Ocean eight nautical miles off the coast of Long Island, New York. The plane was destroyed, and all 230 souls onboard were lost.

The Death on the High Seas Act

The remedies available under U.S. law to the surviving relatives of the victims of Flight 800 were limited. Enacted in 1920, the Death on the High Seas Act ("DOHSA") is a wrongful death statute under which certain surviving relatives can bring suit for economic damages caused by the death of a relative on the high seas. Specifically, Section 30302 of DOHSA provides: "[w]hen the death of an individual is caused by wrongful act, neglect or default occurring on the high seas beyond three nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible." Section 30302 also identifies four classes of surviving beneficiaries for whom a DOHSA action can be maintained: "the decedent's spouse, parent, child, or dependent relative." Except in cases involving Jones Act seamen, where it applies DOHSA provides the exclusive remedy under U.S. law for wrongful death occurring on the high seas.



Just as the class of relatives for whose benefit a DOHSA action can be maintained was limited, so too were the monetary damages available to those who had lost relatives in the crash of Flight 800. At the time, 46 U.S.C. Section 30303 limited recovery in a DOHSA action to "fair compensation for the pecuniary loss sustained by the individuals for whose benefit the action is brought," with any recovery apportioned among the beneficiaries in proportion to the loss each sustained.

Before proceeding further, it is important to understand what "fair compensation for the pecuniary loss sustained" includes, and what losses, falling outside of that definition (i.e., losses not defined as "pecuniary losses"), were not available to the family members of the victims of Flight 800. As interpreted by the courts, DOHSA's pecuniary damages provision allows damages based upon the economic benefits that the surviving beneficiaries could reasonably have expected to receive from the decedent but for the untimely death, such as lost financial support, the value of the household services the decedent would have rendered around the home, the value of the nurturing, guidance, care and instruction the decedent would have provided his or her surviving children, the cost of funeral expenses borne by the surviving relatives, and in some instances, prospective loss of inheritance. Not available under DOHSA's pecuniary damages limitation were more intangible losses that the surviving relatives suffered, such as damages for loss of society and companionship, loss of consortium damages to compensate a surviving spouse for loss of intimacy, and damages for loss of love and affection from the decedent.

DOHSA also contained another important limitation on recovery that impacted the relief available to the surviving family members of those killed in the Flight 800 crash. As a wrongful death statute, DOHSA's primary function is to compensate surviving spouses, children, and dependent relatives for the losses they suffer as a result of the decedent's death. But with one very narrow exception, it does not provide a vehicle for survival actions under which a decedent's estate can recover for injury or harm that the decedent suffered before he or she died, such as damages for pre-death pain and suffering.

The Commercial Aviation Amendment to DOHSA

In the context of Flight 800, these contours created what many viewed as discrepancies within the DOHSA scheme that left some surviving beneficiaries without a meaningful remedy. For example, the spouse and children of a high earning executive could hope to recover a reasonably significant amount based upon the financial and economic support they would have received if the high-earner had not died. In contrast, because non-economic losses were unavailable under DOHSA, parents of young children who died on Flight 800 would receive almost nothing; as one court explained, the practical result of DOHSA's pecuniary damages component was that the lives of children, who often provide little, if any, economic support to their families, were "made to appear practically worthless in the eyes of the law."

Against this background and under the press of public opinion, in April 2000 the United States Congress amended DOHSA to effect two notable changes. First, the amendment, codified as 46 U.S.C. Section 30307, made non-pecuniary damages available in cases where the death resulted from a commercial aviation accident occurring more than 12 nautical miles from the shore of the United States. Second, it exempted from DOHSA's reach deaths caused by commercial aviation accidents on the high seas 12 nautical miles or less from the shore of the United States. Importantly – and perhaps tellingly as to its purpose – although it was passed nearly four years after the fact, the amendment applied retroactively to the day before the TWA Flight 800 disaster occurred.

That amendment had a dramatic effect on DOHSA as a whole. Before the 2000 amendment the territorial limits of DOHSA – the high seas beyond 3 miles from the shore of the United States – and its remedies – fair compensation for pecuniary loss sustained by the surviving family members – were straightforward, well-defined, and uniformly applicable to any death on the high seas. After the amendment, DOHSA's application is anything but; as a leading treatise describes it, "DOHSA as amended seems incoherent." Indeed, after the 2000 amendment, DOHSA's application and the remedies available vary depending on the cause of death and the distance from shore that the incident occurred. Specifically, after the amendment, if the decedent was anyone other than a victim of a commercial aviation accident – including a decedent who was the victim of a non-commercial aviation accident or a cruise ship passenger – DOHSA's 3 nautical mile limit would apply. In that case, the damages recoverable would be limited to pecuniary loss. If the decedent was a victim of commercial aviation accident that occurred more than 12 nautical miles from shore, DOHSA would apply but available damages would expand to include both pecuniary and non-pecuniary loss. And if the decedent was the victim of a commercial airline accident that occurred 12 nautical miles from shore or closer, DOHSA would not apply at all, leaving courts, lawyers and litigants to argue about whether state, federal, or some other law, such as the general maritime law, would apply.

The Proposed Cruise Passenger Protection Act

Despite the many anomalies the 2000 amendment created, bicameral legislation has been introduced in Congress to amend DOHSA to make the commercial aviation accident provisions of Section 30307 applicable to cruise passenger fatalities. Introduced in the House of Representatives as H.R. 2173 and in the Senate as S.B. S965, if enacted the Cruise Passenger Protection Act ("CPPA") would apply to any vessel, other than those involved in coastwise transit between U.S. ports, that is authorized to carry and sleep 250 or more passengers and which either embarks or disembarks passengers at a U.S. port. The proposed amendment also contains a number of provisions that do not directly pertain to DOHSA or the commercial aviation amendment in Section 30307, including proposed crime prevention and reporting requirements, passenger and vessel safety and security provisions, and enhanced enforcement measures for crimes occurring on the vessels to which the proposed amendment would apply.

These bills were previously presented to Congress in virtually identical language – to the House of Representatives in 2013, and to both the House and the Senate in 2015 – each time without success. While neither of the prior attempts gained sufficient support to advance the proposed legislation out of Congress, each was limited to the crime prevention, reporting, safety, and security measures contained in the current version of the House and Senate bills, and neither contained language that would have made the commercial aviation accident provisions of Section 30307 applicable to cruise-related deaths. Given the addition of the cruise fatality language to the most recent version of the CPPA and its absence from prior bills, it is difficult to say what impact, if any, the failure of prior versions to gain sufficient congressional support will have on the current edition of the bill, and as of this writing there is very little legislative history available to provide guidance on how congressional committee discussions regarding the bill are proceeding.

The CPPA Threatens Uniform Application of American Maritime Wrongful Death Law

With little from which we can meaningfully predict the CPPA's chances for being successfully enacted into law or what form it will ultimately take if it does pass through Congress, the question then becomes whether the proposed amendment to DOHSA *should* be enacted into law. At face value, there seems to be some logical appeal to affording surviving relatives of cruise fatalities the same rights and remedies as those available to the surviving relatives of victims of commercial airline disasters. And certainly, the emotional appeal of providing a meaningful remedy to the family of a young child who dies on a cruise ship may be just as strong as that which prompted Congress to provide a remedy to the parents of children who died on TWA Flight 800.

Yet there are also strong reasons against enacting the proposed amendment to DOHSA. Among the most obvious is the congressional intent behind DOHSA as it was enacted in its original form. Under the federalist system established by the United States Constitution and the Tenth Amendment, power is initially vested in each of the fifty States and the authority of the federal government is limited to those powers expressly delegated to it under the Constitution. As a result, each state and the federal government is empowered to enact its own statutory laws and establish its own courts, and thus, to develop its own body of statutory and common law. Recognizing the benefits of uniformity in the field of maritime law and the challenges presented by the federalist system, DOHSA's enactment in 1920 represented an attempt by Congress to bring a system of uniformity to maritime wrongful death claims, which otherwise would have been subject to the differing laws of the States based solely upon where the death occurred.

Rather than promote the uniformity that Congress sought to achieve when it enacted DOHSA, the CPPA's proposed amendment would accomplish precisely the opposite effect. For example, DOHSA originally provided a uniform remedy to all deaths occurring on the high seas more than three nautical miles from shore. In contrast, the proposed amendment would give cruise passenger deaths preferential treatment by making non-pecuniary damages available to their surviving relatives while continuing to limit other plaintiffs to pecuniary loss; certainly, the surviving relatives of non-cruise ship fatalities must feel the same sorrow, loss of companionship, and loss of affection as those to whom the proposed amendment would give a more expansive remedy. It is also difficult to justify exposing cruise ship operators to damages for non-pecuniary loss while limiting the exposure of smaller private vessels to economic damages.

The proposed amendment's geographic scope is also riddled with inconsistencies. In its original form DOHSA set a "bright line" boundary at which it applies to all maritime deaths – three nautical miles from the shore of the United States. After the amendment, DOHSA's geographic boundary would move out to 12 nautical miles from shore for cruise fatalities but would remain at 3 nautical miles for all deaths not subject to the amendment. Inside 12 nautical miles, DOHSA would not apply at all to cruise fatalities and the resulting claims would be subject to such "*Federal, State, and other appropriate law*" as may apply. Thus, between 12 nautical miles and 3 nautical miles from shore, DOHSA would not apply to cruise fatalities but it would apply to all other traditional maritime deaths, leaving cruise operators subject to the varying remedial and liability schemes of state law. Neither the text of the current House and Senate bills nor the relevant legislative history provide any explanation for these geographical distinctions, or for why one boundary applies to cruise fatalities while different boundaries apply to everyone else.

While it is difficult to deny the emotional appeal of expanding DOHSA's remedies to provide compensation to the survivors of those whose lives may otherwise "*appear worthless in the eyes of the law*," the Cruise Passenger Protection Act seems to be a significant step backwards. It expands the class of beneficiaries who would receive preferential treatment through the availability of non-economic damages to include the surviving relatives of cruise ship fatalities, but it fails to provide a reasoned basis for drawing such a distinction between them and the surviving relatives of other maritime deaths. It draws seemingly arbitrary geographic boundaries with no explanation for why it does so. It is unlikely to change the operational procedures and policies of cruise ship operators, who already take steps they deem necessary to avoid loss of life on their vessels. Ultimately, it places emotional appeal above uniformity and equal treatment under the law, and Congress would be well-advised to reject it.



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