

...news, views and reviews from the Center for Justice & Democracy

CENTER FOR JUSTICE &
DEMOCRACY
NEWS

Dear Friends,

We are so excited to tell you that for the first year since moving to New York Law School, we are teaching a full-year clinical course! This is a wonderful opportunity for students to learn about issues affecting access to the civil courts, how civil justice issues interact with the advocacy world, and about the vital work of trial lawyers.

Some hot button issues on which our students and staff will work this year range from generic drug industry liability to forced arbitration and class actions, to medical malpractice and the Affordable Care Act. Worker safety, fracking, federal rule changes, damages caps, product liability, judicial independence – these are all areas that will require additional focus, as well.

We hope you enjoy this newsletter, dealing with the interesting topic of aviation liability. In other words, the depth of our expertise keeps growing! We couldn't do it without you.

Thank you!
Sincerely,

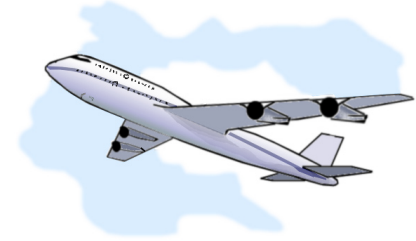
Joanne Doroshov
Executive Director

IN THIS ISSUE: AIR TRAVEL

THE ASIANA DISASTER

More than 180 passengers injured, 3 children dead. This was the aftermath of a horrific crash landing at San Francisco International Airport of South Korea's Asiana Airlines Flight 214 on July 6, 2013. The plane was coming in too slowly and slammed into a seawall in front of the runway, causing the aircraft to skid, lose its tail and burst into flames. Passengers on board numbered 291, including 61 U.S. citizens; more than 210 passengers were South Korean or Chinese citizens.

Pilot error may have been the cause. An initial investigation by the National Transportation Safety Board (NTSB) revealed that the pilot in charge of the flight had never served as an instructor until Flight 214; his student, who was training to fly a Boeing 777 and had never landed one at the San Francisco Airport, was at the controls when the plane crashed. It was the



also the first time the two pilots had flown together. In addition, the NTSB found that the pilots had tried to abort the landing just seconds before the crash and that there was an attempt to boost airspeed before impact with the sea wall.

Under the Montreal Convention, an international treaty ratified by the U.S. Senate in 2003, victims have two years from an date of the accident to file suit against Asiana and can only file in certain locations: 1) where the airline is incorporated

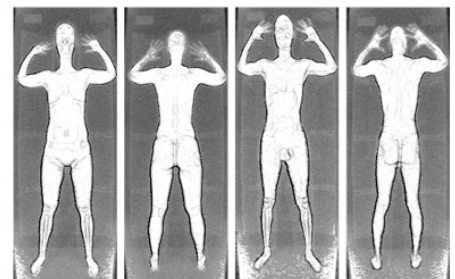
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CIVIL LIBERTIES FOR AIR TRAVELERS IN POST 9/11 AMERICA

The right to privacy and freedom from discrimination are valued in this country, unless you happen to be in an airport. Since the September 11th terrorist attacks, ceding certain civil liberties has become a prerequisite if you want to fly. Though maintaining domestic and international safety is undeniably important, airports and airlines may have gone too far. Below are three recent examples.

Bodily Integrity

In late 2010, air travelers Jeffrey Redfern and Anant Pradhan filed a lawsuit against the Transportation Security Administration (TSA), alleging that the use of "nude body scanners" and enhanced pat-downs as primary screening procedures at U.S. airports vio-



lated their Fourth Amendment right against unreasonable searches, as well as their right to privacy and interstate travel, and should therefore be stopped. Both men, traveling at different times through Boston's Logan and other U.S. airports, had opted out of the scanners and were given invasive pat-downs that included "touching, better de-

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RECENT AVIATION-RELATED CASES BEFORE THE U.S. SUPREME COURT

Northwest, Inc. v. Ginsberg

In October 2013, the Court will hear arguments about whether a frequent flyer kicked out of a customer loyalty program has the right under state law to sue for breach of the implied covenant of good faith and fair dealing or whether the case is preempted by the Airline Deregulation Act, a federal law that overrides state laws relating to “price, route, or service of an air carrier....”

Air Wisconsin v. Hoeper

This coming term, the Court will hear arguments about whether airlines have immunity from defamation claims under the federal Aviation Transportation Security Act, signed into law in the wake of the September 11th terrorist attacks.

United Airlines v. EEOC

In May 2013, the Court declined to review a lower court decision that allowed the Equal Employment Opportunity Commission to pursue a discrimination lawsuit over Americans with Disabilities Act violations which prevented disabled employees from continuing their employment with the airline.

Vreeland v. Ferrer

In 2012, the Court let stand a Florida Supreme Court ruling that federal law does not protect aircraft lessors from liability for property damage, personal injury or wrongful death involving aircraft passengers and crew.

Carder v. Continental

In 2011, the Court denied review of a lower court decision, which held that the federal Uniformed Services Employment and Reemployment Rights Act barred a class action suit by military and Guard pilots and pilot applicants, who were allegedly harassed and discriminated against in their civilian workplace.

THE ASIANA DISASTER *continued...*

(South Korea); 2) where it has its principal place of business (South Korea); 3) where the flight ticket was purchased; 4) in the passenger’s home country; or 5) the site of their trip’s ultimate destination. This means that only permanent U.S. residents, passengers who purchased tickets in the United States or those whose final destination was the United States can seek compensation from Asiana through the American civil justice system. Many South Korean and Chinese citizens who purchased round-trip tickets in Seoul or Shanghai (Flight 214’s city of origin) fit none of these criteria and may be barred from pursuing lawsuits in the United States.

Regarding damages, the treaty makes Asiana strictly liable for proven damages of up to about \$135,000 per injured passenger. If a victim seeks more, the burden is on Asiana to show that it was not negligent or that the crash was caused by a third party, such as Boeing, the aircraft manufacturer. Experts agree that injured passengers who have access to the U.S tort system will likely receive far more in compensation than similarly situated victims whose only option under the treaty is a less favorable legal forum in Asia or elsewhere. This could be especially devastating to passengers who’ve suffered severe harm. “Many survivors of Saturday’s plane crash in San Francisco have a surprising pattern of spine injuries,” according to a July 8th *Associated Press* article. “Among the worst injuries are crushed vertebrae that compress the spinal cord, and ligaments so stretched and torn that they can’t hold neck and back joints in place....”

In August, Asiana announced that it had paid an undisclosed sum to the families of the three girls who were killed and would pay \$10,000 in initial compensation to the 288 crash survivors. As reported on August 13th by the *Associated Press*, multiple passengers and their families were given the offer in writing with eight conditions, terms kept hidden from the public for fear of their impact on future lawsuits. An Asiana



spokeswoman explained that the money is not a settlement and that accepting the amount does not prevent survivors from suing the airline. Yet some legal experts believe the \$10,000 offer was made to dissuade victims from going to court since it would likely cost Asiana over \$10,000 per suit to mount a defense.

To date, multiple U.S. lawsuits have been filed against Asiana by passengers who qualify to seek redress here under the Montreal Convention. Among the

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IMPACT

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injured victims pursuing justice are Younga Jun Machorro and her 8-year-old son, Benjamin, who suffered severe soft tissue injuries, leaving Younga unable to return to work; and Zhengheng Xie, a professor at Shanghai University, whose spine was broken and remains in a body cast after the July 6th crash. He had been flying to California to visit his son. Xie has access to the U.S. tort system because his son bought the round-trip ticket in the United States.

In addition, over 80 foreign and U.S. crash victims have filed lawsuits in U.S. courts against Boeing, which is not sub-

ject to the Montreal Convention. However, unlike the Asiana cases, the burden is on the passengers to show that Boeing was negligent in its production of the 777. Victims allege defects with: 1) the plane's automated and warning systems; 2) sliding ramps that deployed inside the aircraft; and 3) seatbelts that failed to prevent head and spinal injuries. "My husband, my daughter, other passengers and I would not have suffered such terrible injuries if the sliding ramps and the seat belts would not have trapped us in the burning wreckage," said passenger Zhang Yuan, who joined a class action suit against Boeing after suffering severe

spinal injuries and a broken leg in the crash.

According to reports, NTSB's investigation into the Asiana disaster will likely take more than a year to complete. "It misleads the American public that the answer is going to be found right away," NTSB public affairs officer Keith Holloway said in the July 8, 2013 *San Francisco Chronicle*. "It's not going to happen." Fortunately, many victims don't have to wait – they can turn to our civil justice system, and through the discovery process, start to find out the answers themselves.

TERRORISM IN THE AIR

September 11th

In the wake of the 9/11 terrorist attacks, the U.S. Congress acted quickly to protect the airline industry. Their solution was an \$18 billion federal bailout known as the Air Transportation Safety and System Stabilization Act (ATSSSA). Among ATSSSA's provisions: 1) a cap on the airlines' tort liability for 9/11 and future terrorist attacks; and 2) the creation of a Victim Compensation Fund (VCF) for those injured or killed in the tragedy who would receive compensation if they relinquished their right to sue. The bill was signed into law on September 22, 2001.

Victims and families who opted out of the VCF filed 95 lawsuits – 85 for wrongful death – against United Airlines, American Airlines and their security companies, among others. In September 2011, the Bavis family settled the last of wrongful death suits, which accused United Airlines and Huntleigh USA (the company responsible for the security checkpoint at Boston's Logan International Airport) of security failures that led to the death of Mark Bavis, 31, who was on a United flight when it struck the World Trade Center. As reported in the September 20, 2011 *New York Times*, "Family members had long resisted a settlement in the case, which was filed in 2002, saying they wanted to hold the defendants publicly accountable at trial for what the family and its lawyers contended was gross negligence that allowed five terrorists to board Flight 175." Bavis's survivors only agreed to the settlement after their lawyers were permitted to file extensive evidence, revealing "an important story as to why this happened," explained Bavis's twin brother, Michael. "We hope it's information that will make a difference."

Lockerbie Bombing

On December 21, 1988, Pan Am Flight 103 exploded over Scotland en route from London to New York. All 259 people aboard, including 189 Americans, were killed. In 2003, U.S. victims' families each received \$8 million of a \$10 million settlement under a deal reached between Libya and the United States. Nearly five years later, families were given the remaining \$2 million after the two countries reached another agreement, with the United States pledging to restore Libya's immunity for all terror-related lawsuits and dismiss all civil cases pending against Libya in U.S. courts in exchange for Libya's funding a \$1.5 billion compensation program. This arrangement nullified a \$6 billion judgment obtained by a group of American families against Libya in connection with the 1989 explosion of UTA Flight 772 over the Sahara Desert, which killed all 170 people on board, including 7 Americans.

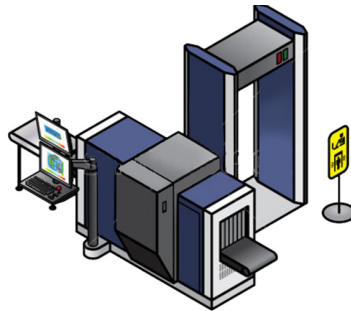
Today the Libya Claims Program, operated by the U.S. Justice Department's Foreign Claims Settlement Commission (FCSC), is running out of money and unable to fully compensate victims of UTA Flight 772 and other airplane-related acts of terrorism, like the 1986 hijacking of Pan Am Flight 73, where 379 passengers and crew, including at least 78 U.S. citizens, were held hostage for 16 hours, with 20 shot and killed, including two Americans, and 100 severely injured. As reported by the May 29, 2013 *National Journal*, "Last week, victims waiting for their FCSC awards received letters from the Treasury informing them that they would be receiving an 'initial' \$1,000 payment and 20 percent of the balance of their award."

scribed as prodding and lifting of the genitals and buttocks,” according to the complaint. Though the case was ultimately rendered moot in July 2013 after the TSA replaced the nude body scanners with less explicit machines, the suit was significant because it brought public attention to the TSA’s invasive, and potentially unsafe, practices.

Discrimination

On September 11, 2011, American Shoshana Hebshi was forcibly removed from a Frontier Airlines plane in handcuffs, strip searched and held for four hours in a 6’x10’ cell after the crew alerted security to suspicious behavior by two men sitting near Hebshi, the daughter of a Saudi Arabian father and Jewish mother. In January 2013, Hebshi filed a civil rights lawsuit against Frontier Airlines, Detroit Metro Airport officials, the TSA and

other authorities. “I was frightened and humiliated,” Hebshi told the American Civil Liberties Union. “As an American



citizen and a mom, I’m really concerned about my children growing up in a country where your skin color and name can put your freedom and liberty at risk at any time.”

Freedom of Speech

In 2013, Aaron Tobey reached settlements with the TSA and Richmond air-

port police after being arrested, handcuffed and held for nearly an hour and a half at Richmond International Airport. Tobey had stripped to his shorts at an airport screening area in protest of full-body scanners, revealing a handwritten abbreviated version of the Fourth Amendment on his torso. After the 4th Circuit Court of Appeals allowed the case to proceed, ruling that his actions were lawful and that we should be “unwilling to relinquish our First Amendment protections – even in an airport,” the airport police and TSA settled the lawsuit. Airport security officers underwent a two-hour training course on passenger First and Fourth Amendment rights and airport officials pledged to review rules related to First Amendment activities. The TSA agreed to let the appeals court decision stand and to not prosecute Tobey.

FEDERAL LIMITS ON LIABILITY

Montreal Convention (2003)

Ratified by the U.S. Senate, this international treaty imposes a two-year statute of limitations on lawsuits against international airlines. The limitations period begins to run “from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.”

Aviation and Transportation Security Act (2001)

Under this statute, Congress capped air carrier, aircraft manufacturer and airport owner/operator liability for September 11th-related lawsuits to the limits of their insurance coverage.

Aviation Medical Assistance Act (1998)

This law gives immunity to airlines that obtain or attempt to obtain help from a passenger during an in-flight medical emergency, nor are they liable for the acts of the passenger giving assistance provided that the passenger is not an employee or agent of the airline and the airline believed in good faith that the passenger was a medically qualified individual.

General Aviation Revitalization Act (1994)

GARA immunizes certain general aviation aircraft (i.e., civilian aircraft seating fewer than 20 passengers, excluding scheduled passenger-carrying airlines) and component part manufacturers from liability for death or injury caused by products that are older than 18 years at the time of the accident, regardless of the manufacturer’s negligence.

Since GARA’s passage, countless victims and their families have been denied access to the civil justice system. Among the cases barred: *Moyer v. Teledyne Continental Motors, Inc.*, filed by Ronald and Judy Moyer’s children, who alleged that their parents were killed after a crankcase crack caused engine failure, crashing their single-engine plane in January 2003.

Federal Aviation Act (1994)

As stated by 49 U.S.C. § 44112(b), the lessor, owner or secured party of a civil aircraft, aircraft engine or propeller is insulated from liability for personal injury, death or property damage the aircraft caused on land or water if it was not in the lessor, owner or secured party’s “actual possession or control.”