

New York Law Journal

Select 'Print' in your browser menu to print this document.

©2007©2007 New York Law Journal Online

Page printed from: <http://www.nylj.com/>

[Return to Kreindler & Kreindler LLP Website](#)

Aviation Law

Steven R. Pounian And Blanca I. Rodriguez
03-30-2005

The longest-running aviation litigation — involving the Dec. 21, 1988 bombing of Pan Am flight 103 over Lockerbie, Scotland — may finally be drawing to an end after 16 years.

The litigation led to the largest total payout in a commercial aviation case — over \$500 million — and then a historic settlement of over \$2 billion with the nation of Libya, marking the first occasion that a foreign state has appeared in a U.S. court, accepted responsibility and paid damages for a terrorist act.

Flight 103, a Boeing 747 jet, took off from London for Kennedy Airport and had just reached its cruising altitude of 31,000 feet when a bomb exploded inside the cargo hold. All 259 passengers and crew aboard the plane and 11 persons on the ground were killed. Until Sept. 11, 2001, the bombing of Flight 103 was the deadliest terrorist attack aimed at the United States.

First Phase

The first phase of the litigation started in 1989 with the filing of death actions against the airline Pan Am and its security subsidiary. All of the cases were assigned to Judge Thomas C. Platt in the U.S. District Court for the Eastern District of New York for pretrial proceedings.

The airline case turned on critical evidence unearthed in discovery that a suitcase unaccompanied by any passenger had been transferred to Pan Am in Frankfurt, Germany, from an Air Malta flight. A painstaking criminal investigation by U.S., Scottish and British authorities tracked down proof that Libyan government agents in Malta planted the bomb in a suitcase and placed it on the Air Malta flight with a baggage tag for transfer onto Flight 103. Pan Am received the suitcase and loaded it aboard Flight 103 without checking, as required by federal aviation rules, to make sure that the bag belonged to a passenger on the flight.

After a three-month trial in 1992, a Brooklyn federal jury found the airline defendants had committed wilful misconduct in failing to provide mandated security and were therefore liable for compensatory damages. On appeal, the liability verdict was upheld by the U.S. Court of Appeals for the Second Circuit.¹ Damages trials were held in several individual cases and, by 1996, over 250 cases against the airline defendants were resolved for a total of over \$500 million.

Just as the airline litigation was coming to a close, the litigation shifted into a second round with a new defendant: Libya. A death action had previously been brought against Libya for the bombing, but that suit was dismissed because the Foreign Sovereign Immunities Act (FSIA) did not permit actions against foreign states for most events outside the U.S.² The Lockerbie families successfully lobbied to change this legal anomaly, however, and in 1996 Congress amended the FSIA to permit certain death suits against seven foreign states, including Libya, that had been formally designated by the secretary of State as "state sponsors of terrorism."³ The amendment applied retroactively to the time of the Lockerbie bombing. Thereafter, many plaintiffs who had just resolved their suits against Pan Am commenced new death actions against Libya for the bombing. Those cases were again assigned to Judge Platt.

Unlike other foreign states sued under the new law, such as Iran and Iraq, Libya appeared in the litigation through U.S. counsel. At the outset, Libya moved to dismiss the plaintiffs' suits, claiming that the FSIA amendment was unconstitutional. This motion was denied by Judge Platt, and on an interlocutory appeal, the Second Circuit affirmed.⁴

Discovery was put on hold pending the outcome of the murder trial of the two Libyan government agents who were charged with planting the bomb on Flight 103. Facing international pressure, Libya agreed to release those agents for a criminal trial in Camp Zeist, the Netherlands, before a panel of three Scottish judges. In 1999, following a lengthy proceeding, one agent was convicted, while the other was acquitted. On appeal, the conviction was upheld. The Libyan agent responsible for the bombing is currently serving his sentence in a Scottish prison.

In 2001, the Plaintiffs' Committee appointed by Judge Platt served document discovery and subsequently took the deposition of a Libyan airline official in Paris. At that time, Libya and the Plaintiffs' Committee first began to discuss the possibility of a settlement.

Negotiations Begin

Thereafter, starting in fall 2001, the committee and a team of Libyan negotiators commenced a long series of meetings in London and Paris regarding a potential settlement. The Libyan negotiators included U.S. and French counsel, a Libyan Supreme Court Justice, Libyan businessmen, a leading Libyan international law professor, representatives of the Central Bank of Libya, officials of the Libyan Foreign Ministry, Libya's ambassadors to Britain and Italy and other high-ranking Libyan governmental officials. Translation between English, French and Arabic was often necessary.

The negotiations were fraught with complex practical, legal and diplomatic issues. The Libyans would only agree to offer compensatory damages to the estate representative of each decedent and were emphatic that no punitive damages would be paid. There was a

legal question whether punitive damages were even available, and, indeed, the U.S. Court of Appeals for the District of Columbia Circuit has now held that such damages cannot be recovered from a foreign state in an action under the FSIA's exception for terrorist acts.⁵ The Libyans further claimed that the prior amounts paid by Pan Am should be a set-off on any recovery. They also stressed that any settlement must be linked to the lifting of various commercial sanctions that had been imposed on Libya by the United Nations and the U.S.

The committee argued that for a comprehensive settlement to work, the offer must be significantly higher than the average Pan Am settlement. The committee was also well aware that the Lockerbie families would not accept any deal unless Libya first accepted responsibility for the bombing.

Libya's Proposed Settlement

After many meetings and back-and-forth discussions, in October 2002, the Libyans made a proposed settlement offer of up to \$10 million in each of the 270 death cases to be paid in three installments: \$4 million upon the lifting of U.N. sanctions, another \$4 million upon the lifting of certain specified U.S. sanctions, and a final \$2 million upon the removal of Libya from a U.S. list of state sponsors of terrorism. The funds would be held in an escrow account for at least eight months, and the actions could not be dismissed unless at least \$5 million was paid for each death. The offer would not take effect until Libya complied with a U.N. resolution that required Libya to accept responsibility for the bombing. The proposed settlement had other conditions, including a requirement that the offer was made subject to the acceptance of the estate representatives of all 270 decedents. In addition, the difficult issues relating to how to escrow the settlement funds were left for later discussion.

Many obstacles to a settlement remained. Although the vast majority of the representatives favored the settlement, a small group initially expressed opposition. The committee itself suffered a severe setback when its chairman, Lee S. Kreindler, suffered a stroke and died in February 2003. (Editor's Note: Mr. Kreindler, the founder of Kreindler & Kreindler and longtime author of this column, was recognized around the world as the founder and dean of aviation accident law.)

The settlement efforts were also impacted by the outbreak of war in Iraq in March 2003, as Libya would not participate in formal discussions while the major combat phase of that war was ongoing.

In May 2003, however, the Libyans indicated their willingness to return to the negotiating table. A critical roadblock was averted when the Libyans withdrew their insistence on unanimous acceptance of the settlement offer. In the end, 269 of the 270 decedents' representatives formally accepted the settlement. Another hurdle was crossed when the parties negotiated and signed a detailed Escrow Agreement that provided for the settlement funds to be held at a bank in Switzerland.

In August 2003, Libya paid \$10 million per decedent, a total of \$2.7 billion, into an escrow account at the Swiss bank. Libya also sent a letter to the United Nations formally accepting responsibility for the bombing. In response, the U.N. sanctions were lifted in September 2003, and pursuant to the settlement agreement, \$4 million per decedent, a total of \$1.076 billion, was paid to the Plaintiffs' Committee in trust for each estate representative. One year later, in September 2004, an additional \$4 million per decedent was transferred when President George W. Bush lifted the U.S. commercial sanctions against Libya specified in the settlement agreement. As a result, \$8 million per death, a total of over \$2.1 billion, has been paid to date.

Litigation Continues

The litigation is not over. The sole administrator who rejected the settlement is still proceeding with an action against Libya. That case is now pending in the U.S. District Court for the District of Columbia. No trial date is set.

The possibility of a final payment of \$2 million under the settlement agreement, a total of over \$500 million, remains open. That payment was linked to the removal of Libya from the U.S. list of state sponsors of terrorism. Libya currently remains on that list, while relations between Libya and the U.S. apparently continue to improve. After seven extensions of the escrow agreement, two weeks ago Libya refused to agree to any further extension and placed the remaining settlement funds in its separate account at the Swiss bank. Further discussions are now planned between the Plaintiffs' Committee and the Libyans regarding the final settlement payment.

Steven R. Pounian and Blanca I. Rodriguez are partners at *Kreindler & Kreindler LLP*.

Endnotes

1. In re Air Disaster at Lockerbie, Scotland, 37 F3d 804 (2d Cir. 1994), cert. denied, Pan American World Airways, Inc. v. Pagnucco, 513 US 1126 (1995).
2. Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F3d 239 (2d. Cir. 1996), cert. denied, 520 US 1204 (1997).
3. 28 USC §1605 (a)(7).
4. Rein v. Socialist People's Libyan Arab Jamahiriya, 162 F3d 748 (2d Cir. 1998).
5. Cicippio-Puleo v. Islamic Republic of Iran, 353 F3d 1024 (D.C.Cir. 2004).