

Sports Litigation Alert

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Crash for the KHL: Analysis of the Russian Hockey Team Airplane Tragedy and Lessons to be Learned in Sports Organization Risk Management

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On September 7, 2011, a Russian plane crash killed virtually an entire professional hockey team. Russian authorities are still investigating the accident, but one thing is certain—the crash devastated much of the international hockey community. This was not the first time that a sports team has been stricken by such a sudden and deadly tragedy. In 2001, an airplane chartered for the Oklahoma State University men’s basketball team crashed in Colorado, killing ten, including two players. The National Transportation Safety Board (“NTSB”) determined that the airplane lost a.c. electrical power, and that the pilot did not adequately manage the workload in responding to the loss of power. In 1985, three members of the Iowa State University women’s cross country team, fresh from a second place finish at the national championships, were killed when their plane crashed in icing conditions. In 1980, a LOT Polish Airlines plane carrying 14 members of the U.S.A. Boxing team crashed in Warsaw when component parts of one of the engines failed. Twenty-nine were killed in 1977 when a plane carrying the University of Evansville men’s basketball team crashed due to improper weight and balance and the failure to remove safety locks prior to the flight. And no year was more tragic in collegiate sports than 1970, when two football teams—Marshall University and Wichita State—were involved in separate plane crashes killing a total of 51 players.

Air travel today is safer than it has ever been, but as the recent Russian hockey team crash reminds us, accidents still occur. And when these accidents happen, litigation inevitably follows. While the lawsuits following such disasters are bound to take different paths, there are certain issues that arise in almost every plane crash lawsuit, and this article will take a brief look at

some of these issues, and how the same might possibly play out in hypothetical lawsuits involving the Russian hockey team crash.

While one of the first things an attorney must look at in evaluating any litigation is whether the chosen forum is appropriate, this consideration generally looms larger in airplane crash lawsuits. This is due to the interstate and international nature of air travel, as well as the fact that the passengers, manufacturers, and aircraft owners involved in any particular lawsuit could be from all over the world. The global nature of the aviation industry provides tort plaintiffs a menu of fora from which they can choose the most advantageous in terms of procedural law, substantive law, and damages awards.

Any litigation arising out of the Russian hockey team crash is likely to be in Russia, as the aircraft was manufactured there, the aircraft operator was based there, and the accident occurred there. The Aviation Code of the Russian Federation would govern the legal proceedings and damage awards imposed against the air carrier. Section 117(1.2) of the Code provides that, with some exceptions, the air carrier’s liability for passenger injuries is capped at 2,000,000 Russian rubles, or about \$67,000. Reportedly, the air carrier has already offered to settle claims with the passengers’ families for this amount. The cause of the accident is still under investigation by the Investigative Committee of the Prosecutor’s Office and Russia’s Interstate Aviation Committee, and there is a small chance their conclusion could allow for additional compensation to the passengers’ families.

Given the limited compensation available in Russia, the advantages of suit in the United States are ob-

vious. Russian hockey team plaintiffs may try to join in the growing trend of suing in the United States over a foreign airplane crash. Several of those killed in the crash had connections to the United States through playing in the NHL or amateur hockey leagues, and their families may have a basis for bringing suit in the U.S. To file here, they will have to develop a good faith theory of liability against a defendant who can be sued in the United States; hypothetically, the manufacturer of a component that malfunctioned in the crash could be headquartered in Chicago. Civil procedure rules could allow such a suit despite the fact that the crash occurred in Russia, involved a Russian-manufactured airplane owned and operated by a Russian company, and killed Russian residents. Similar issues can arise even in lawsuits involving plane crashes in the United States. Some states have reputations as being more plaintiff-friendly than others, and a plaintiff will file suit in what he believes to be the most favorable forum.

A defendant unhappy with the chosen forum has some options to challenge the location of the lawsuit. One option is to seek dismissal based on a lack of personal jurisdiction. Whether personal jurisdiction exists—in other words, whether a court sitting in a particular state can properly exercise its power over a defendant—is controlled by the Due Process Clause of the Constitution. *J. McIntyre Machinery, Ltd. v. Nicasastro*, 131 S.Ct. 2780, 2786 (2011). A court can exercise that power only when the defendant has sufficient contacts with the chosen forum so as not to offend “traditional notions of fair play and substantial justice.” *Id.* at 2787, quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945). Personal jurisdiction issues arise when the defendant is not a resident of the state in which the suit is brought. So, if the Russian hockey team plaintiffs are able to sue that fictional manufacturer in Chicago, they probably will not be able to sue the Russian charter operator in Chicago because the charter operator has no connection to Illinois and has not “purposefully availed” itself of the privilege of conducting activities within Illinois. *Id.* at 2787.

Even if personal jurisdiction exists, a defendant can also seek dismissal based on the doctrine of *forum non conveniens* by arguing, essentially, that even though the plaintiff’s chosen forum is proper, an alternative forum exists where litigation will be much more convenient. If, after considering a variety of “private factors” and “public factors,” the court decides that

the lawsuit should be heard in a different forum, the judge can dismiss the case. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S.Ct. 252 (1981). The “private factors” the court will consider include ease of access to evidence, ability to compel unwilling witnesses to appear, the cost of attendance of witnesses, the possibility of a view of the accident scene, and other assorted practical difficulties. *Id.* at n. 6. The “public factors” include court congestion, the interest in having localized controversies decided locally, avoiding conflict of laws issues, whether the chosen forum will be able to adequately apply foreign law, and the unfairness of imposing jury duty on citizens of a community with no connection to the accident. *Id.* Securing a *forum non conveniens* dismissal is an uphill battle, as typically the plaintiff’s chosen forum is granted a certain amount of deference. Plus, the international nature of the aviation industry, combined with advances in technology that have eased access to evidence, often militate against dismissal or transfer in air crash cases.

Another complexity that often arises in aviation disaster litigation is choice of law. If the Russian hockey team plaintiffs were to find a way to maintain suit in the United States, one or more of the defendants are certain to argue that some issues, or even the entire case, should be decided under Russian law. For example, the defendant may argue that the damages limitations of the Aviation Code of the Russian Federation ought to apply and bar any compensation in excess of \$67,000. Rules on choice of law differ from state to state, though the Due Process Clause prohibits choice of law decisions that are arbitrary or fundamentally unfair, and requires whatever law is applied to have a significant contact to the parties and the accident. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308, 101 S.Ct. 633, 637-38 (1981).

Considering that aviation disaster plaintiffs can have multiple fora to choose from, it is not unusual for the same plane crash to be litigated in multiple jurisdictions. For example, if the families of those killed in the Russian hockey team crash are able to maintain suit in the U.S., they may each file in different federal districts. Defending the same issues in multiple courts would be exceedingly expensive for defendants, and could potentially result in inconsistent rulings from court to court. To address these problems, Congress provided for a Judicial Panel on Multidistrict Litigation. 28 U.S.C. § 1407. Under this system, which has its own Rules of Procedure, civil cases that involve

common questions of fact can be transferred to a single district for pretrial proceedings. When pretrial proceedings are complete, the cases are sent back to their courts of origin for trial.

The Russian hockey team crash occurred during a domestic flight, but if it had occurred during an international flight, the Montreal Convention may have governed the ensuing litigation. The Montreal Convention (formally the Convention for the Unification of Certain Rules for International Carriage by Air, reprinted in S. Treaty Doc. No. 106-45) sets out rights and liabilities for passengers and air carriers involved in accidents during international flights. Most importantly, the Montreal Convention provides a scheme of limited strict liability for personal injury claims, but only up to a certain amount of damages. An air carrier is liable for personal injury claims up to 100,000 Special Drawing Rights (approximately \$158,000); beyond that amount, the carrier is allowed to limit compensation by proving either that the damage was not the result of the carrier's negligence, or that the damage was solely the result of a third party's negligence. *Id.*, Art. 21.

The General Aviation Revitalization Act (49 U.S.C. § 40101 note; hereinafter "GARA") is another important law in aviation cases, though it would not be applicable to the Russian hockey team crash. GARA imposes, with some important exceptions, an 18-year statute of repose for lawsuits against manufacturers of general aviation aircraft and components. The statute defines general aviation aircraft as those with fewer than 20 passenger seats that are not engaged in scheduled passenger carrying operations. Thus, while GARA will not cover large commercial aviation disasters, it could be implicated in smaller-scale crashes.

The factual issues that must be addressed in aviation litigation can also be quite thorny and time-consuming. When an airplane crashes in the United States, the NTSB commences an investigation and ultimately determines what probably caused the crash; most other countries have a similar agency. The Russian Prosecutor's Office involvement in the investigation of the hockey team crash is indicative of the European trend toward criminal investigations and prosecutions of those responsible for aviation accidents. The NTSB has the ability to name manufacturers or others involved in an airplane crash as a "party" to its investigation, and will rely on these parties for technical assistance during the course of the investigation. The

NTSB's mission is to advance transportation safety, not to help litigants win cases. Thus, the United States Department of Transportation adopted regulations that strictly govern how the NTSB's investigation can be used in evidence. For example, a NTSB employee's involvement in a lawsuit is limited to a single deposition; no party can compel a NTSB employee to testify at trial. 49 C.F.R. § 9.9. Moreover, a NTSB employee can only testify to facts, and is prohibited from offering opinions. *Id.* Litigants, therefore, necessarily must rely on private consultants to develop expert opinions as to the cause of a crash. Depending on the circumstances of a particular crash, these could be experts in aeronautical engineering, piloting, aerospace medicine, aircraft maintenance, accident reconstruction, or any other number of specialties. These complex and technical factual issues, combined with the legal issues and high-stakes involved, make air crash litigation especially expensive and time-consuming.

Teams and athletic departments cannot avoid air travel in the modern world, nor should they, given the convenience and safety record of aviation. However, teams and athletic departments should take steps to enhance the safety of their travel programs, to avoid both the tragedy of an aviation accident as well as the potential liability and expense of a lawsuit. Oklahoma State University revised its air travel policies following the basketball team crash, and the NTSB has called the post-accident policies a model for athletic programs of all sizes. The NTSB's discussion of OSU's post-accident policies can be found here: <http://www.nts.gov/doclib/reports/2003/aar0301.pdf>.

Again, NTSB reports are focused on prevention of future accidents, but interestingly, the "safety issue discussed in this report is the lack of oversight for athletic team and other college- and university-sponsored travel." Specifically, the NTSB addresses its concerns to the two largest bodies governing college sports: the NCAA and the NAIA.

Currently, the NCAA has travel procedures, organized by Division for Championships as well as NCAA business. This is largely to help control travel costs, as the NCAA has entered into an agreement with Short's Travel Management of Waterloo, Iowa, to provide air transportation and special services to persons traveling on NCAA business. For all Division I championships except men's and women's basketball, any team that is located less than 400 miles from the site of competition

will be required to drive. Further, charter options, such as the one taken by OSU, will be pursued by Short's only if reasonable commercial options are not available. Note that teams choosing to travel during the playing season outside of NCAA championship competition arrange their own travel.¹ Such was the case for OSU in which a charter flight was donated by an alumnus. Since the deadly crash, OSU and other schools, have tightened restrictions on such travel. See below:

“No specific restrictions on athletic team travel were provided in [OSU's] former air transportation policy. The revised team travel policy indicates that other aircraft, including donated aircraft, are an acceptable means of travel for coaches and professional athletic department staff but that student athletes and teams are generally not permitted to travel on such aircraft. (Students are allowed to travel on commercial, charter, and time-share aircraft.) Coaches, professional athletic department staff, and student athletes traveling under special circumstances can decline travel on other aircraft, in which case accommodating transportation (within the framework of the policy) will be provided. Unlike the former policy, specific requirements must now be met for other aircraft, including that the aircraft are powered by two or more turbine engines and are certified for flight into known icing conditions.”

—NTSB Safety Recommendation
to Dr. Myles Brand, NCAA (Jan. 21, 2003).

¹ The NAIA also has a travel policy available on its homepage.

Air travel policies should take into account matters such as minimum training requirements for pilots, maintenance requirements for aircraft, safety audits, Federal Aviation Regulation compliance, and other matters that bear upon the safety of any particular flight program. Any team or school's policies should also be reviewed and updated regularly, as the field of aviation safety is always evolving. Though it should go without saying, the safest air travel policy in the world is useless unless it is followed, so teams should take pains to strictly adhere to its policy. Teams that use air transportation should also regularly re-evaluate their insurance policies and pertinent indemnity agreements to make sure that they are adequately covered should an accident occur, even if the team owns no aircraft and relies on third-party transportation providers. Finally, as passengers on such aircraft faculty, staff, student-athletes, and professional athletes should look to their organization's insurance policies to make sure that if something did happen on that flight, that there is applicable coverage to avoid a situation such as the one in Russia in which recovery for the hockey players and staff will likely be minimal if at all.

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