ARE ALL AIRLINE CRASH VICTIMS TREATED EQUALLY AND FAIRLY UNDER THE LAW?

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The 1929 Warsaw Convention international air transportation treaty system had as its core purposes limiting the liability of air carriers for death or injury to passengers and creating a measure of uniformity regarding transportation of cargo. It was enacted at a time when the airline industry was in its infancy and the flight risks associated with the new technology of piston-powered flight machines were great. Insofar as the passengers were concerned the treaty sought to balance the risks associated with international air travel between the airlines and the passengers, assuring minimum compensation for death or injury claims that might arise in the course of international air travel, including embarking and disembarking, and give ultimate outcomes a modest degree of predictability. The formal title of the Warsaw Convention which expressed its purpose, in part, was “Convention for the Unification of Certain Rules Relating to International Transportation by Air.” After some hesitation, the United States adhered to the Convention in 1934.² Between 1929 and 1999 there was mounting dissatisfaction, most specifically by the United States, with the low limits of liability in the absence of proof of

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² 49 Stat., Part II p. 3,000.
“willful misconduct” or its functional equivalent, and that resulted in several relatively minor intermediate increases in the absolute minimum compensation limits.\(^3\) Without question, aviation has now evolved to be a safe and low-risk enterprise and liability insurance coverage is available at modest per passenger cost. Proof of “willful misconduct” almost always required expensive and time-consuming litigation and often shifted the burden of compensating passengers to manufacturers of aircraft and its components, even when an airline’s liability was clear.

The 1999 Montreal Convention (MC99), the most recent amendment of the series of international aviation treaties, made significant strides in modernizing the international air transportation rules relating to liability to passengers and documentation relating to cargo that existed since 1929.\(^4\) Importantly from the perspective of airline passengers, this treaty not only

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\(^3\) In 1955 the Hague Protocol amended the 1929 Warsaw Convention by increasing the damage limit in passenger injury and death cases to approximately $20,000. Dissatisfied with those limits the United States refused to be a signatory to the Hague Protocol and went so far as to threaten to “withdraw” from and renounce the Warsaw Convention system. In fact, a formal “renunciation” of the treaty was submitted and then withdrawn when the 1966 Montreal Agreement was filed by the airlines with the U.S. Civil Aeronautics Board. The Montreal Agreement raised the damage limitation to $75,000. Though adopted by all airlines, the increase only applied to claims in which the passengers’ tickets included an origination, stopping place, or termination in the United States. In all other respects the Warsaw/Hague system was preserved. However, even claims to which this “special contract” applied required proof of “willful misconduct” in order to obtain compensation in excess of $75,000.

\(^4\) The treaty is formally known as “Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October, 1929 as Amended by the Protocol Done at The Hague on 28 September 1955.”
ratified the air carriers’ 1996 commitment set forth in the International Air Transport Association (IATA) agreement by which the airlines’ raised the absolute liability compensation limit to 100,000 SDR’s, air carriers could no longer avoid unlimited liability to fully compensate passengers or their heirs for damage and harm caused unless the air carrier could prove complete freedom from fault. This shift in the burden of proof, as a practical matter for the first time, rendered airlines absolutely liable without any treaty limitations or restrictions other than those resulting from the choice of forum and the applicable local laws. In other words, the era of airlines’ “limited liability” was over. MC99 also added a long-sought “Fifth Jurisdiction” to where a death or injury lawsuit could be filed to include the victim’s “permanent residence.” This was also an overdue enhancement of passengers’ rights.

5 1996 IATA agreements preserved the airlines’ Article 20 “all necessary measures” defense to avoid unlimited liability.
6 “2. In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier’s aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement. 3. For the purposes of paragraph 2,
   a) “commercial agreement” means an agreement, other than an agency agreement, made between carriers and relating to the provision of their joint services for carriage of passengers by air;
   b) “principal and permanent residence” means the one fixed and permanent abode of the passenger at the time of the accident. The nationality of the passenger shall not be the determining factor in this regard.”
What MC99 did not address, however, was the dramatic and often harsh impact of the disparities among laws setting forth the scope of wrongful death recoveries generally. Because virtually every country on the globe is an MC99 signatory the variations in local laws are significant. In other words, even with MC99’s improvements, local law, not treaty law, controls damage issues and specifies who has the right to assert a claim, how those damages should be calculated and allocated among family members.

The failure to harmonize the great disparities in local law is far more than technical. It is in direct conflict with MC99’s two main objectives: to allow full and fair compensation for all air transportation victims, and to promote “equitable compensation” and “an equitable balance of interests” as the Convention’s preamble states. The differences lead to uneven and *inequitable* recoveries. By applying “local” law to the claims of passengers injured or killed in the same

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7 The MC99 preamble declares as its guiding principle the following:
RECOGNIZING the importance of ensuring protection of the interests of consumers in international carriage by air and the need for *equitable compensation* based on the principle of restitution;
REAFFIRMING the desirability of an orderly development of international air transport operations and the smooth flow of passengers, baggage and cargo in accordance with the principles and objectives of the Convention on International Civil Aviation, done at Chicago on 7 December 1944;
CONVINCED that collective State action for further harmonization and codification of certain rules governing international carriage by air through a new Convention is the most adequate means of achieving an *equitable balance of interests*;
accident one passenger or his heirs may be able to recover economic and non-economic losses while the passenger in the adjoining seat might get next to nothing.

This distinction must be examined in a practical context. Everyone is familiar with the post-aircrash drill and it is important to view the post-crash claims process through the passengers’ lens.

In the immediate aftermath of a commercial aviation accident great media attention is paid to the tragedy and the resulting deaths and injuries. Good faith assistance is offered to grieving families and advances are made to help the families deal with their immediate financial needs. Promises are made by airline CEOs and government officials to make every effort to discover the causes of the tragedy and offer assurance that the passengers or their heirs will be cared for. The passenger manifest when published will almost always confirm that the doomed plane was carrying passengers from several countries. The Malaysia Airlines Flight 370 crash of July 8, 2014, the crash of Germanwings Flight 9525 and other recent cases are illustrative. On board MAS 370 were passengers whose nationalities included China, Malaysia, Australia, New Zealand, U.S. and a few other States. The Germanwings’ passengers included travelers from Germany, France, Spain, Netherlands, Mexico, The United Kingdom and one or two other
countries. Passengers from China, Korea, the United States and elsewhere were on board Asiana Airlines Flight 214 that crashed on landing at San Francisco International Airport in July, 2013.

Once an aircrash ceases to be front-page news and media interest fades the passengers’ or their families’ effort to obtain compensation for their losses begins. Aside from having to cope with their personal emotional crises, they have to consult lawyers and start making hard choices. The victims will quickly learn that the countries in which claims may be filed in court are limited and that the consequences of the choice they make are great. MC99’s Article 33 will be examined and explained. Under the Warsaw/Hague Convention systems suit can be brought where the passengers ticket was purchased, the place of incorporation or principal place of business of the carrier or the ultimate destination on the ticket. As noted above, MC99 Article 33 added the country in which the passenger had his or her “permanent residence.” Fact issues relating to jurisdiction and choice of forum often complicate the decision and create their own anomalies.

That said, wherever the passenger or his or her heirs choose to file their claim carries with it the fact that the choice-of-law rules of that forum will determine what damage law controls, including the nature and quantum of damages they can expect to recover. In some
cases the applicable damage law is predictable, but in others not so. For example, if the available jurisdictions are limited to European Union members, EU choice of law not some other country’s rules will apply and those rules in turn will determine what country’s damage law applies. The EU choice of law rules are set forth in its regulations, commonly referred to as Rome I\(^8\) and Rome II\(^9\) and are intended to promote predictability. That is easier said than done. On the other hand, if the jurisdiction options for a crash victim include the United States most U.S. courts have adopted a flexible choice of law analysis and seek to apply the law of the jurisdiction that has the greatest interest in the controversy.\(^{10}\) Other countries adhere to \textit{lex loci} and still others to the \textit{lex fora} principle.

Therein lies the problem.


\(^{10}\) In the United States most states have adopted a variety of tests to determine which jurisdiction has the greatest interest in the matter at issue and/or the parties. The various tests in which similarities outweigh differences are called “the significant contacts test”, “the balance of interests test”, and “the comprehensive impairment test”. Some jurisdictions still adhere to “\textit{lex loci delecti}”, the place where the tort occurred. In aviation cases issues of a passenger’s domicile, residence, place of accident, and place of manufacture of a failed product all come into play in the analysis.
Since the nature and extent of recoverable compensatory damages are markedly different from one country to the next the right to obtain compensation for death or injury lacks any true consistency and certainly no uniformity.

For example, all signatories to the 1999 Montreal Convention allow recovery for “economic loss” which in a wrongful death case can be loosely defined as the material benefits obtained and expected from a decedent, such as loss of future income. In a personal injury case future medical care and loss of future income are the major “economic loss” components. To be sure there are differences in the way “economic loss” is to be calculated, but at least there is agreement that those losses are compensable.

On the other hand, there is no similar agreement regarding “non-economic loss.” For the purpose of this article, suffice it to say that “non-economic” losses include the pain and suffering of the of the passenger who survives an aircrash, the pain and suffering that a passenger experiences in the pre-death phase of an air crash, the loss of mutual benefits inherent and derived from family relationships, such as love, companionship, affection, parental care and guidance, and the grief which includes the emotional suffering that naturally attends the death of
a beloved member of the family. Some countries allow compensation for those intangible losses while other countries do not.

An important and remarkable contrast in the way passengers are treated and their rights lies in what is commonly referred to as “EU261”. This is a regulation passed by the European Parliament which went into effect in February, 2005. In sum, the regulation establishes rules for compensating airline passengers who are denied boarding, experience flight cancellations or long delays. EU261 requires prompt alternate rerouting, rebooking, or compensation. Airlines are obliged to display a notice at their check-in counters stating:

If you are denied boarding or if your flight is cancelled or delayed for at least two hours, ask at the check-in counter or boarding gate for the text stating your rights, particularly with regard to compensation and assistance.

Delays exceeding two hours for a scheduled flight require that passengers receive written notice setting out their rights under the regulations.

11 European Union Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding, or cancellation or long delay of flights.
A few hours of delay, therefore, can translate into hundreds of dollars in compensation.  

See, Wallentin-Hermann v. Alitalia—Linee Aeree Italiane SpA, (Case C-549/07, December 22, 2008. The exceptions to carriers' compensation obligations are limited to certain “extraordinary circumstances.” Article 5(3). See The European Court of Justice’s 2007 decision in Sturgeon v. Condor (C-4002/07), and Bock v. Air France (C-432/07) in which he European Court of Justice said:

Articles 5, 6 and 7 of Regulation EC 261/2004 must be interpreted as meaning that passengers whose flights are delayed may be treated, for the purposes of the application of the right to compensation, as passengers whose flights are cancelled and they may thus rely on the right to compensation laid down in Article 7 of the regulation where they suffer, on account of a flight delay, a loss of time equal to or in excess of three hours, that is, where they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier.

The regulation applies to any passenger on any airline departing an EU member state, travelling to an EU member state on an airline based in an EU member state, provided that the passenger has a paid-for confirmed ticket and arrives in time for the flight or certain transfers.
It is incongruous that the EU by regulation requires compensation for a few hours of inconvenience and delay experienced by airline passengers, but allows EU members to deny non-economic loss compensation for a life-time of suffering and deprivation when a family member is killed in an aircrash. The irony is underscored by the fact that the air carrier is now absolutely liable as a matter of treaty law by reason of MC99.

There is also interesting language in a very recent decision not involving aviation that was published by the Supreme Court of Florida on June 8, 2017 that bears directly on this issue of limitations or caps on non-economic loss compensation and the inequities of caps. The Florida Supreme Court having earlier ruled that a statutory cap on non-economic loss recoveries in wrongful death cases\(^{12}\) was unconstitutional, extended the holding to embrace personal injury non-economic loss caps in medical malpractice cases. Both were held to be unconstitutional and violations of the Equal Protection Clause of the Florida Constitution. The Court concluded its analysis saying:

> We conclude that the caps on noneconomic damages in sections 766.118(2) and (3) arbitrarily reduce damage awards for plaintiffs who suffer the

\(^{12}\) Estate of McCall v. United States, 134 So. 3d 894 (Fla. 2014).
most drastic injuries. We further conclude that because there is no evidence of a continuing medical malpractice insurance crisis justifying the arbitrary and invidious discrimination between medical malpractice victims, there is no rational relationship between the personal injury noneconomic damage caps in section 766.118 and alleviating this purported crisis. Therefore, we hold that the caps on personal injury noneconomic damages provided in section 766.118 violate the Equal Protection Clause of the Florida Constitution.

Accordingly, we affirm the Fourth District’s decision, and remand to the district court for further proceedings consistent with this opinion.

North Broward Hospital District, etc. et al. v. Susan Kalitan (No. SC15-1858, June 8, 2017, ___ So. 3d ___ (Fla. 2017).

To the same extent that the Florida Supreme Court found that there was no insurance “crisis” to justify discriminating against victims who suffer catastrophic injuries in medical malpractice, the same holds true for aviation accident victims. The airline insurance industry has no crisis.\(^\text{13}\) It is hardly ever that an airline’s coffers are used to settle claims; there may be airline

\(^{13}\) It is worth recalling that when the debate about whether to remove limits of liability compensation embodied in the 1929 Warsaw Convention and 1966 Montreal Agreement were on-going, pressed by the U.S. Congress committees considering the matter, an issue high on the agenda was the question of whether there was proof that there was economic necessity for airlines to preserve their so-called “limited liability” in the absence of proof of “willful misconduct”. The question was put to the International Air Transport Association in U.S. Senate 1977-1982 hearings and submissions and yet no economic justification was forthcoming. It is likely that if airlines and the aviation community were challenged today in the halls of government just as earlier no proof of economic necessity would or could be produced.
reserves, but in most cases it’s all insurers’ money. If victims in one country have no right to recover damages for non-economic losses or minimal recovery their rights are as much subject to a “cap” as they were in Florida and other places where victims’ compensation rights are limited. Given an opportunity to rule many courts in the United States, though not all, have rejected caps as “unequal” under the law.

The real point is that limitations on recovery for non-economic losses are not an issue between victims of air disasters and countries or airlines, the limitations are a matter that places the victims of disaster in conflict with the aviation insurers. That invites the simple question, “Why should victims suffer catastrophic non-economic losses without the right to obtain compensation for that harm anywhere while the insurance industry prospers?”

The point of this article is to call attention to the fact that the difference in country-to-country rights to obtain compensation, especially for non-economic losses leads to grossly unequal and unfair treatment of air crash victims. This should be addressed by the international aviation community of airlines and insurers and corrected. That can be done through amendment of the 1999 Montreal Convention, by amending the EU regulations, or by and inter-carrier agreement along the lines of the 1996 IATA Agreement.
In advocating for the elimination of these inequities we should consider the following.

All of the passengers flying on the same airplane pay the same basic fare. Fares may fluctuate among passengers depending on computer-driven marketing and competition considerations, seat selection, passenger loads, time of purchase, code-shares, “frills” or “no-frills”, etc., but whatever the fare may be the per passenger or per-seat allocation of the air carrier’s liability insurance premium is the same. The premium allocation is not different for someone sitting in the First Class cabin and for someone in the Economy cabin. Premiums are fixed by the carrier and the insurance underwriters based upon insurance market place competitive forces, the carrier’s loss history, the amount of coverage purchased and other factors. Whatever the premium may be, the revenue source from which the premiums are paid is the passenger fares. Logically, since the airlines’ premiums are derived from the passengers, they are funding their own potential claims. The insurance premium is in the ticket price. All passengers, therefore, should be treated equally because they are contributing to the premium equally. Put another way, passengers are the ones funding the airlines’ insurers’ obligation to pay compensation in the event of a disaster. The unfairness of unequal compensation for losses sustained following an aircrash is magnified by the obvious fact that everyone in an accident suffers the same
experience, is injured or killed in the same event, at the same time and by the same air carrier. Justification for disparate treatment is hard to manufacture.

Airlines and insurers may counter that there is no need to make any changes to the global compensation system. One can also expect the argument that victims should be compensated in accordance with the laws of their domicile or nationality or the laws of any of the fora where they are permitted to sue under the Convention and that comports with their reasonable expectations. That proposition does not withstand analysis. First, airline passengers do not expect to die or be injured in an air crash. Second, airlines and their insurers are paid premiums to place the victim or survivors in the position they would have been had the crash not occurred. No one expects his or her compensation to be affected by fortuitous circumstances, even domicile.

Non-economic loss compensation is a way of recognizing the agonizing impact of the destruction of the social fabric of a family. The failure to allow compensation for non-economic losses cannot be justified by arguing that love, companionship or grief are not capable of economic measurement. The reality is that the currency of the courtroom is money and what
constitutes “fair” compensation in money terms is up to the fact-finder and subject to appellate review. That is how “fairness” is hopefully guaranteed in every legal system.

In death and injury cases money and a monetary award for non-economic loss is concrete recognition that the victim was important to his or her family, not simply as a money maker or provider. It is consolation damages for years of prospective pain and suffering and loss. It is a social statement of value. Necessarily, if the parties cannot agree on fair compensation for non-economic loss a judge, arbitrator or other fact finder can make the determination, and those determinations are not made in a vacuum. Awards are made in consideration of the individual circumstances of the claimant, societal and cultural values and other factors and every legal system incorporates judicial mechanisms to insure reasonableness. Making non-economic loss assessments and compensation awards, though somewhat subjective, should be mandatory across all legal systems especially in aviation cases.

**CONCLUSION**

Fortunately, in the grand scheme, airline travel is safe with accidents few and far between. Liability coverage is purchased at relatively low cost given the cost to risk ratio. There
is no excuse for not allowing all passengers the right to receive full compensation for economic

and non-economic losses when an aviation tragedy strikes their families.