

Asiana Flight 214 and the Montreal Convention

A look at the exclusive remedy for all the passengers' claims against Asiana

By Michael S. Danko and Kristine K. Meredith

Our own backyard. For many of us, the July 6th crash of Asiana Flight 214 at San Francisco Airport struck a deeply personal chord. Who hasn't heard a fellow passenger express concern about SFO's over-water approach, or perhaps wonder whether the aircraft was going to make the runway? Not all such worries can be chalked up to simple jitters about airline travel. It is a fact that the runway safety area for runway 28L ("two-eight-left") was shorter than the safety area for most runways. The runway began only 300 feet from the water's edge. That didn't comply with the regulations. In fact, to meet the federal standards, the airport had just finished repainting the runway markings so as to move the runway threshold an additional 300 feet away from the seawall.

Runway 28L was equipped with an instrument landing system, or "ILS," that electronically guides pilots to the designated touchdown zone. That guidance is helpful at night and is crucial in bad weather when the pilots can't see the runway. After moving the runway threshold, SFO was required to relocate the ILS. Otherwise, the ILS would guide pilots to the old touchdown point, rather than the new one, now 300 feet downfield. To avoid misleading pilots, until the ILS could be relocated, it had been turned off. The ILS was off when Flight 214 made its approach.

The weather was clear on July 6 when Asiana Flight 214 arrived from Seoul. The tower directed the Boeing 777 to make a "visual approach" to 28L. That means the crew was to find the runway and fly to it simply by looking out the window. As it descended, the crew was to continually adjust the aircraft's power setting and pitch to ensure that the aircraft arrived in the landing zone at the right speed and height. Too fast or too high and Flight 214 could run off the far end of the runway. Too low or too slow and it could stall and crash short of the runway.

Approaches usually work out best if the crew flies down a gradient of about three degrees. That profile allows the crew to keep the aircraft's speed and altitude in check. And a three-degree slope is what an aircraft will fly if it stays on the ILS course. Pilots learn and practice this descent path as part of their initial training without help from an ILS. Given the ideal weather conditions on July 6, guidance from the ILS simply wasn't necessary. Flying the proper slope without the ILS's help shouldn't have been difficult.

Trouble was that over the years the Asiana crew had become increasingly reliant on electronics and cockpit automation for even fair-weather landings. That resulted in a phenomenon that human factors experts call "deskilling." Studies show that piloting skills degrade, especially among less experienced crews, when pilots do not regularly handle the aircraft manually.[1]

The Asiana crew misjudged and came up short of the 28L threshold. They were not up to the task of landing without guidance from an operating ILS. Thus, in a sad twist of fate, SFO's efforts to ensure a safe undershoot area contributed to the very type of accident those efforts were intended to prevent. Tragically, the crew shorted the landing, Flight 214 hit the seawall and broke apart.

One hundred and eighty passengers were injured and three were killed. One of those killed, a 16-year-old girl, survived the crash but was fatally injured by a fire truck as she lay on the runway. Of the 291 passengers, 77 were Korean, 141 were Chinese, and 61 were Americans.

The Montreal Convention

No question about it, the crew should have been able to land the airplane safely on the runway. A functional ILS might have made the job easier, but a competent crew should have been able to arrive at the runway's landing zone without it. Accordingly, passengers seeking compensation for their injuries would be expected to look first to Asiana Airlines.

Claims against an air carrier arising from injuries suffered onboard an international flight are governed by the Montreal Convention, a treaty that is among the most widely recognized in the world. The Montreal Convention follows from the Warsaw Convention, a similar treaty which predated World War II. For air carriers, the new Convention provides certainty about where claims will be adjudicated. For passengers, the convention provides a right to compensation for bodily injury or death without, in most cases, caps on recovery.

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The 191 signatories of the Montreal Convention include China, the Republic of Korea, and the United States. Given their accord, the Montreal Convention provides the exclusive remedy for all the passengers' claims against Asiana.[2]

Asiana Airlines's liability

The Montreal Convention requires the international air carrier to compensate its passengers or their families whenever the passenger's injury or death is the result of an "accident." The airline's obligation to pay does not turn on the accident's cause. Pilot negligence, mechanical failure, or even terrorist attack – it doesn't matter. If a passenger is killed or injured as a result of an accident, the airline is liable. A plaintiff need not prove that the airline was at fault.

Cap on airline liability

The airline is strictly liable for a passenger's damages up to 113,100 "Special Drawing Rights," or about $170,000.[3] The airline can avoid liability for sums exceeding that amount only if it can prove it was totally "free from fault."[4] That is usually an impossible task for an airline. Even when an accident results from the classic "act of God" – such as when the aircraft is struck by lightning or other weather phenomena – the air carrier can seldom show that there was nothing it could have done to avoid the accident. It's the problem of proving a negative. Thus, the Convention's "cap" on the airline's liability hardly ever comes into play.

Here, the question of whether the airline was "free from fault" will not be close. The Asiana pilots should have been able to land the plane without crashing it. Thus, Asiana will be unable to prove that the crash was *not* due to its negligence or other wrongful act. The airline will be subject to unlimited liability for *all* damages that are compensable under the Convention without regard to any limit of liability. Not all damages, however, are compensable.

Recovery of damages for emotional distress

Airplane crash victims often suffer emotional distress resulting from what is referred to as "the fear of impending doom." The emotional distress encompasses the anxiety and panic the passenger experiences between the time he realizes that the aircraft is going to crash and when the aircraft comes to rest and he is out of danger. Temporally, this type of mental injury usually precedes the passenger's physical injury, if any.

By most accounts, Flight 214's crash landing and the events that followed were horrific experiences for all aboard. Surely many passengers will struggle with emotional injuries that will disrupt both their work and family life for months, if not years, to come. Outside the context of the Montreal Convention, an airline passenger would expect to be compensated for all the emotional distress suffered, regardless of whether the passenger experienced any physical injury.[5] But under the Convention, an airline is not liable for a passenger's emotional distress, regardless of how severe, unless the passenger has also sustained a bodily injury. Thus, Asiana passengers who evacuated without suffering any such physical injury, will be left without any remedy at all.

What if, in addition to severe emotional distress, a passenger sustained a relatively minor injury, such as a laceration from an evacuation slide or perhaps a twisted knee? Can that passenger recover for her emotional injury?

Not likely. The majority of courts have ruled that the only emotional distress that is compensable under the Montreal Convention is that which is causally related to the physical injury. For example, the Eighth Circuit held in *Lloyd v. American Airlines* (8th Cir. 1992) 291 F.3d 503, that "mental injuries must proximately flow from physical injuries caused by the accident." (*Id.* at 509.) It thus ruled that a passenger who survived a crash could recover only emotional damages which flowed from the physical injuries to her legs and from her smoke inhalation, and that her post-traumatic stress disorder was therefore *not* compensable.[6]

The Northern District's opinion in *Jack v. Trans World Airlines* (N.D. Cal. 1994) 854 F.Supp. 654 is credited as serving as the cornerstone of the majority view and is a must-read for anyone handling an Asiana Flight 214 case.[7]

The *Jack* case dealt with TWA Flight 843. Bound for SFO from New York's JFK, Flight 843 aborted its takeoff and crashed. Fire completely destroyed the plane but all passengers survived. Many had minor physical injuries as a result of the crash and evacuation. TWA removed to federal court the claims of three of the passengers who were ticketed for international travel. The court followed the majority rule, holding that the international travelers could recover damages for the emotional distress flowing from their physical injuries, but *not* the emotional distress caused by the experience of crashing.

Plaintiffs with impact injuries may recover for their impact injuries and the emotional distress flowing only from the physical injuries. They may also recover for the physical manifestations of their emotional distress. Plaintiffs with physical manifestations may recover damages for the manifestations and any distress flowing from the manifestations, but may not recover damages for the emotional distress that led to the manifestations. *In both instances, the emotional distress recoverable is limited to the distress about the physical impact or manifestation, i.e., the bodily injury. Recovery is not allowed for the distress about the accident itself.* (*Id.* at 668, Emphasis added.)

Only one federal district court has permitted international passengers to recover for emotional distress unrelated to their physical injuries. The Court in *In re Air Crash Disaster near Roselawn, Indiana, on October 31, 1994* (N.D. Ill 1997) 954 F.Supp. 175 held that a physical injury

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was simply a prerequisite to obtaining full compensation for mental injuries. In that case the compensable mental injuries included pre-impact fear, provided the impact resulted in physical injury or death. Thus, in *Roselawn*, once a victim established a physical injury, *all* of his mental injuries were deemed compensable. *Roselawn's* reasoning has been widely criticized as conclusory and has not been followed by other federal courts.[8]

Further narrowing the scope of what a passenger may recover as compensation for emotional injuries is the Ninth Circuit's ruling in *Carey v. United Airlines* (9th Cir. 2001) 255 F.3d 1044.

The *Carey* court held that, contrary to the ruling in *Jack*, a passenger's *physical manifestations* of his emotional distress do not satisfy the Convention's 'bodily' injury requirement. Such injuries – which can run the gamut from skin rashes to stomach ulcers – are *not* compensable.

Comparative fault

Because it's so difficult for an airline to prove after a crash that it was free from fault, it's often said that airlines have "no defense" to most Montreal Convention cases. That's not entirely accurate, as the Convention provides that the carrier is to be "exonerated from its liability to the claimant to the extent the [passenger's] negligence or other wrongful act or omission caused or contributed to the damage."[9] Thus, those who were injured because, for example, they failed to properly use their seatbelts, or those who would not have been injured during the evacuation had they left behind their carry-on baggage, can expect a difficult time obtaining compensation for even their physical injuries.

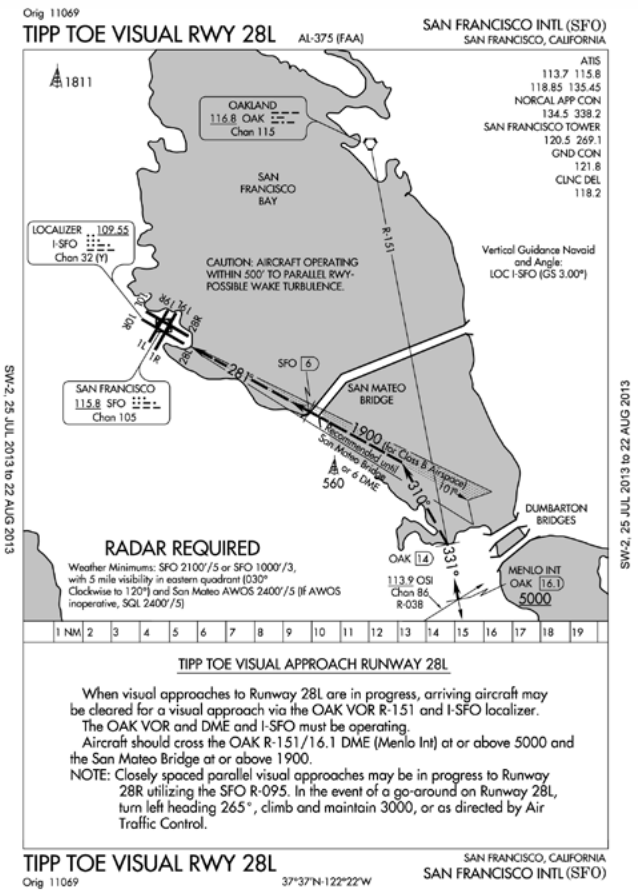
No punitive damages

The Montreal Convention does not allow for punitive damages, regardless of how derelict the airline or its employees, or how willful their misconduct.[10]

The complaint

Complaints against Asiana should set forth a single cause of action for "Treaty Liability." Allegations pertaining to the airline's negligence, gross negligence, or wilful misconduct, are irrelevant and are thus misplaced. (Recall that it is not the plaintiff's burden to plead or prove negligence, but rather the airline's burden to plead and prove that it was *free* from negligence or other fault if it seeks to limit its liability.) The only necessary allegations are that the plaintiff was a fare-paying passenger engaged in international travel, that defendant was the air carrier, that there was an accident, and that the plaintiff passenger suffered injury or death as a result.

Because the Convention is a federal treaty, federal courts have original jurisdiction. There is a conflict in authority as to whether state courts have concurrent jurisdiction. Thus, a plaintiff filing the complaint in state court should expect it to be removed.



Visual approach to Runway 28L at SFO.

Obtaining jurisdiction

Without question, the most important issue in Montreal Convention cases is jurisdiction. That's because the Convention leaves the issue of how much a passenger or her family is to be compensated to the local law of the jurisdiction in which the case is being heard. For cases brought in the U.S., for example, a plaintiff who has lost a child is likely to be compensated in the millions of dollars. But the same case brought in China may result in compensation in an amount equivalent to $20,000 or less. Thus, for some passengers, if they cannot sue in the U.S., they will have no meaningful remedy at all.

The Montreal Convention's jurisdictional provisions are for the most part unambiguous. Passengers whose permanent and principal residence is in the U.S. can most certainly sue Asiana in U.S. courts. But it will be much more difficult for foreign tourists to sue Asiana here. A passenger who is not a U.S. resident can sue Asiana here *if and only if*: 1.) The passenger's ticket was issued in the United States; or

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2.) The passenger's journey was a round trip that started in the United States; or
3.) The passenger's journey was a one-way trip that ended in the United States. Unless the passenger can satisfy one of these requirements, the passenger cannot sue Asiana Airlines in the United States.[11]

The Convention aims to establish uniformity around the world in compensating international air travelers who are injured in a crash. But application of the Convention's jurisdictional provisions often results in wildly disparate treatment of passengers who most would argue should be treated the same. Imagine: two Chinese residents seated next to each other, perhaps they are also sisters. One traveled on a one-way ticket, and one a round-trip ticket. Both suffered serious spinal injuries in the crash. Despite virtually identical injuries, one will be compensated in accordance with U.S. standards, and one will be compensated pursuant to Chinese law. One will receive millions of dollars and one virtually nothing. Few travelers would ever suspect that the details of their ticket purchase will determine whether they have a meaningful remedy in the event of an accident.

Liability of United Airlines

One other option is available for a select few who cannot establish jurisdiction here over Asiana. In the event of an accident, the Convention allows a passenger to sue his "contracting" carrier as well as the "actual carrier." United Airlines sold tickets to some of the passengers on Flight 214 as Asiana's code share partner. United is thus those passengers' "contracting carrier."[12] Because United Airlines has its principal place of business in the U.S., the Convention allows anyone who flew on a United ticket – regardless of his residency or destination – to sue United here.

Conclusion

While the Montreal Convention establishes liability against Asiana, its provisions will significantly limit the recovery available to most of the passengers who have suffered primarily non-economic loss. Because the Montreal Convention governs only claims against the airline, practitioners will thus undoubtedly look for compensation to potential third-party defendants such as Boeing, various component parts manufacturers, and The City and County of San Francisco. Given the role pilot error played in this crash, however, any recovery against third parties who contributed to the cause of the crash is likely to be significantly reduced when liability is apportioned in accordance with Proposition 51.

Mike Danko has represented the families of those lost in dozens of different aviation disasters. His notable cases include those arising from the crashes of TWA Flight 800 over Long Island Sound, Egypt Air Flight 990 near Nantucket Island, and the Air France Concorde at Charles de Gaulle Airport in Paris, France. Mike Danko is an active pilot who has logged more than 3000 hours in various makes and models of airplanes and helicopters.


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Endnotes:

[1] Institute of Ergonomics and Human Factors, Contemporary Ergonomics and Human Factors 2013 (Anderson edit. 2013) p. 61.
[2] Article 29 of the Montreal Convention provides: In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. . . .
[3] A Special Drawing Right is an artificial currency established by a "basket" of global currencies whose value fluctuates depending on the global currency markets. The value is published daily by the International Monetary Fund. Special Drawing Rights are to be converted into applicable national currencies at the date of the judgment.
[4] Article 21 of the Convention provides: The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 113,000 Special Drawing Rights if the carrier proves that:
(a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or (b) such damage was solely due to the negligence or other wrongful act or omission of a third party.
[5] See, e.g., *Long v. PKS, Inc.* (1993) 12 Cal.App.4th 1293.
[6] See also *Ehrlich v. American Airlines Inc.*, (2nd Cir. 2004) 360 F.3d 366 [a couple who survived runway overshoot could not recover for mental injuries caused by the accident (fear, anxiety and sleep disruption) that did not "flow from" the physical harm they suffered (knee, neck, back, shoulder and hip injuries)].
[7] Though *Jack* construed the Warsaw Convention, rather than the Montreal Convention, it is still persuasive. The Explanatory Note to the Montreal Convention states that "it is expected" that the provision of Article 17 governing carrier liability for passenger injury and death will be "construed consistently with the precedent developed under the Warsaw Convention and its related instruments." Montreal Convention, S. Treaty Doc. No. 106-45.
[8] *In re Air Crash at Little Rock Arkansas, on June 1, 1999* (8th Cir. 2002) 291 F.3d 503; *Ehrlich v. American Airlines Inc.* (2d Cir. 2004) 360 F.3d 366; *Ligeti v. British Airways PLC* (S.D.N.Y. Nov. 5, 2001) 2001 WL 1356238; *Carey v. United Airlines, Inc.* (9th Cir. 2001) 255 F.3d 1044.
[9] Montreal Convention, Article 20.
[10] Montreal Convention, Article 29.
[11] Montreal Convention, Article 33.
[12] Montreal Convention, Article 39.

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