

MEDIATION: THE COMMON SENSE SOLUTION TO SOLVING THE MYRIAD CHOICE OF LAW ISSUES IN COMPLEX AVIATION ACCIDENT CASES

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Six minutes after Swissair First Officer Stefan Loew advised Canadian air traffic control authorities that Swissair Flight 111 had declared an emergency, that electric power had been lost and that the crew was attempting to prepare the cabin for an emergency landing by using flashlights, Swissair Flight 111, an MD-11 aircraft, plunged into the Atlantic Ocean some nine miles off the coast of Peggy's Cove, Nova Scotia, resulting in the death of 215 passengers and 14 crewmembers aboard the ill-fated flight.¹

The passenger mix aboard Swissair Flight 111 had been a routine one for the New York to Geneva route: A combination of diplomats, business executives, vacationers, retirees and students heading to Geneva, Switzerland on the overnight flight from New York which had departed Kennedy Airport shortly after 7:00 p.m. on Thursday, September 2, 1998.² The tragic accident, the worst in Swiss aviation history, plunged the airline, which had an impeccable reputation for safety and service, into bankruptcy three years later.³ The accident itself was the subject of the most intensive accident investigation history in Canadian history, with the Transportation Safety Board of Canada issuing its final report on March 27, 2003, nearly five years after the crash.⁴ The accident spawned at

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¹ AVIATION INVESTIGATION REPORT A98H0003, AVIATION INVESTIGATION REPORT IN-FLIGHT FIRE LEADING TO COLLISION WITH WATER SWISS AIR TRANSPORT LIMITED, McDONNELL DOUGLAS MD-11, HB-IWF, PEGGY'S COVE, NOVA SCOTIA 5 NM SW, 2 SEPT. 1998 1-3 (Transp. Safety Bd. of Can. 2003) [hereinafter AVIATION INVESTIGATION REPORT], available at <http://www.tsb.gc.ca/en/reports/air/1998/index.asp>.

² See N. R. Kleinfield, *The Crash of Flight 111: The Victims; List of 229 Was a Kaleidoscope of Nations*, N.Y. TIMES, Sept. 4, 1998; see also Gary Stoller, *Doomed Plane's Gaming System Exposes Holes in FAA Oversight*, USA TODAY, Feb. 16, 2003, available at http://www.usatoday.com/money/biztravel/2003-02-16-swissair-investigation_x.htm.

³ Susan LeBlanc, *They Didn't Have a Chance*, HALIFAX HERALD LIMITED, Mar. 28, 2003, <http://www.iasa.com.au/folders/sr111/gerretyesq.html>.

⁴ See AVIATION INVESTIGATION REPORT, *supra* note 1.

least two books, one of which dealt with the accident from a pilot's point of view and the other telling the story of surviving family members of passengers lost in the crash of Swissair 111.⁵

The crash resulted in the death of approximately 115 American passengers as well as passengers of French, Swiss, Spanish, Iranian, Canadian, and a smattering of other nationalities.⁶

THE LEGAL CONUNDRUM AND THE POSSIBLE DEFENDANTS

The Swissair 111 accident raised thorny legal issues for all that could potentially be involved in the complex litigation which invariably ensues in the aftermath of a plane crash. Obviously, a target defendant in the litigation would be Swissair, the flag carrier of Switzerland, who would be responsible to the passengers under the provisions of a treaty of the United States commonly known as the Warsaw Convention.⁷ The Warsaw Convention, an international treaty of the United States, had a long and tortured history.⁸ In 1995, Swissair, together with numerous other world airlines, had signed the International Air Transport Association (IATA) Intercarrier Agreement⁹, which waived the contentious limit on liability for international air accidents,¹⁰ and replaced it with a liability regime whereby the carrier agreed to accept responsibility for up to 100,000 SDRs¹¹ and unlimited liability for sums in excess of that amount if the airline could not prove that it took "all necessary

⁵ DON LEDGER, *SWISS AIR DOWN: A PILOT'S VIEW OF THE CRASH AT PEGGY'S COVE* (Nimbus Publishing 2000); STEPHEN KIMBER, *FLIGHT 111 THE TRAGEDY OF THE SWISSAIR CRASH*, (Seal Books 1999).

⁶ N. R. Kleinfeld, *supra* note 2.

⁷ Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in note following* 49 U.S.C. § 40105 (1997) [hereinafter Warsaw Convention].

⁸ *See generally* Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497 (1967).

⁹ *See* Warsaw Convention, *supra* note 7; *see also* International Air Transport Association (IATA) Intercarrier Agreement on Passenger Liability [hereinafter Intercarrier Agreement], available at <http://www.iata.org/nr/contentconnector/cs2000/siteinterface/sites/legal/file/iaa.pdf>.

¹⁰ This had been set at \$75,000 in the absence of proof of "willful misconduct." Warsaw Convention, *supra* note 7, at art. 25.

¹¹ Approximately U.S. \$140,000 depending on the conversion rate of the Special Drawing Rights (SDRs) into U.S. dollars. "The SDR is an international reserve asset, created by the [International Monetary Fund] in 1969 to supplement the existing official reserves of member countries. . . Its value is based on a basket of key international currencies." INT'L MONETARY FUND, FACTSHEET: SPECIAL DRAWING RIGHTS (SDRs) (2006), <http://www.imf.org/external/np/exr/facts/sdr.htm>.

measures” to avoid the loss, an almost impossible burden for any air carrier to meet in aviation accident litigation.¹² While the availability of the Intercarrier Agreement,¹³ along with the unlimited liability of the airline if it failed to prove that it took “all necessary measures,” made recovery predictable with respect to about half of the passengers on board the flight, Article 28 of the Warsaw Convention loomed as an important impediment to recovery in the courts of the United States.¹⁴ Article 28 of the Warsaw Convention, dealing with jurisdiction, provided that the air carrier could be sued in only one of four places:

- (1) the “domicile of the carrier”;
- (2) the “principal place of business” of the carrier;
- (3) the carrier’s “place of business through which the contract has been made”; or
- (4) the “place of destination.”¹⁵

Where none of those four places was in the United States, the court lacked subject matter jurisdiction and the cases could not proceed against Swissair. Many of the Swiss and French passengers’ tickets had been issued in France or Switzerland and had provided for roundtrip transportation from France or Switzerland to the United States and return. Those cases were barred in the United States given Swissair’s status as a corporation domiciled in Switzerland with its principal place of business there.¹⁶ Therefore, at the outset of the litigation, nearly half the passengers were prohibited from suing Swissair in the courts of the United States. While their home fora of Switzerland and France were likely available for pursuit of claims arising from the crash, the remedies and level of damages recoverable in wrongful death actions in France

¹² Under the “all necessary measures” defense, a carrier may exonerate itself from liability if it proves that it took all reasonable measures to avoid the damage, or that it was impossible for the carrier to take such measures. *See* Warsaw Convention, *supra* note 7, at art. 20; *see also* *Mfrs. Hanover Trust Co. v. Alitalia Airlines*, 429 F. Supp. 964, 967 (S.D.N.Y. 1977), *aff’d*, 573 F.2d 1292 (2d Cir. 1977).

¹³ Warsaw Convention, *supra* note 7; Intercarrier Agreement, *supra* note 9.

¹⁴ Warsaw Convention, *supra* note 7, at art. 28.

¹⁵ *Id.*; *see also* *Sopcak v. Northern Mountain Helicopter Serv.*, 52 F.3d 817, 818–19 (9th Cir. 1995); *Klos v. Polskie Linie Lotnicze*, 133 F.3d 164, 167–68 (2d Cir. 1997); *Swaminathan v. Swiss Air Transp. Co.*, 962 F.2d 387, 389 (5th Cir. 1992); *Wylar v. Korean Air Lines Co.*, 928 F.2d 1167, 1175 (D.C. Cir. 1991); *Kapar v. Kuwait Airways Corp.*, 845 F.2d 1100, 1104 (D.C. Cir. 1988); *Smith v. Can. Pacific Airways, Ltd.*, 452 F.2d 798, 802 (2d Cir. 1971).

¹⁶ *See* Warsaw Convention, *supra* note 7, at art. 28; *see also* *Aviateca S.A. v. Friedman*, 678 So. 2d 387 (Fla. 3d DCA 1996); *Wylar v. Korean Air Lines Co.*, 928 F.2d 1167 (D.C. Cir. 1991).

and Switzerland were far more restrictive than in the courts of the United States.

Another natural target was SR Technics, which had formerly been the maintenance arm of Swissair and which was responsible for maintaining the Swissair fleet in airworthy condition.¹⁷ There was, however, an issue as to whether SR Technics could be sued separately since, under United States jurisprudence,¹⁸ SR Technics could be considered to be the agent of the carrier for purposes of invoking both jurisdictional and limit of liability defenses under the Warsaw Convention.¹⁹ While the family of a passenger who could sue Swissair in the United States courts did not need to name SR Technics as a defendant in order to get full relief, the foreign plaintiffs looked to sue SR Technics in the United States as a way of avoiding the jurisdictional bars of the Warsaw Convention.²⁰

Another prime target was Boeing, which had taken over McDonnell Douglas Corp., the manufacturer of MD-11 aircraft.²¹ While there was nothing in the immediate aftermath of the accident which suggested that the aircraft had been defectively designed or manufactured by McDonnell Douglas/Boeing, plaintiffs commonly join the aircraft manufacturer as a defendant in major aircraft litigation.

In addition to those two obvious targets, the operator and manufacturer of the aircraft, the Swissair accident offered a plethora of other potential defendants who may have borne some liability for the accident.²² These included the so-called “IFEN defendants,” *i.e.*, those companies who participated in the manufacture, design and installation of the in-flight entertainment system aboard the Swissair aircraft.²³ The in-flight entertainment

¹⁷ See *In re Air Crash Disaster Near Peggy's Cove, Nova Scotia* on Sept. 2, 1998, 210 F. Supp. 2d 570, 572–73 & n.3 (E.D. Pa. 2002); see also SR 111 Supporting Technical Information, available at http://www.tsb.gc.ca/en/reports/air/1998/a98h0003/02sti/18additionalinformation/companies.asp?print_view=1.

¹⁸ *In re Air Disaster at Lockerbie, Scotland* on Dec. 21, 1988, 776 F. Supp. 710 (E.D.N.Y. 1991); *In re Aircrash Disaster Near Roselawn Indiana* on Oct. 31, 1994, No. 95 C 4593, MDL 1070, 1997 WL 572898, at *2 (N.D. Ill. Sept. 10, 1997); *Waxman v. C.I.S. Mexicana de Aviacion, S.A. de C.V.*, 13 F. Supp. 2d 508 (S.D.N.Y. 1998).

¹⁹ See Warsaw Convention, *supra* note 7, at art. 23; see also *In re Air Crash Disaster Near Peggy's Cove, Nova Scotia* on Sept. 2, 1998, No. MDL 1269, 2002 WL 334389, at *6–9 (E.D. Pa. Feb. 27, 2002).

²⁰ See *In re Air Crash Disaster Near Peggy's Cove*, 2002 WL 334389, at *6–9.

²¹ See *In re Air Crash Disaster Near Peggy's Cove*, 210 F. Supp. 2d at 572; see also William Pfaff, *Europe: Aerospace Competition with America Is Growing*, Aug 2, 2000, available at <http://www.algora.com/31/news/details.html>.

²² See *In re Air Crash Disaster Near Peggy's Cove*, 210 F. Supp. 2d at 572.

²³ *Id.*

system aboard the Swissair fleet was one of the newest and most technologically advanced in the industry, and there was some suspicion that the wiring for the IFEN system, which placed a heavy burden on the electrical system of the aircraft, had been the originating cause of the fire that had brought down Swissair Flight 111.²⁴ The role of the IFEN defendants was not clearly identified at the outset of the litigation, and there were disparities as to exactly “who” had done “what” with respect to the IFEN system.²⁵ The system was sold to Swissair by Interactive Flight Technologies (IFT), who had designed the system.²⁶ IFT had in turn contracted with Santa Barbara Aerospace (SBA), a California corporation, who obtained the Supplemental Type Certificate for the IFEN system, a pre-requisite for installing the system on the aircraft, from the Federal Aviation Administration.²⁷ The actual wiring and installation of the IFEN system on the Swissair fleet was performed by Hollingsead International, Inc., a California based company who provided the workmen to install the system at Swissair’s facility in Zurich.²⁸ To further complicate matters, by the time the litigation was commenced, Santa Barbara Aerospace had declared bankruptcy, effectively shielding it from any potential liability, except to the extent that it had liability insurance which may have been available to provide coverage for the company’s activities.²⁹

Another potential defendant in the case was DuPont, who faced lawsuits from family members on two counts: (1) that they had manufactured the Mylar thermal blankets used for insulation purposes in the aircraft shell; and (2) that they were the manufacturer of Kapton wiring used in the aircraft, which wiring was alleged to be susceptible to flammability, chafing, cutting and cracking.³⁰

One final potential defendant was Delta Air Lines, who while not operating the flight, had a “code share” agreement with Swissair whereby Swissair Flight 111 also bore a Delta flight number

²⁴ *Id.*

²⁵ See *In re Air Crash Disaster Near Peggy’s Cove*, 2002 WL 334389, at *6–7.

²⁶ See *In re Air Crash Disaster Near Peggy’s Cove*, 210 F. Supp. 2d at 572.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Anna Wilde Mattheews, *FAA Reviews its Oversight of Adjustments*, WALL ST. J. Sept. 23, 1999, at B4. IFT’s stock has since been delisted and the company is in dire financial straits. Gary Stoller, *Doomed Plan’s Gaming System Exposes Holes in FAA Oversight*, USA Today, Feb. 17, 2003 at 1B, available at http://www.usatoday.com/money/biztravel/2003-02-16-swissair-investigation_x.htm.

³⁰ See *id.* at 572–73; see also *In re Air Crash Disaster Near Peggy’s Cove*, 2002 WL 334389, at *1.

and was shown in Delta's schedules as a code share flight operated jointly by Swissair and Delta.³¹ Some fifty of the passengers aboard the plane had passenger tickets issued by Delta Air Lines and it was unclear as to whether the decedents' families could file a separate lawsuit against Delta Air Lines based upon the allegations that, as a code share partner of Swissair, Delta bore some liability for the loss.³²

THE CHOICE OF LAW ISSUES

The intricacies involved in selecting the right parties to sue and proving a liability case against them were not limited to facts of the case: Determining the applicable law provided an equally disturbing myriad of possibilities. What law would govern liability? What law would govern damages? What elements of damages would be recoverable? Swissair was a Swiss corporation and its liability was governed under the Warsaw Convention, as modified by the Inter-carrier Agreement.³³ Under Article 17 of the Warsaw Convention, Swissair was responsible for an "accident" resulting in the death of a passenger aboard the aircraft.³⁴ While Article 17 of the Warsaw Convention provided the framework for liability, it did not identify the particular law which would be applied in determining the elements of recoverable damages. The Supreme Court had previously held that Article 17 of the Warsaw Convention created a "pass through," meaning that the types of damages that were recoverable would be subject to either state law or national law.³⁵ In this case, since the crash of Swissair Flight 111 occurred on the high seas, defined at that time in the Death on the High Seas Act

³¹ See *In re Air Crash Disaster Near Peggy's Cove*, 210 F. Supp. 2d at 572; see also *Swissair Settlement Rejected*, CBS NEWS, Mar. 12, 1999, available at http://www.cbsnews.com/stories/1999/09/08/world/main61734.shtml?source=search_story.

³² This issue has now been rectified by Article 41 of the Montreal Convention, Official Title: Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on 28 May 1999, ICAO Doc. No. 9740 (entered into force November 4, 2003), reprinted in S. Treaty Doc. 106-45, 1999 WL 33292734 (Treaty) provides that both the operating carrier (in this case Swissair) and the contracting carrier (i.e. Delta, the carrier who issued the tickets upon which the passengers were traveling at the time of the flight) bear responsibility in the event of the death or bodily injury of a passenger.

³³ See Warsaw Convention, *supra* note 7, at art. 1, 17, & 28; Inter-carrier Agreement, *supra* note 9.

³⁴ See Warsaw Convention, *supra* note 7, art. 17; see also *Air France v. Saks*, 470 U.S. 392, 405 (1985); *Olympic Airways v. Husain*, 540 U.S. 644 (2004).

³⁵ *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996).

(DOHSA),³⁶ as beyond one marine league (approximately three miles)³⁷ from the shore of any state, DOHSA governed the recovery for damages.³⁸ It was questionable under the facts of this case whether DOHSA would apply to the other defendants or only the air carrier. Moreover, at that time, DOHSA, which had been in effect since the 1920, provided only for pecuniary damages as result of the death of a decedent on the high seas.³⁹ While there were legislative proposals to amend DOHSA to allow for the recovery of non-pecuniary damages (such are frequently recoverable under most state wrongful statutes), those proposed amendments to DOHSA, which were introduced following the crash of TWA Flight 800 off the coast of Long Island on July 17, 1996,⁴⁰ were bogged down in Congressional Committees and had not yet been enacted. As will be seen later, the uncertainty as to the scope and application of DOHSA, and the measure of damages recoverable thereunder, became a significant stumbling block in the settlement of cases. This ultimately resulted in the court taking an active role in order for mediation cases to break the log jam which had occurred because of the uncertainty surrounding DOHSA.

Another important legal issue, which may have precluded consideration of the suits of the foreign passengers in the courts of the United States was the *forum non conveniens* doctrine, which gives district courts the power to dismiss cases to another country when the “private interest” and “public interest” facts favor resolution of the case in a foreign forum.⁴¹

After the matters had been assigned to Chief Judge James T. Giles in the United States District Court for the Eastern District of Pennsylvania by the Judicial Panel on Multidistrict Litigation,⁴² defendants Boeing and Swissair agreed, shortly prior to the first scheduled conference in the case, not to contest liability for compensatory damages awardable under whatever damage law the court determined to be applicable.⁴³ Since there was to be no dis-

³⁶ 46 U.S.C. § 761 (1994).

³⁷ See *In re Air Crash Disaster Near Peggy's Cove*, 210 F. Supp. 2d at 579 n.8.

³⁸ *Id.* at 571 & 586.

³⁹ *Id.* at 573 & 575.

⁴⁰ *In re Air Crash Off Long Island, New York on July 17, 1996*, 209 F.3d 200, 203 (2d Cir. 2000).

⁴¹ The Supreme Court articulated the doctrine as early as 1947 in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), and re-enforced it a quarter of a century ago in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

⁴² See generally 28 U.S.C. § 1407 (2006).

⁴³ See *In re Air Crash Disaster Near Peggy's Cove*, 210 F. Supp. 2d at 571, 573.

pute as to liability, defendants strengthened their hand by arguing that the claims of plaintiffs who represented foreign decedents should be dismissed in the courts of the United States and litigated in the home countries of the decedents, claiming those countries had the most significant interest in awarding the victims' families compensation under the laws of their home countries.⁴⁴

Because of the damage conundrum, and the issue of whether DOHSA was applicable to these claims arising from this accident, which provided only for pecuniary losses, very few of the claims arising from the crash in 1998 had been settled by the summer of 1999. If the DOHSA was to be the applicable damage law, then claimants such as the parents of students and other non-significant wage earners, such as retirees who had perished in the crash, would receive very small damage awards.

A movement was afoot in Congress to amend DOHSA to allow recovery for loss of care, comfort and companionship, non-pecuniary elements of damages which heretofore had not been permitted in DOHSA cases.⁴⁵ Additionally, the statutory beneficiaries, who were already allowed to recover pecuniary losses, could recover non-pecuniary losses such as loss of care, comfort and companionship without any showing of financial dependency on the deceased passenger.⁴⁶ These statutory beneficiaries included parents, children and spouses. However, as of the summer of 1999, the proposed DOHSA amendments had not yet been enacted into law, and until such amendments were signed into law, defendants' and plaintiffs' counsel were understandably hesitant to settle their cases. Plaintiffs were unwilling to settle for purely DOHSA damages, which precluded non-pecuniary losses, and were instead willing to argue that the law of their decedent's domicile, which in the cases of Pennsylvania or Connecticut decedents may have provided much more generous recoveries, was applicable. New York law was favorable to the plaintiffs since pre-impact conscious pain and suffering claims could be recovered.⁴⁷ Connecticut law, where wrongful death damages were calculated based on the value of the life of the decedent, was even more favorable.⁴⁸ Pennsylvania law, if applicable, provided separate causes of action

⁴⁴ See *In re Air Crash Disaster Near Peggy's Cove*, 2002 WL 334389, at *2.

⁴⁵ See *In re Air Crash Disaster Near Peggy's Cove*, 210 F. Supp. 2d at 573.

⁴⁶ *Id.*

⁴⁷ See *McDougal v. Garber*, 73 N.Y.2d 246 (1989).

⁴⁸ See Conn. Gen. Statutes § 52-555; see also *Feldman v. Allegheny Airlines, Inc.*, 524 F.2d 384, 386 (2d Cir. 1975) ("Connecticut law measures . . . recovery by the loss to the decedent of her life.").

for both conscious pain and suffering and wrongful death.⁴⁹ Defendants, raising the flag of DOHSA and the specter of dismissing nearly 100 cases to the courts of Europe on the ground of *forum non conveniens* with respect to the foreign passengers, were hesitant to pay damages based on proposed amendments to DOHSA, which had not yet been enacted. Moreover, the statutory beneficiaries who could recover under DOHSA were quite proscribed. For instance, if a relative of the deceased was not dependent upon the deceased, there could be no recovery.

The wild card, as it is in many cases, was punitive damages: assuming that the law of a state, and not DOHSA, which precluded punitive damages, was applicable, punitive damage claims could arguably be asserted against several of the defendants.⁵⁰ While Swissair could be confident that it did not face punitive damages exposure since no punitive damages were allowed in a Warsaw Convention case, it could not be certain that the same rule would apply to SR Technics, its agent who performed maintenance services on the aircraft and who, plaintiffs argued, played a role in the installation of the IFEN system.⁵¹ While Boeing was confident that Washington and California law precluded punitive damages, there was an argument that the law of Missouri, which was the headquarters of McDonnell Douglas at the time the aircraft was manufactured, may have permitted a punitive damage claim.⁵²

These legal and factual contentions, plus the specter of a long accident investigation by the TSB, portended a long and drawn out discovery contest and a lengthy liability trial, regardless of what liability law would apply to various defendants and what the applicable damage law was ultimately determined to be.

Defendants' concession that they would not contest liability for compensatory damages set the stage for defendants to argue that there was no need for liability discovery, depositions, document discovery or the other familiar litigation tools typically employed in a mass aviation disaster case.⁵³ Defendants did reserve their right to make certain motions, such as *forum non conveniens*,

⁴⁹ See 42 PA. CONS. STAT. ANN. § 8301 (2007); see also *Torres v. Brooks Armored Car Service Div.*, Civ. No. 93-5683, 1994 WL 143144, at *2 (E.D.Pa. Apr 12 1994).

⁵⁰ See *In re Air Crash Disaster Near Chicago, Ill.* On May 25, 1979, 644 F.2d 594, 614-15 (7th Cir. 1981)

⁵¹ See *In re Air Crash Disaster Near Peggy's Cove*, 210 F. Supp. 2d at 572.

⁵² See MO. ANN. STAT. § 509.200 (2008); see also *Peak v. W.T. Grant Co.*, 386 S.W. 2d 685, 690 (Mo. App. 1964) (following the majority rule, Missouri permits recovery of punitive damages).

⁵³ See *In re Air Crash Disaster Near Peggy's Cove*, 2002 WL 334389, at *2.

the applicability of DOHSA, and the non-availability of punitive damages, in order to shape the scope of the litigation.⁵⁴ Obviously, if all of those motions were successful, defendants' liability exposure would be much less than if unlimited recoverable damages were allowed under the laws of the various decedents' domiciles. After approximately nine months, all of the motions were fully briefed and ready for submission to the court in June of 2000.⁵⁵

On June 19, 2000, when the parties appeared before the court to argue the various motions, only fourteen of the passenger cases had been settled, eight European cases and six American cases. In March 2000, during that briefing period, DOHSA had been amended to allow for recovery of non-pecuniary damages.⁵⁶ At the hearing before Chief Judge Giles in June 2000, counsel for both sides readily admitted that the reason that more cases had not settled was the uncertainty as to the law. The defendants argued that no cases could really settle before DOHSA had been amended, because for plaintiffs' counsel to do so would be virtual malpractice. The plaintiffs argued that they were not going to give up the right to recover punitive damages until they at least had a viable remedy available to them in the form of the amended DOHSA statute, which allowed for recovery of non-pecuniary damages for loss of care, comfort and companionship.⁵⁷

THE BREAKING OF THE LOGJAM: THE ORDER TO MEDIATE

While the briefs submitted by both sides were exhaustive, the problem was that very few cases had been settled during the extended briefing period.⁵⁸ Plaintiffs were understandably waiting for the DOHSA amendments allowing recovery of non-pecuniary damages to wind their way through Congress, and defendants were reluctant to settle by paying elements of damages which were not yet properly recoverable. Moreover, since the availability of punitive damages had not been determined, lawyers representing the families in single non-dependency cases, where the economic losses would be insubstantial under unamended DOHSA, were under-

⁵⁴ *Id.*

⁵⁵ *See, e.g.*, Pls.' Mem. of Law in Resp. and Opp'n to the Mot. of Defs.' to Dismiss Claims for Punitive Damages Based on the Death on the High Seas Act, 2000 WL 34015859 (E.D. Pa. Jan. 28, 2000).

⁵⁶ *See In re Air Crash Disaster Near Peggy's Cove*, 210 F. Supp. 2d at 573.

⁵⁷ *Id.*

⁵⁸ *See* Pls.' Mem. of Law in Resp. and Opp'n, 2000 WL 34015859.

standably reluctant to settle. Judge Giles, realizing that perhaps uncertainty in the law was the best catalyst to settlement, broke the logjam by suggesting mediation before the court.⁵⁹ The judge asked both parties whether they would agree to submit certain selected cases for settlement efforts through the court.⁶⁰ Settlements would be predicated on the parties agreeing that, for purposes of the mediation, the cases would be settled within the parameters of the new DOHSA statute.⁶¹ After securing the agreement of all parties to proceed in that fashion, Judge Giles made the following procedural rules:

1. Plaintiffs would submit fifteen cases for review by the court within seven days. These fifteen cases would be the first to go to mediation.
2. The financial information with respect to those fifteen cases would be provided to defendants immediately.
3. The defendants could serve damage interrogatories within ten days.
4. Answers to those interrogatories would be served within ten days.

The court would allow ten business days to conduct mediations in the fifteen cases.⁶²

The alternative to breaking the logjam of deciding the heavily briefed motions would leave one side vanquished, one victorious, and with perhaps one-half of the cases, those of the foreign decedents, dismissed to foreign venues. However, the losing side was certain to appeal, whether as of right or by permission of the district court sought pursuant to 28 U.S.C. § 1292(b). Such an appeal would realistically prolong the disposition of any of the cases for at least another year. Since only a handful of the cases had been settled nearly two years after the crash, the court was anxious to move the cases forward. Chief Judge Giles, who had multidistrict litigation experience, but no major aircraft accident litigation experience, astutely viewed mediation as the way to move the case forward. The court offered the plaintiffs the opportunity to divide up the fifteen cases, which would first be mediated among various

⁵⁹ Note that other than Plaintiffs' Memorandum of Law in Response and Opposition, all other briefs, pleadings, orders, transcripts, and other court documents relating to this litigation were not published and are not available on any electronic database. All of these documents are on file with the author.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

types – foreign citizens, American citizens, dependency cases, wage earner cases, and single non-dependency cases.⁶³ With the basic information provided to defendants by the plaintiffs, defendants would be in a position to review the cases and proceed to mediation armed with the facts necessary to make reasonable settlement offers.⁶⁴

The court made a number of procedural rulings which significantly contributed to the ultimate success of the mediation process.⁶⁵

1. The court ordered that all parties appear at the mediation.⁶⁶ Defendants persuaded the court that their counsel had full authority to act on behalf of their clients, and the court excused defendants from participating, with counsel left to represent their interests.⁶⁷ The court did insist that, absent unusual circumstances, all of the plaintiffs appear.⁶⁸ The court believed that this was important to avoid the plaintiffs receiving “filtered” information through their counsel.⁶⁹ The judge also believed it important that the plaintiffs themselves hear directly from defense counsel as to what the defendants perceived to be the weaknesses of the plaintiffs’ cases.⁷⁰ While the plaintiffs would hear from their own counsel during the initial presentations as to the strengths of their cases, the court believed it important that the plaintiffs learn what defense counsel believed to be the weaker portions of the case.⁷¹ The court also directed that plaintiffs’ counsel send damage brochures and settlement demands to the court in advance of the mediations.⁷²

2. The court also allowed ample time for each case to be mediated and never pressed the parties to present their case within any certain period of time. However, the court was quick to advise counsel when it thought that the parties were simply so far apart that further negotiations would not be productive. It allowed two, three, four, and even on occasion, five hours for the presentation of

⁶³ *Id.*

⁶⁴ Because only Swissair and Boeing had agreed to waive liability for compensatory damages, only those two defendants were involved in the mediation process.

⁶⁵ See *supra* note 59.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

a case.⁷³ While there was initially some reluctance on the part of plaintiffs' counsel to join in the process, their skepticism dissipated after the court was able to successfully mediate all the cases brought before it.⁷⁴

The format established by the court became the rule for all of the ensuing mediations. The court would first invite the plaintiffs in with their counsel and with defense counsel. The court expressed its condolences to the families for their loss and quickly made them feel at home.⁷⁵ Chief Judge Giles possesses a very calm and pleasant demeanor and the parties could quickly identify with him. The judge then let plaintiffs' attorneys make an opening presentation, and if the family member so desired, they could also make their own presentation, talking about the deceased in the presence of counsel and the court.⁷⁶ The court did a magnificent job conveying its condolences to the families, sorrow for their loss, and the realization by the court that dollars could never compensate them for the loss of a loved one.

3. The hearings were all conducted informally. The mediations were set in chambers around a large conference room table. No one was excluded from the presentation. While plaintiffs initially felt uncomfortable in hearing the "negative" side of their case from defense counsel, the court believed, correctly, that it was wise for the family to hear everything about their case, the good and the bad. After initial presentations by plaintiffs' counsel and defense counsel, the court met with each side separately to assess their positions. If the court thought that the parties were hopelessly apart with no possibility of a settlement, it so advised the parties, but urged them both to be reasonable. The process worked. The court never gave "its" settlement number. It told the parties that it would not disclose to the other side what had been said to the court in confidence. This built confidence in the court by the parties and the attorneys quickly recognized the Court's ability to keep private its feelings and views of the case. The court never forced a settlement figure on either the plaintiff or defendant, although the court did advise as to the uncertainty of outcomes, the need for the court to interpret the "new DOHSA" language of care, comfort and

⁷³ *Id.*

⁷⁴ See *In re Air Crash Disaster Near Peggy's Cove, Nova Scotia* on Sept. 2, 1998, No. MDL 1269, 99-5998, 2004 WL 2486263, at *2 (E.D. Pa. Nov. 2, 2004) ("Swiss and Boeing . . . have settled all outstanding lawsuits brought by the estates of the Flight 111 victims.").

⁷⁵ See *supra* note 59.

⁷⁶ *Id.*

companionship and the possibility of appeals which would further delay the case.⁷⁷

4. The court also pushed for resolution of the case on the day of the mediation. There were to be no delays or “call backs.” The court believed that the case was most likely to be settled when the parties were in front of the court. At the inception of the mediations, due to its busy schedule, the court did employ other judges or magistrate judges to assist. However, the vast majority of the cases were handled personally by Chief Judge Giles. This was beneficial to all parties as the court developed a rapport with the attorneys so that the judge got to know the counsel involved very well, particularly defense counsel, who were before the court virtually every day. The cases were, for the most part, prepared very well and accurately.⁷⁸ There were, of course, several embarrassing moments when the amounts claimed were in a foreign currency, not U.S. dollars, which led defense counsel to argue for a much smaller recovery than had originally been sought by the plaintiff.⁷⁹

5. The key to the mediation was preparation. The judge relied on counsel to prepare the cases well and to give him accurate information. The court was impressed by reasonableness. The judge relied heavily on counsel as the arbiters of fairness and, particularly with respect to defense counsel, it relied on them not to take advantage of attorneys for several of the families who may not have been as experienced or as well versed as other attorneys. This benefited the families and assisted in the fair administration of justice.

The court also had to deal with several difficult cases where family relationships were, to say the least, fractured: There were the parents who disinherited their adult daughter from sharing in their estate because of their objection to her alternative lifestyle⁸⁰, the “common law” (a status not recognized under New York law) wife who claimed that she was entitled to recover because she and her alleged common law husband decedent had once visited the Poconos Mountains in Pennsylvania (a state which recognized common law marriage),⁸¹ and the obvious family strains between in-laws as to the proper allocation of any settlement moneys obtained during the mediation process.⁸² These disagreements are of

⁷⁷ *Id.*; see also *In re Air Crash Disaster Near Peggy’s Cove*, 210 F. Supp. 2d at 573.

⁷⁸ See *supra* note 59.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

course not unusual in mass disaster litigation, and in fact surfaced in the Victims Compensation Fund administered by Kenneth Feinberg after the September 11th disaster.⁸³

It was somewhat difficult for defense counsel to always be pleasant, as difficult a series of cases as these were. While every case in which a family loses a loved one is heartbreaking, and while experienced defense counsel in aviation cases have “heard it all,” counsel must remember that each family has sustained a horrific and terrible loss. As my partner succinctly phrased it, mediation in aviation wrongful death cases is a job for “grown-ups.”⁸⁴

We did learn throughout the course of mediation that there were key signs to look for in determining whether the mediation would be successful. If a family member refused to even acknowledge the presence of defense counsel, look him in the eye or shake hands, it was very unlikely that the case was going to settle. Some people who have lost a family member are not ready, even two or three years after the death of a loved one in a aviation accident, to come to grip with the death of their loved ones, and are not prepared to accept any sum of money in settlement. Some cases, despite the best efforts of the parties and the court in mediation, simply could not be settled at mediation because some plaintiffs felt that no money could replace their mother, child or husband, or because they wanted a jury to tell them what the loss of their loved one was worth.

Some cases presented unusual legal issues, discussed above, which did not make it easy for the cases to be settled at mediation. In one case, the only statutory beneficiary under DOHSA was a child who had been disinherited by her parents under their will.⁸⁵ As she was the only statutory beneficiary, assuming that DOHSA was applicable, none of the siblings of the two decedents would be entitled to recover, absent a proof of showing of pecuniary damages. Needless to say, that case did not settle at mediation.⁸⁶

The court also emphasized to counsel and the parties that it was the parties who actually settle the cases, not the court.⁸⁷ The judge’s style was calm. He did not browbeat people, lock doors or refuse to let parties use the facilities. His main interest was in

⁸³ KENNETH FEINBERG, WHAT IS LIFE WORTH: THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11 (Public Affairs 2005).

⁸⁴ Reference made by Desmond T. Barry, Jr., Esq.

⁸⁵ See *supra* note 59.

⁸⁶ *Id.*

⁸⁷ *Id.*

keeping the parties flexible enough to try to settle the cases. The judge's initial question, asked separately to each side, was "what is your best possible number" with the lawyer explaining his reasoning behind his position.⁸⁸ The court expected counsel to be candid with him. If the parties were close to settling the case, the court urged the parties to keep on negotiating. If, however, the parties were hopelessly apart, the judge so advised the parties.⁸⁹ The court stressed that every case had a value and that each case must be resolved by some process, be it mediation or trial.⁹⁰ The judge had high confidence, which he often expressed to counsel for both sides, that counsel would find a way to resolve the matters promptly as the mediation process presented the best opportunity for both sides to settle the cases.

THE END RESULT

What was the result of the mediations process? The answer is simple: The process worked. Out of the 215 passenger cases, all eventually settled without a single damage trial.⁹¹ Virtually all of those settlements came after the mediation process was started by the court. Once the mediation process started, cases settled quickly. Lawyers wanted to know what the cases were settling for, and while there was a confidentiality order entered in each case by the Court, once the attorneys knew what the "going rate" was for certain type of cases, cases settled.⁹² Obviously, what plaintiffs' lawyers wish to avoid is other families (and the lawyers' competitors) getting more money on similar cases. While the mediations were confidential, and the court directed confidentiality with respect to all settlements, the word got out so that the attorneys knew the settlement value of certain types of cases. Once attorneys and their clients became convinced that all cases were being dealt with fairly and equitably, there was less reluctance to settle.

In late February 2002 the court granted both of the motion to strike all claims for punitive damages and the motion for applica-

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See *In re Air Crash Disaster, MDL No. 1269 Near Peggy's Cove*, 2004 WL 2486263, at *2 ("Swiss and Boeing . . . have settled all outstanding lawsuits brought by the estates of the Flight 111 victims.").

⁹² See *supra* note 59.

tion of DOHSA.⁹³ Fortunately, by that time a great majority of the cases had settled and no appeal was taken from the Judge's decisions.

The element of uncertainty benefited all parties, particularly in the foreign passenger cases. While the results obtained in the mediation were settlements probably less than the jury verdict potential in the United States and more than the amounts that would have been awarded in the courts of Europe, the parties felt that justice had been obtained. In cases involving American passengers, those lawyers representing families of Pennsylvania and Connecticut decedents probably received less than they would have received under Pennsylvania and Connecticut law, given the Court's ruling that DOHSA was applicable.⁹⁴ However, those counsel who represented families of New York decedents probably fared better under amended DOHSA since New York law does not provide for non-pecuniary losses in wrongful death actions.⁹⁵

The important factor is that once the mediation process started, virtually all of the cases settled quickly with the defendants being out of the litigation, plaintiffs getting fair settlement value for their cases, and the judicial system not being overburdened with mass disaster litigation.

The moral of this story is that with a good strong judge, competent defense counsel who can evaluate cases and plaintiffs who have a genuine desire to settle their cases, mediation in aviation disaster cases, which have complex legal and factual issues, can be successful.

⁹³ See *In re Air Crash Disaster Near Peggy's Cove*, 210 F. Supp. 2d at 586 (striking punitive damages based on DOHSA); *In re Air Crash Disaster Near Peggy's Cove*, 2002 WL 334389, at *11 (striking punitive damages based on the Warsaw Convention).

⁹⁴ See *In re Air Crash Disaster Near Peggy's Cove*, 210 F. Supp. 2d at 586.

⁹⁵ New York Estate Power & Trust § 5-4.3.

