

Asiana Airlines Flight 214, Malaysia Airlines Flight 370 and Flight 17

By Jonathan S. Ziss

**U**nder the applicable international treaties, the only way in which either Asiana or Malaysia Airlines could escape liability is by proving that these accidents were caused solely by the neglect of other parties and that the respective airlines took all possible measures to avoid the losses.

# Strict Liability for International Aviation Disasters

Within a span of just eight months, the international aviation community experienced the tragic loss of three large commercial aircraft resulting in hundreds of deaths and injuries. Last July, Asiana Airlines Flight 214 crash-

landed in San Francisco. Malaysia Airlines Flight 370 quite literally was lost—disappearing from radar and presumably ending in disaster. And shortly before this article went to press, Malaysia Airlines Flight 17 was shot out of the sky by a missile over Eastern Ukraine, an area in which military forces are engaged in active aggression.

While technical and forensic investigations continue in all three instances, the legal framework for liability is already well developed. This article will review these tragic events and will explain the unique legal environment in which liability claims are made in the aftermath of an international aviation disaster. The article will also spotlight the uniquely modern challenges faced by corporate defendants in the age of instantaneous, crowd-sourcing, social media.

## Asiana Airlines Flight 214

It was 5:04 p.m. Korean Standard Time on July 6, 2013, when Asiana Airlines Flight 214

took off from Seoul's Incheon International Airport, about 30 minutes later than scheduled. The weather was clear as the Boeing 777 began its planned 10-hour voyage to San Francisco International Airport. Four crewmembers, 12 flight attendants, and 291 passengers were on board the plane, which had accumulated 36,000 flight hours since its first voyage in February 2006.

The flight itself was uneventful. According to the National Transportation Safety Board (NTSB), as the plane began its descent into San Francisco the autopilot was switched off, and Flight 214 was cleared for a visual approach. A pilot who was in transition training for the 777—he had 9,684 total flight hours but had logged just 43 hours as pilot-in-command of a 777 since beginning his training on March 25, 2013—was in the left seat, with an instructor pilot to his right. While this was the latter pilot's first trip as an instructor, he had logged roughly 3,000 hours in the 777. A relief first officer sat in the cockpit jump



■ Jonathan S. Ziss is the chair of Goldberg Segalla's Aviation Litigation Practice Group and a member of the steering committee for DRI's Aviation Law Committee. He represents regional, national, and international air carriers, as well as under wing service providers, municipal authorities, general aviation owners and pilots, and fixed base operators, in connection with property and casualty liability litigation. In addition to handling disputed matters, he counsels commercial airlines in connection with industry-related consumer compliance and contractual matters.

seat during the approach and landing, while a fourth pilot was seated in the cabin.

For roughly 42 seconds, the plane appeared to descend normally to 500 feet and slow at a proper rate to 134 knots. Over the next 18 seconds, the plane slowed below the target speed for such a landing. Roughly eight seconds later, at 200 feet, the pilot attempted to increase the aircraft's speed. A "stick shaker" stall warning was triggered about four seconds before impact, followed by a crew member's call for a "go-around"—an attempt to abort the landing—at the three-second mark. Another call for a "go-around" was made about 1.5 seconds before the crash.

It was too late. At 11:28 a.m. Pacific Daylight Time, Flight 214 struck the seawall in front of the runway, and subsequently the runway itself, causing the engines, landing gear, and tail section to separate and the remainder of the plane to cartwheel before coming to a stop on runway 28. The wreckage soon burst into flames and an evacuation began. To make the situation even more difficult, the emergency slides did not deploy properly due to the severe force of the impact—with two slides deploying *inside* the aircraft cabin. Two passengers—16-year-olds—were found dead at the scene, and a third, also age 16, died several days later from her injuries after reportedly being run over by an airport crash tender, her body possibly having been obscured by fire-fighting foam. A total of 181 of the 307 individuals on board were reportedly injured.

### "Haven't Felt This Way Since 9/11"

News of the crash traveled quickly. Crucially, some news emanated from the airplane's passengers. Samsung executive David Eun tweeted about the crash at around 1 p.m.: "I just crash landed at SFO. Tail ripped off. Most everyone seems fine. I'm ok. Surreal." Later, Eun tweeted the following: "Fire and rescue people all over the place. They're evacuating the injured. Haven't felt this way since 9/11." Another Twitter user, Eunice Bird Rah, told CNN shortly after the crash that her father was on the plane and said that it was obviously approaching the runway too low and missed the end before skidding out of control.

Meanwhile, eyewitnesses began posting photos via social media within minutes. Some came from passengers on delayed

flights stuck on the tarmac, others from travelers in the airport and residents living nearby. The first photos showed dark smoke billowing from the wreckage, followed by the decimated remains of Flight 214. The stated numbers of unaccounted-for passengers, fatalities, and injured were varied and changed as the afternoon and evening wore on.

At around midnight, local time, the NTSB arrived on the scene to start its investigation. The NTSB began tweeting about the crash even before arriving at the crash site. In fact, between July 6 and July 17, the @NTSB account posted 86 tweets, with many of these including photos. Complete videos of the media briefings conducted by NTSB Chair Deborah Hersman were also tweeted to followers, and the account even replied to questions and comments from Twitter users. This served the objective of the NTSB to be open and transparent by disseminating accurate information about the state of its investigation.

Asiana's first tweet about the crash came roughly six hours after it occurred: "Thank you for your concern and support at this time. We are currently investigating and will update with news as soon as possible." By that time, social media had taken the story in directions that the airline could never have imagined. An initial Asiana Airlines press release deemed cold and unsympathetic did not help matters.

### "We're Not Talking About a Few Knots"

As Hersman stated at an NTSB news conference, no distress calls had been issued before Flight 214's approach, and no "aircraft anomalies" were detected. One passenger said that the pilot gave no warning of a possible crash landing in the seconds before impact. During the approach, however, the plane was coming in too slow, well under the target airspeed of 137 knots: "We're not talking about a few knots," Hersman said.

Months later, the flying pilot told the NTSB that he had been "very concerned" about landing without an airport navigation system: the airport's Instrument Landing System was not functioning. However, as Hersman stated at a post-crash media briefing, "You don't need instruments to get into the airport" safely," and,

"The crew is required to maintain a safe aircraft. One of the very critical things that needs to be monitored on approach to landing is speed." Meanwhile, the trainee pilot's significant lack of experience flying a 777 was deemed by the NTSB to be particularly noteworthy and would become a recurring issue throughout the investigation.

On March 17, 2014, Asiana filed its accident investigation submission report with the NTSB. The document includes Asiana's analysis of the accident, including the following summary statement from the airline:

The crash of flight 214 was the result of a unique and complex chain of inter-related events. The record makes clear that the flight crew members were thoroughly trained and well-equipped to complete the approach to SFO without incident. Nevertheless, the accident flight crew did not ensure a minimum safe airspeed. The investigation also reveals, however, a number of other contributing causes of the accident, including inconsistencies in the B777's automation logic that led to the unexpected disabling of airspeed protection, a low airspeed alerting system that activated too late to permit recovery of the flight, and air traffic control demands that led to excessive pilot workload during final approach.

*Asiana Airlines Accident Investigation Submission*, NTSB Accident File: DCA 13MA120 (Mar. 17, 2014).

Boeing's submission to the NTSB included a statement that "all airplane systems were functioning as expected prior to impact and did not contribute to the accident." The NTSB convened in Washington, D.C. on June 24, 2014, to determine the probable cause of the disaster, concluding:

... the probable cause of this accident was the flight crew's mismanagement of the airplane's descent during the visual approach, the pilot flying's unintended deactivation of automatic airspeed control, the flight crew's inadequate monitoring of airspeed, and the flight crew's delayed execution of a go-round after they became aware that the airplane was below acceptable glidepath and airspeed tolerances. Contributing to the accident were: (1) the complexities of the auto-throttle and autopilot flight director sys-

tems that were inadequately described in Boeing's documentation and Asiana's pilot training, which increased the likelihood of mode error; (2) the flight crew's non-standard communication and coordination regarding the use of the auto-throttle and autopilot flight director systems; (3) the pilot flying's inadequate training on the planning and execut-

By that time, social media had taken the story in directions that the airline could never have imagined.

ing of visual approaches; (4) the pilot monitoring/instructor pilot's inadequate supervision of the pilot flying; and (5) flight crew fatigue which likely degraded their performance.

*Crash of Asiana Flight 215 Accident Report Summary*, NTSB Public Meeting of June 24, 2014. (The reader should note that NTSB probable cause findings are inadmissible as evidence in a civil action.)

### Falsities, Blame, and Lawsuits

False information is a fact of the Internet era, but in the case of Flight 214, it was television news that fell victim to an unfortunate prank. KTVU in San Francisco incorrectly reported the names of the pilots after an NTSB intern reportedly confirmed the racist names. Among the more tame examples were "Sum Ting Wong" and "Wi Tu Lo." In July of last year, Asiana filed a lawsuit against KTVU, but amidst heavy criticism, the airline dropped the suit shortly after a large-scale passenger lawsuit was filed.

Presently, 27 lawsuits arising from the crash of Flight 214 are pending against Asiana, Boeing, or both in the United States District Court for the Northern District of California. The cases pending in the Northern District of California have been consolidated into multidistrict litigation, styled, *In Re: Air Crash at San Francisco, California, On July 6, 2013*, U.S.D.C., N.D.CA., MDL No.: 2497. Federal subject matter jurisdic-

tion is predicated upon an international treaty governing the rights of passengers and others with respect to aviation-related injury claims. See Convention for the Unification of Certain Rules for International Carriage by Air (Montreal, 28 May 1999) (the "Montreal Convention"). The city and county of San Francisco and San Francisco International Airport also are defendants in one of the lawsuits pending in the Northern District, filed on behalf of the parents of 16-year-old Ye Meng Yuan, the teenage girl who was allegedly run over and killed by two emergency vehicles at the crash scene. Altogether, the lawsuits pending in the Northern District comprise the claims of 54 passengers and one crew member.

In addition to California, a number of Flight 214-related suits are pending in Illinois. Sixteen cases were brought over the course of several months in Cook County, Illinois, against The Boeing Company, and they were removed to the United States District Court for the Northern District of Illinois under 28 U.S.C. §§1441(a) and 1442(a)(1). Boeing asserted that the federal district court had subject matter jurisdiction under 28 U.S.C. §§1331(1) (admiralty jurisdiction) and 1442(a)(1) (federal officer jurisdiction, meaning cases against a "person acting under" an officer of the United States). The district court remanded the first of these cases to state court. Boeing filed a motion for reconsideration, which was denied. Boeing then filed a notice of appeal to the United States District Court for the Seventh Circuit. An expedited briefing schedule was established and the remand proceedings were stayed. The appeal covers all of the Cook County, Illinois, Flight 214 claims filed against Boeing.

### Asiana's Real-Time Response

Regardless of whether there is merit to Asiana's claims that faulty software design was a contributing cause, public opinion of the airline's response to the crash has been overwhelmingly unfavorable. Asiana CEO Yoon Young-doo faced criticism for not arriving in San Francisco until three days after the incident. Before his arrival, he called the pilots "very competent," but he did acknowledge his "tremendous responsibility for those affected by the crash." Asiana later announced plans to increase pilot training to decrease the risk of pilot fatigue.

Asiana took up to five days to contact passengers' families, which the U.S. Department of Transportation (DOT) deemed far too slow, under the Foreign Air Carrier Family Support Act of 1997, as amended, codified in part at 49 U.S.C. §41313. In fact, the regulators fined Asiana US \$500,000, the first instance in which a government fine was leveled against an airline for a slow and otherwise deficient response to an accident. According to the report, for the first 18 hours after the crash the only airline number reachable by families was a reservations line, forcing those seeking information to "navigate through cumbersome automated menus before being connected to an Asiana employee." Even locating this phone number on the airline's website required significant effort, according to the DOT.

After the Department of Transportation imposed the fine, Asiana released a statement saying that it "provided extensive support to the passengers and their families following the accident and will continue to do so." The airline attributed the slow response to short staffing due to a holiday weekend.

Even so, the DOT found that the airline had failed to adhere to federal law repeatedly: "In the very rare event of a crash, airlines have a responsibility to provide their full support to help passengers and their families by following all the elements of their family assistance plans," said U.S. Transportation Secretary Anthony Foxx. Elaborating, Foxx commented, "The last thing families and passengers should have to worry about at such a stressful time is how to get information from their carrier." It should be noted that Asiana had on file with the DOT an approved "family assistance plan," and yet real-time circumstances swamped the plan. The plan had been filed in 2004, perhaps not long removed in time, but eons removed in terms of the development of sources of communication and the pace—and resulting expectations among the public of corporate responsiveness—in 2014.

### Malaysia Airlines Flight MH370

Similar to Asiana Airlines Flight 214, Malaysia Airlines Flight 370 took off in normal conditions. Departing from Kuala Lumpur International Airport at 12:41 a.m. Malaysia Standard Time on March 8, 2014, the Boe-

ing 777—the same type of plane involved in the Asiana crash—was scheduled to land at Beijing Capital International Airport at 6:30 p.m. China Standard Time on March 7. Also similar to Flight 214, the Malaysia Airlines flight included 12 crewmembers. The number of passengers, 227, was significantly less.

The similarities between flights 214 and 370 end quickly. Unlike the former, Flight 370 never arrived anywhere near its destination. In fact, it did not arrive at all. Twenty-six minutes after taking off, the aircraft sent its last automatic maintenance data transmission. At 1:19 a.m., air traffic controllers heard what investigators initially reported as the last words from the cockpit: “All right, good night.” Later, Malaysian authorities announced that the final words—spoken by either the pilot or co-pilot—were, in actuality, “Good night Malaysian three-seven-zero.”

The transponder was shut off two minutes later, severing all contact. No distress signal was ever sent. At 1:30 a.m., the captain of another plane attempted to make contact, hearing only static. About 45 minutes later, Malaysian military radar plotted the aircraft south of Phuket island, indicating that the plane turned west and then north over the Andaman Sea.

What happened next is still unknown. While electronic signals thought to be from the aircraft’s black box were detected in April, authorities now suspect that these signals did not emanate from a man-made device. Meanwhile, an underwater search in the Indian Ocean failed to find any sign of the missing plane, and a search of the surface discovered only garbage.

### “MH370 Has Been Lost”

Sixteen days after Flight 370 took off from Kuala Lumpur, Malaysian Prime Minister Najib Razak stated that authorities “concluded that MH370 flew along the southern corridor and that its last position was in the middle of the Indian Ocean, west of Perth.... It is therefore with deep sadness and regret that I must inform you that, according to this new data, flight MH370 ended in the southern Indian Ocean.” Meanwhile, Malaysia Airlines notified families of the passengers that it was assuming “beyond any reasonable doubt that MH370 has been lost and that none of those on board survived.”

While the search continued on various fronts, details about the passengers and crew were revealed. All 12 crewmembers were Malaysian citizens. The 53-year-old captain had logged more than 18,000 hours of experience in the skies, while the first officer, age 27, had 2,700 hours. The pilot’s homes were searched and reportedly turned up nothing suspicious, while early claims of possible terrorist responsibility were deemed fraudulent.

As expected when a plane carrying more than 200 passengers disappears, the mysterious fate of Flight 370 drew the eyes of the world. America’s “big three” television networks, ABC, CBS, and NBC, all broke into regular programming with updates, while CNN made Flight 370 its top story for weeks. The network drew widespread criticism for its coverage, which banded about various theories, including “supernatural” possibilities. The public, however, was watching; CNN saw a 68 percent increase in ratings over the previous year.

On Twitter, the hashtag #MH370 connected users anxious to discuss theories about the flight’s fate. Others used social media to grieve, drawing additional media attention. In one case, the teenage daughter of the flight’s chief steward has continually tweeted messages about her missing father, among them: “How I wish to wake up every morning, hoping that it is just a dream. But sadly, this is... sigh; reality.”

As of early June, the search for answers—and evidence—continues. The individual charged with leading the hunt, former Australian Defense Force Chief Angus Houston, has called it the most difficult search in human history. Until the cause of the disappearance can be determined, and the wreckage is found, many questions of liability and jurisdiction are unanswerable.

### The Response

As was the case with Asiana Flight 214, Malaysia Airlines itself has been the subject of intense criticism in the aftermath of MH370’s disappearance. In this instance, the government came under fire as well, with the investigation described as hugely flawed. The missteps ranged from not having a proper response plan in place to inaccurately characterizing the event as involving “suspects” with terror links (later

debunked), and changing the account of the flight’s last words. In addition, poor coordination led to a three-day delay in switching the search zones after new information revealed the initial search was too far south, by more than 600 miles.

Prime Minister Razak drew fire for contradicting his March 24 statement that “none of those on board survived.” How-

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ever, on March 29, he stated that officials are “hoping against hope, no matter how remote.... We are praying and we will continue our search for the possible survivors.”

### “Here Come the Lawyers”

A CNN headline on April 22 said it all: “More Than 45 Days into the Search, Here Come the Lawyers.”

The first legal action arising from the airliner’s disappearance was the widely reported case *Siregar v. Boeing Co.*, No. 14-L-003408, which was filed in the Cook County, Illinois, Circuit Court in Chicago on March 25 of this year by a relative of a passenger seeking information on the aircraft and pilots. However, other members of the family of the passenger quickly denounced the lawsuit as having been unauthorized, and a Cook County Circuit Judge dismissed the suit on grounds that the petition was incorrectly filed, without the benefit of a potential known defendant. (Federal law prohibits unsolicited communication concerning a potential action for personal injury or wrongful death by an attorney (or representative of an attorney) or any potential party to the litigation to an individual injured in the accident, or to

a relative of an individual involved in the accident, before the 45th day following the date of the accident.)

Meanwhile, the missing plane is still a popular topic on Twitter, with one devastatingly simple hash tag, in particular, garnering worldwide attention: #PrayForMH370. And, theories continue to fill the information void, from sudden mechanical crises to an intentional crash, reminiscent of Egypt Air Flight 990.

Flight 990 involved the crash of a Boeing 767-366ER in the ocean south of Nantucket, shortly after takeoff from JFK International Airport. Lost were four crew members, 10 flight attendants, and 203 passengers. The NTSB determined that the probable cause of the accident was “the airline’s departure from normal cruise flight and subsequent impact with the Atlantic, as a result of the relief first officer’s flight control inputs.” National Transportation Safety Board Aircraft Accident Brief, EgyptAir Flight 990, Oct. 31, 1999, <http://www.nts.gov/doclib/reports/2002/aab0201.pdf>. In other words, the relief first officer intentionally flew the aircraft into the ocean. With characteristic understatement, the NTSB noted, “The reason for the relief first officer’s actions was not determined.”

### Months Later, Another Malaysia Airlines Disaster

Just a few months after the disappearance of Flight 370, tragedy again struck a Malaysia Airlines flight. Taking off from Amsterdam at 12:15 p.m. (local time) on July 17, Malaysia Airlines Flight 17 was scheduled to land at Kuala Lumpur International Airport at 6:10 a.m. (local time) on July 18. A total of 298 people—283 passengers and 15 crew members—were onboard, an increase over Flight 370’s total of 239. About two hours after takeoff, the flight disappeared from radar, and soon after, the airline made its first tweet about the disaster: “Malaysia Airlines has lost contact of MH17 from Amsterdam. The last known position was over Ukrainian airspace. More details to follow.” At press time it was widely reported that the aircraft was shot down—perhaps accidentally—by a sophisticated anti-aircraft missile operated by pro-Russian separatist forces. All of the passengers perished, including World Health Organization spokesman Glenn Thomas; note that an earlier tally of 295 passengers was later raised to

include three infants seated on laps, a particularly dispiriting detail.

Malaysia Airlines’ long-term response to this new disaster, and its impact on the airline’s already-wounded international reputation, will become clear over the weeks and months to come.

### The Law Governing International Aviation Disaster Liability

As will be discussed more fully below, Asiana 214 has spawned nearly 50 lawsuits that are presently pending in U.S. courts. Malaysia Airlines 370 has produced much less litigation to date, but it is fairly safe to predict that it is only a matter of time before additional suits are filed on behalf of passengers, even if the mystery surrounding the loss of the flight remains unsolved. Under the applicable international treaties, the only way in which either Asiana or Malaysia Airlines could escape liability is by proving that these accidents were caused solely by the neglect of other parties and that the respective airlines took all possible measures to avoid the losses. Given the position taken by Asiana in connection with the NTSB investigation, it has apparently yielded that defense. The position of Malaysia Airlines has yet to be declared in this arena.

### Claims Against Asiana Airlines and Malaysia Airlines

Because both Asiana Flight 214 and Malaysia Airlines Flight 370 were international flights, the claims of everyone aboard will likely be governed by a series of international treaties governing injury and death lawsuits arising out of international air carriage. The more recent of those treaties, the Montreal Convention of 1999, will likely govern most if not all of the claims, since most of the passengers on these flights were from countries that are signatories, provided that they intended to begin and end their trips in their home countries. See Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:22001A0718\(01\):en:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:22001A0718(01):en:HTML) (last visited June 20, 2014).

The Montreal Convention is a modernized version of the Warsaw Convention of 1929. The Warsaw Convention has been interpreted over the decades by the U.S. Supreme Court and lower federal courts.

Because the language of the two treaties is identical or similar in many subject areas, judicial decisions concerning the Warsaw Convention often are read as applying to the Montreal Convention. Recognized as the supreme law of the land in the United States, claims against an airline involving international flight must be filed under the terms of the Montreal Convention, and not under state negligence laws. “Montreal,” as the convention is more casually known in the aviation community, is the sole and exclusive legal basis for suing an airline for injuries suffered in the course of an international trip.

The Montreal Convention requires an airline to compensate passengers who sustain bodily injury, or the families of those lost, whenever a crash was the result of an “accident.” An “accident” is undefined, but has been interpreted by the United States Supreme Court as “an unexpected or unusual event or happening that is external to the passenger.” Montreal Convention, Article 17; *Air France v. Saks*, 470 U.S.392 (1985). Whether a crash was caused by a pilot’s willful misconduct, a hijacking, or even a terrorist attack is largely beside the point. A crash will be considered an “accident” and the financial responsibility of the airline will be determined in accordance with the Montreal Convention.

### Jurisdiction and Venue Considerations for Claims Against the Airlines

The initial consideration for litigants under the Montreal Convention is where on earth lawsuits may be filed against an airline. Plaintiffs commonly attempt to pursue their claims under the Montreal Convention in the United States, where recoveries are largest, but many of the Asiana Flight OZ 214 and the Malaysia Airlines Flight MH 370 claimants may ultimately be unable to do so, at least if the airlines are the only defendants.

Article 33 of the Montreal Convention offers plaintiffs a choice of jurisdictions to bring their cases. Two of those are usually the same—the domicile and principal place of business of the airline—in these cases, Korea, for Asiana Airlines, and Malaysia, for Malaysia Airlines. The other three choices also are often the same: (1) a passenger’s “final destination,” in other words, the very last stop for the entire trip shown

on the passenger's ticket or flight confirmation; (2) the place where the ticket was purchased, an often complex question when the ticket is purchased online; and (3) the place where a passenger had his or her permanent residence, as long as the airline does business in that country. Based on these three factors, those passengers who lived in the United States at the time of the accident, or who had round trip tickets that ended in the United States, will have the right to bring claims in U.S. courts. If certain passengers do not meet those two criteria, but purchased their tickets from U.S.-based travel agencies, there is an argument that they can assert claims in the United States as well.

Foreign passengers who were traveling on tickets that ultimately returned them to homes outside of the United States, but who purchased their tickets overseas, will find it difficult to maintain a case here solely against the airline. That being said, combining a case against an international air carrier with claims against other defendants, such as an aircraft or a component part manufacturer or an airport authority, could change the jurisdictional landscape. In any event, jurisdiction is a crucial feature of international aviation disaster claims. It would be difficult to overstate the importance of this dynamic.

For the Asiana 214 tragedy, the bulk of the lawsuits were filed in federal district court in the Northern District of California, and they have been consolidated into an a multidistrict case, styled, *In Re: Air Crash at San Francisco, California, on July 6, 2013*, before the Honorable Yvonne Gonzalez Rogers. An action is also pending in California state court brought by the family of the young woman who suffered fatal injury allegedly from having been run over on the field by an emergency vehicle. And, as is noted above, a number of Asiana 214 cases were filed in Illinois state court against Boeing, although Asiana is not presently a party to any of these, and they all are currently on appeal from orders of remand following successful challenges to notices of removal.

### **Claims Against Other Parties May Be Possible in the United States**

For many families that cannot sue Malaysia Airlines in the United States under the

jurisdictional provisions of the Montreal Convention, if there is evidence that a loss was due to a defect involving the airframe, power plant, hydraulics, or other technical systems, it is a virtual certainty that the plaintiffs' attorneys will bring product defect claims in the United States. Claims against product manufacturer defendants are not governed by the Montreal Convention, and there are few jurisdictional rules that would prevent these foreign plaintiffs from suing in U.S. courts, seeking to obtain U.S.-scale damages. Moreover, foreign plaintiffs may argue that since they have valid claims against U.S. defendants in U.S. courts, they should be permitted to pursue their claims against Malaysia Airlines in the same courts to avoid piecemeal litigation. This latter argument will be a difficult one to make and to prevail with based on the case law to date, but it is not entirely out of the question as a potential tactic.

### **Potential for Dismissals Based on Forum Non Conveniens**

When a U.S. court has jurisdiction over a claim, it retains the ability to conclude that a case before it cannot be conveniently tried in its jurisdiction because of the location of evidence and the witnesses. This is not likely to be relevant in cases brought by U.S. residents. But when the passengers are not residents of the United States, while they still may bring their claims here based on other grounds, the airlines or other defendants may argue that it would be more convenient to try their claims in the courts of their home countries. If a court agrees, it will either dismiss the case or place it on hold, and direct the plaintiffs to file their claims in the foreign country. If for some reason the claims cannot be maintained in the foreign country—due to no fault of the plaintiff—the U.S. court will allow the case to resume.

### **Compensation Under the Montreal Convention**

Under the 1999 Montreal Convention, both Asiana Airlines and Malaysia Airlines will be held liable for damages suffered by the passengers' families without proof of fault, up to 113,100 Special Drawing Rights (SDR). An SDR is a monetary reference used by the International Mone-

tary Fund and others. In 2013, the U.S. dollar value of SDR 113,100 was approximately US \$175,504.

Under Article 21(2) of the 1999 Montreal Convention, an airline is liable for all of a plaintiff's damages, which may potentially exceed the SDR 113,100 threshold, unless the airline proves that it was completely without fault or that an accident was caused

## **Unless Malaysia**

Airlines could prove that it did everything possible to prevent the plot or deed, it will likely be held liable to the families of the passengers for full compensatory damages under the applicable law.

solely by the fault of a third party. Unlike most laws that place the burden on a plaintiff to prove his or her claim, the Montreal Convention imposes on an airline the duty to prove its faultlessness. This is, needless to say, a critical feature of the legal landscape underlying claims against airlines arising from international aviation disasters.

### **Compensation for Claims Brought Outside of the Montreal Convention**

Note that the legal issues would be somewhat different for the families of Malaysia Airlines Flight 370 passengers from Holland, Indonesia, Russia, and Taiwan because those nations are not signatories to the Montreal Convention. Those families may be required to resort to the 1929 Warsaw Convention, predecessor of the Montreal Convention, or they may need to pursue claims under domestic laws. Their compensation rights should be similar to those that the Montreal Convention provides, however, because Malaysia Airlines voluntarily waived the more restrictive limits of liability contained in the Warsaw Convention.

### Malaysia Airlines' Strict Liability

It remains to be seen whether the intensive ongoing investigation will identify evidence that will allow Malaysia Airlines to mount a defense under Article 21(2) of the Montreal Convention. Even so, someone cannot assume that the airline will escape liability if the evidence demonstrates that the flight was diverted by a criminal act.

Under settled decisional law, there can be no claim unless a passenger suffered a physical injury of some sort; a claim for purely emotional injuries is not viable.

Crime, including terrorism, whether perpetrated by a flight crew or passengers, is a known risk in aviation. Therefore, unless Malaysia Airlines could prove that it did everything possible to prevent the plot or deed, it will likely be held liable to the families of the passengers for full compensatory damages under the applicable law.

### Asiana Airlines' Strict Liability

According to its publicly reported statement to the NTSB, discussed above, Asiana will ultimately be held liable for all of the cognizable damages suffered by the passengers on Flight 214, up to and, as may be the case, beyond SDR 117,000. As is noted above, under Article 21(2) of the Montreal Convention, the airline is liable for all of a plaintiff's damages, even those beyond the SDR 117,000 ceiling, unless the airline proves that it was completely without fault or that the accident was caused solely by the fault of a third party.

### Physical Injury Requirement

Even with Montreal's strict liability scheme and its shifted burden of proof, the financial exposure of Asiana and its insurers may not extend to all passengers. In fact,

a number of the passengers on Asiana Flight 214 may have no legal remedy at all against the airline. Under settled decisional law, there can be no claim unless a passenger suffered a physical injury of some sort; a claim for purely emotional injuries is not viable.

This rule arose from a case before the U.S. Supreme Court in which a number of passengers sued for the terror that they experienced when the engines on their plane failed. The passengers endured a no-doubt harrowing experience as the plane rapidly lost altitude over the ocean before one engine was restarted and disaster was averted. Fortunately, no one was physically injured. The U.S. Supreme Court reviewed the language of the Warsaw Convention and held that its language and legislative history required someone to have suffered a physical injury (*i.e.* a true "bodily injury") to maintain a claim under Montreal. *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991). An allegation of emotional distress may be added to a claim for physical injury, but it cannot be maintained on its own.

In the 20-plus years since this decision, lower federal courts have struggled with the question of how serious a physical injury must be for someone to maintain a psychic or emotional injury claim under the Montreal Convention. Compare, for example, a minor bruise or pinprick with a broken limb or concussion. Given that many Asiana 214 passengers suffered very modest or no physical injuries while experiencing an acutely distressing sequence of events, it will be interesting to see how the issue of emotional distress plays out in the claims against the airline. In the Malaysia 370 scenario, however, we appear to have a different calculus: an apparent loss of life, but without evidence of passenger awareness of an unfolding threat—as in a sudden catastrophic explosion, for example—meaning a claim for emotional distress is merely speculative.

### Damages Under Local Laws: No Punitive Damages

The courts where Montreal Convention cases are tried must use their own rules to determine who is entitled to sue and the kinds of damages that they may seek. Montreal Convention, Article 29. In U.S. courts, these issues are typically governed

by either local laws or the laws of a passenger's domicile or permanent place of residence. While selecting the appropriate damages laws is not an uncomplicated process, it seems fairly certain, for example, that for those passengers aboard Asiana Flight 214 who live in California, damages will be governed by California laws.

Article 29 of the Montreal Convention also prohibits the award of punitive damages in connection with claims against the airlines. This prohibition would not extend to defendants other than the airline, however.

### Claims by Passengers Who Can Sue Asiana in the United States

As discussed above, passengers with cognizable claims against Asiana Airlines would appear to be entitled to "full recovery" under the Montreal Convention. Likewise, the Malaysia Airlines scenario poses an extreme challenge to mounting a defense to the airline, regardless of whether the mystery is solved. Thus, we might reasonably conclude that those passengers, or their survivors, who can bring their claims in the United States are unlikely to benefit from bringing claims against additional defendants. Taking the financial strength of the airlines into account, and perhaps more to the point, the applicable insurance resources, financial responsibility for any verdict or settlement should not be an issue, even taking into account the claims of surviving spouses for losses in their own right. And yet, claims against the manufacturer, Boeing, have been brought in seeming abundance: in excess of 40 such claims have been filed either against Boeing alone or in tandem with Asiana. One possible explanation is that not all passengers can bring their claims against Asiana in the United States, which is recognized as the most desirable forum for accident compensation.

It remains to be seen whether the passenger claims are resolved by settlements, leaving the defendants to adjust the ultimate financial responsibility for the losses among themselves, once the proverbial dust surrounding any battles over jurisdiction and venue are concluded, or whether courts deconsolidate and try the U.S.-venued claims ultimately, or some combination of results devolves.

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In the case of MH17, there are early questions being raised concerning insurance coverage both for passenger loss of life and property, and for the lost hull (the aircraft itself, valued in the hundreds of millions of dollars). The questions may turn on interpretation of “wartime exclusions” commonly found in airline insurance policies, given that the disaster was, loosely speaking, apparently the result of an act of war, and/or interpretation of “terrorism exclusions”. The fact that MH17 was lost over a conflict zone where there has been no formal declaration of war; the fact that Malaysia most certainly is not at war; and, the fact that the shoot-down may have been a mistake as opposed to a malicious act, might come into play as financial responsibility for the disaster is considered. Likewise, efforts to seek indemnity, whether by Malaysia Airlines or/or by its insurers, from the party or parties responsible for the destruction of MH17 might eventually become a feature of this tragedy. The continued financial viability of Malaysia Airlines may hang in the balance, one can confidently say without fear of overstatement.

The ultimate lessons of Asiana Airlines Flight 214 and Malaysia Airlines Flight 370 will not be learned for some time because the litigation surrounding the disasters will take place over many years to come. What is clear, however, is that the compensation scheme for many of the passengers who suffered injury or for the survivors of those who perished is well settled. Regardless of what caused these two tragedies, compensation will be paid to the victims. The litigation will focus primarily on adjusting the losses among the potentially responsible parties.

Beyond the litigation arena, both Asiana Airlines and Malaysia Airlines received brutal lessons in contemporary social media and its response to unfolding tragedy. From live tweets by passengers still at the crash site and wet with foam, to a truly global and ceaseless conversation about solving the mysterious disappearance of an airliner, corporate communications have never been so challenged. As a result, decisions must be made at the highest levels and communicated to a global audience within mere minutes. Failing to deliver a prompt and proper message could

be utterly catastrophic, meaning crisis preparedness is vitally important. The stories of aircraft incidents and the responses that follow do not fade quickly. In a worst-case scenario, such as Flight 370, there may literally be no end in sight. **FD**