

# Disappearance of Malaysia Airlines Flight 370

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The March 8 disappearance of Malaysia Airlines flight 370, a Boeing 777 aircraft carrying 227 passengers from 14 different countries, is an unparalleled event in modern aviation. There is no other instance in recent history of a passenger jet being lost without a trace. Yet unlike the many open questions surrounding the disaster, the law provides relatively simple and direct answers regarding liability.

How can any action proceed where the circumstances of the disaster are unknown? The answer is clear with regard to the airline's liability, which is governed by the 1999 Montreal Convention treaty.

While in an ordinary tort case, the plaintiff has the burden of proving negligence by establishing a failure to use reasonable care, the Convention imposes absolute liability on the airline for the first "100,000 Special Drawing Rights" (at present, about \$154,000) of proven damages for an accident and allows for the unlimited recovery of such damages unless the airline can meet its burden of proving that the accident "was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents."<sup>1</sup> There can be no doubt and Malaysia Airlines admits that there was an "accident" when the plane disappeared and was presumably lost at sea.

The Montreal Convention has been described by the U.S. Court of Appeals for the Second Circuit as "a treaty that favors passengers rather than airlines."<sup>2</sup>

Unless the Malaysia Airlines plane is found and evidence exculpating the airline is uncovered, it has no defense to liability for damages. There are reports that Malaysia Airlines has agreed to make an initial payment of \$50,000 to the survivors of each passenger.

Even in an ordinary tort case, where the Montreal Convention does not apply and the plaintiff has the burden of proving negligence, an aircraft disappearance would not automatically preclude liability against the airline. In 1948, a passenger aircraft on a flight from Alaska to Seattle disappeared and no trace of the plane or its passengers was ever found. The Alaska federal court applied the doctrine of *res ipsa loquitur*, finding that the airline had exclusive control of the plane and that the circumstances of the disappearance permitted an inference of negligence.<sup>3</sup>

## Forum and Liability Questions

While Malaysia Airlines is liable, nearly all of the suits against the airline must proceed in foreign courts. In a passenger death or injury case involving a foreign carrier, the Convention bars suit in the United States unless this country was the ultimate destination of the passenger's journey; the place where the passenger's ticket was purchased; or the place where the passenger resided.<sup>4</sup> Even in cases involving U.S. residents, there are potential questions whether the airline may seek dismissal under the doctrine of *forum non conveniens*, and if so, whether the court should decline jurisdiction in favor of a foreign forum. A San Francisco federal court granted *forum non conveniens* dismissal of cases brought by the survivors of U.S. passengers against Air France and Airbus involving the 2009 crash in the Atlantic on a flight from Rio de Janeiro to Paris.<sup>5</sup>

Despite an airline's treaty liability for unlimited damages, foreign plaintiffs will often choose to pursue an action in the United States against an American manufacturer in an effort to obtain the higher damage recoveries typically available in our courts.

But unlike the Montreal Convention claim against an airline, the plaintiff has the burden of proving negligence or a defect in a products liability claim. Until the plane and its "black box" recorders of the flight data and cockpit communications are found, there is no basis for a plaintiff to establish that Boeing was

liable for causing the accident. While a product defect or negligence can be shown through circumstantial evidence, Boeing (unlike the airline) did not have exclusive control over the plane and the manufacturer's negligence cannot be inferred simply from the currently known facts regarding the plane's departure off course and disappearance.

The one criticism that could be made of the aircraft's design at this time is to question why there was no fail-safe system to permit authorities on the ground to track the plane's location and download its flight data. Flight 370's pilots did not make a radio call to air traffic control regarding the flight's diversion. Flight 370's on-board transponder device, which identified the plane and its altitude, and enhanced the radar signal seen by air traffic controllers on their radar screens, stopped operating shortly after the cockpit crew's last radio communication.

The loss of the transponder made it difficult for controllers to track flight 370 when it turned off course (a fact later determined upon investigation of the raw radar returns); therefore, a timely alert was not issued and the plane was lost. European regulators are currently considering new equipment requirements for the continuous tracking of an aircraft's location while in flight.

The issues raised in the 1983 Korean Air Lines flight 7 disaster case offer interesting parallels to the disappearance of Malaysia Airlines flight 370. Korean Air Lines flight 7, a Boeing 747, was heading from Anchorage to Seoul when it was flown over 300 miles off course into Soviet airspace, where it was tracked and shot down by a military fighter jet. While the location of the crash was confirmed by the Soviet Union, it retained and refused to release the plane's wreckage, including the black box recorders. The cause of the plane's off-course deviation was shrouded by mystery.

Actions were brought against Korean Air Lines and Boeing and were heard in federal court in Washington, D.C. Boeing was granted summary judgment on causation grounds and in 1989 the trial proceeded against the airline. At that time, the applicable aviation treaty (the 1929 Warsaw Convention) placed the burden on the passenger's survivors to prove willful misconduct to recover unlimited damages, and the jury found that the airline was liable based on the known facts regarding the plane's off-course flight path, which the pilots should have monitored for over five hours before the disaster.

In 1993, four years after the trial, the black box recorders were released by the Russian government. The flight data showed that the pilots incorrectly believed that they had properly directed the navigation system to fly the plane on course but that the system had not accepted their input and kept flying the plane on a direct heading toward and into Soviet airspace. The newly uncovered evidence demonstrated a flaw in the navigation system that could have provided the basis for suit against Boeing. But the claim against Boeing had already been dismissed, and in any event, the plaintiffs successfully recovered damages against the airline.

## Pre-Suit Discovery

In the Malaysia Airlines flight 370 disaster, a Chicago law firm on March 25, 2014, filed a petition for pre-suit discovery against Boeing and Malaysia Airlines on behalf of a relative of a flight 370 victim in the Circuit Court of Cook County, Ill. An Illinois rule allows an injured party to bring such a petition to identify the names of potentially responsible persons and entities.<sup>6</sup> The flight 370 petition, however, sought documents regarding a variety of different theories for the disappearance, such as pilot error, fire, structural corrosion, and an in-flight fuselage failure leading to catastrophic decompression.

On March 28, 2014, the Illinois state court sua sponte dismissed the petition, finding that it went beyond the requirements for pre-suit discovery because it was "eminently clear from the petition and the facts alleged therein, that the Petitioner [was] clearly possessed of the identification of two entities who may be liable for damages, one being the Respondent Boeing, and the other being the Respondent Malaysia Airlines."<sup>7</sup>

The lack of available proof at this time necessarily restricts any case against the manufacturer Boeing. Unless the plane and the black box recorders are found, the available legal remedy will be against the airline pursuant to the rules established by the Montreal Convention treaty.

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### Endnotes:

1. Montreal Convention, Article 21(2).

2. *Ehrlich v. American Airlines*, 360 F.3d 366, 371 n. 4 (2d Cir. 2004).

3. *Haasman v. Pacific Alaska Air Express*, 100 F.Supp. 1 (D. Alaska 1951), *aff'd sub nom, Des Marais v. Beckman*, 198 F.2d 550 (9th Cir. 1952).

4. Montreal Convention, Article 33.

5. *In re Air Crash Over the Mid-Atlantic on June 1, 2009*, 760 F.Supp.2d 832 (N.D. Cal 2010), dismissed all foreign and American cases, and the same court later denied a renewed request by the American plaintiffs alone to retain jurisdiction. *In re Air Crash Over the Mid-Atlantic on June 1, 2009*, 792 F.Supp.2d 1090, 1096-7 (N.D. Cal, 2011).

6. Ill. S. Ct. R. 224.

7. *Siregar v. The Boeing Company*, No: 14-L-3408, slip op. at 3 (Cir. Ct. Cook Cty., Law Div. March 28, 2014).

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