

Legal Challenges Faced by Victims of Plane Shootdown Over Ukraine

Steven R. Pounian and Justin T. Green
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This coming July 17 will mark the first anniversary of the shootdown of Malaysia Airlines Flight 17 over eastern Ukraine. Flight 17, a Boeing 777 jet, was heading from Amsterdam to Kuala Lumpur with 298 passengers and crew from 10 countries. While most of the litigation regarding this disaster will likely proceed outside the United States, the disaster raises novel issues and also presents the first time since the 1999 Montreal Convention treaty came into force where an airline may attempt to limit the recoveries of the passengers' families to the arbitrary treaty limitation.

The Dutch Safety Board took charge of the crash investigation at the request of the Ukrainian government. The Dutch have a particular interest in determining the parties responsible for the shootdown because about two-thirds of the passengers were from the Netherlands. The Dutch Safety Board is working with representatives of other interested nations, including the Ukraine, Australia, the United States and Russia. Large portions of the plane wreckage have been shipped from the Ukraine to a facility in the Netherlands for analysis by the Safety Board.



The Safety Board has been cautious to state that it has not yet determined the cause of the disaster pending the conclusion of its investigation, expected later this year. Shortly after the disaster, however, the U.S. government declared that the plane was brought down by a surface-to-air missile fired from an area controlled by Ukrainian separatists and that Russia had recently supplied those separatists with anti-aircraft weapons and training.¹

There is no doubt that Flight 17 was shot down. The Safety Board's preliminary report states that the wreckage inspection showed that the plane was cruising at 33,000 feet when it was struck from the outside by "a large number of high energy objects" and disintegrated in mid-air.² That report also found that the plane's "black box" recorders show that the communications and flight data were completely normal until coming to an abrupt end, and that there is no apparent mechanical or operational explanation for the crash.

The Safety Board recently sought information from witnesses who may have seen a Russian made BUK missile launcher in eastern Ukraine around the time of the disaster and released photographs of the launcher and telephone intercepts of Russian rebels about the launcher and its crew.³ The facts regarding the launcher and its crew are central to determining fault and the role, if any, that Russia played in the shootdown.

Liability of the Airline

The 1999 Montreal Convention governs Malaysia Airlines' liability to the passengers' families.⁴ Under the Convention the airline is strictly liable up to a damage limit of 113,100 Special Drawing Rights (approximately \$159,000). Above that limit, the airline is liable unless it can prove that it was not negligent or otherwise at fault, or that the sole cause of the disaster was the act of a third party.⁵ The Convention contains jurisdictional restrictions, and given the airline's home in Malaysia and the various locations where the tickets were purchased and the passengers resided, the treaty mandates that nearly all of the cases be brought in European or Asian courts.⁶

The Montreal Convention imposes a liability burden of proof on airlines, and as a result they have been generally forced to pay damages for accidents without limitation. For example, even under the circumstances of the March 2014 disappearance of Malaysia Airlines Flight 370 in 2014, the airline is liable unless new evidence surfaces that it somehow was not negligent in causing its plane to go off course and crash.

Since the burden is on the airline, the lack of evidence regarding the cause of Malaysia Airlines Flight 370's disappearance means that the airline cannot prove that it is without fault. But here, the facts are known: Malaysia Airlines can argue that it was not negligent because a criminal attack was responsible for the disaster and that the actions of the person or persons who fired the missile and murdered the passengers and crew are the sole legal cause of the disaster.

But was the airline negligent for operating its aircraft over the eastern Ukraine during a time of known hostilities? Three days before the flight 17 disaster, a Ukrainian military transport at 21,000 feet was shot down by a surface-to-air missile over eastern Ukraine and there had been similar attacks on other Ukrainian government aircraft.

Indeed, during the several weeks prior to the disaster, other airlines including Asiana, China Airlines & Qantas decided to change their flight routes to avoid overflying eastern Ukraine.⁷

The airspace over eastern Ukraine, however, was officially closed only up to 32,000 feet and remained legally open to commercial jets like Flight 17 that were operating above that altitude.⁸ At the time of the shutdown, three other commercial airline flights were flying over the same conflict-ridden area of eastern Ukraine, and no legal restrictions had been imposed for such flights above 32,000 feet. As the Dutch Safety Board stated in its preliminary report: "[a]t the time of the occurrence, the aircraft was flying in unrestricted airspace, under [Air Traffic Control], following the route and flying the altitude as cleared by ATC."⁹

The question is therefore raised: If airspace remains open for flight according to the responsible government authorities, to what extent must airlines question that decision and take it upon themselves to assess the risk of possible military or terrorist activity? While the issue is open, there is a risk that the treaty will impose the Montreal limitation on the actions for the passengers' deaths.

It is not known whether Malaysia Airlines will attempt to limit its liability for the passengers' deaths, and there are practical reasons why it may decide to avoid a historic fight. As stated, other airlines responded to the knowledge of hostilities and the shutdown of government aircraft in eastern Ukraine by rerouting their flights, most likely at increased operating costs.

Malaysia Airlines may not want a court to publically examine its decision not to reroute its flights and to instead fly only 1,000 feet above the airspace closed by the Ukraine because of the danger of a shutdown. Malaysia Airlines (and its insurer) may conclude that it is in the airline's interest to simply compensate the families based on their proven losses rather than mount an expensive attempt to enforce the Montreal Convention's limitation, a battle that they may ultimately lose.

Other Avenues of Recovery

Given the threat of a limited recovery against the airline, what other avenues of recovery are available?

In December 2014, an action was filed against the government of Ukraine in the European Court of Human Rights by the families of three German passengers seeking over U.S. \$1 million per victim.¹⁰ The action claims that Ukraine was responsible to provide secure airspace and should have closed the area over eastern Ukraine after the danger from the ongoing hostilities, including the potential of a missile attack, became apparent.

The action also states that the Ukraine left the airspace open despite the danger to collect "overflight fees amounting to millions every day." It has been reported that because of the missile threat, the Ukraine had itself prohibited its own government aircraft from operating in the area below 32,000 feet prior to the disaster and the Ukraine knew that the missiles used by the separatists could reach commercial aircraft above that altitude.

That the first civil action should point the finger at the Ukrainian government demonstrates the difficulty of civil litigation against the criminal perpetrators of the attack. Even if the Ukrainian separatists believed by the United States to be responsible for the missile attack are somehow identified, located and served with process before a Ukrainian court, it is unlikely that those individuals would have assets to pay any judgment.

There is also the possibility of an action directly against the Russian government for its alleged involvement in furnishing the sophisticated weapon and instructions necessary to carry out the attack. U.S. law was amended in 1996 to provide a cause of action for U.S. citizens against Libya as a state sponsor of terrorism for the 1988 bombing of Pan Am flight 103 over Lockerbie, Scotland.

The United Nations imposed complete trade sanctions on Libya tied to the payment of compensation in the Lockerbie action, and litigation in U.S. federal court eventually resulted in a U.S. \$2.7 billion settlement. But the laws passed to permit litigation against Libya for the Flight 103 disaster provide no basis for suit against Russia since it is not designated as a "state sponsor of terrorism" and the families of the passengers and crew are foreign citizens who have no right to pursue claims in the U.S. against a foreign state for a tort arising outside of the U.S.

Russia has been successfully sued in the European Court of Human Rights, which entered a 2011 judgment ordering Russia to pay 1.3 million damages to over 60 victims of the 2002 Moscow theater terrorist attack. The basis for the judgment was Russia's inadequate planning and conduct of the rescue operation to free the hostages. Although the plaintiffs won their case, the victory may have been Pyrrhic because the damages awarded by the court were extremely low.

There is a threshold jurisdictional question whether Russia can be sued before the European Court for a disaster that occurred outside Russian territory. The European Court has previously found Russia liable for rights abuses inside Moldova caused by a regime established with Russia's economic and military collaboration and support.¹¹ Whether this principle could provide the basis for suit under the facts of the Flight 17 disaster based on the actions of the Ukrainian separatists is uncertain.

The best route for a recovery against Russia may be a diplomatic agreement. But given the world political climate, the lack of any apparent push by Europe (or the U.S.) toward an accounting by Russia and Russia's status as a major military power (and member of the Security Council with veto power), there appears to be little chance of a concerted worldwide effort to hold Russia responsible to compensate the victims of Flight 17. Russia itself has blamed the Ukraine for the missile attack.

Conclusion

Since the advent of the Montreal Convention, the victims of major airline disasters have generally been able to recover damages without any arbitrary limitation. The circumstances of the Flight 17 disaster raise the possibility that damages in a major aviation accident may be limited without any other avenue for recovery.

Endnotes:

1. <https://www.whitehouse.gov/blog/2014/president-obama-speaks-malaysia-airlines-flight-mh17-russia-and-ukraine-and-situation>.
 2. The Safety Board's Preliminary Report can be found at: <http://www.onderzoeksraad.nl/uploads/phase-docs/701/b3923acad0ceprem-rapport-mh-17-en-interactief.pdf>.
 3. <http://www.bbc.com/news/world-europe-32120644>.
 4. Convention for the Unification of Certain Rules for International Carriage by Air, opened for signature on May 28, 1999, reprinted in S. Treaty. Doc. No. 106-45, 2242 U.N.T.S. 350 (Montreal Convention).
 5. Montreal Convention, Article 21.
 6. Montreal Convention, Article 33.
 7. <http://www.telegraph.co.uk/news/worldnews/asia/malaysia/10975344/Asian-airlines-stopped-flying-over-Ukraine-months-ago.html>.
 8. See supra note 3 at 13.
 9. Id. at 12-13.
 10. *Kenke v. Ukraine* (filed in European Court of Human Rights Dec. 1, 2014).
 11. Case of *Ilascu and Others v. Moldova and Russia*, 48787/99 (Judgment entered August 7, 2004). The decision can be found at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61886>.
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