

9-11 & AIRLINE CIVIL LIABILITY

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Position Paper

This Position Paper addresses whether United and American Airlines are liable to 9-11 passengers, ground victims, and injured survivors, whose representatives bypass the government's Victim Compensation Plan and file a civil action in New York.

Questions Answered

1. *Is an airline liable for damages to the family of passengers on a 9/11 hijacked airplane?*
2. *Is an airline liable for damages to an individual who was injured or died while in the World Trade Center on 9-11?*
3. *Is an airline liable for physical injuries suffered by a bystander who was not in the World Trade Center, but watched from the ground nearby as the first tower collapsed?*
4. *Is an airline liable for the negligent infliction of emotional distress suffered by a bystander who suffered no physical injury as he watched from the ground nearby as the first tower collapsed?*

Brief Background

Shortly after the events of 9/11, the airlines lobbied Congress to pass the “Air Transportation Safety and System Stabilization Act” (Public Law 107-42) which includes the “September 11th Victim Compensation Plan of 2001” (Title IV of the Act).

On December 21, 2001, the Department of Justice set forth the Interim Final Rules on how funds would be dispersed to survivors, victims, and survivor families (the “Recipients”) who apply for relief under the Fund.

On March 13, 2002, the Final Rules on payments under and procedures for the Fund were published in the Federal Register (Volume 67, Number 49). These rules include a “no-fault” alternative to litigation against the airlines involved in the events of 9/11. Under these rules, any recipient applying for relief under the Fund must waive all rights to file a lawsuit against the airlines involved.

What is a Cause of Action?

On December 20, 2001, Ellen Mariani filed the first civil lawsuit against United Air Lines, Inc., on behalf of her husband who died on United Flight 175. That flight was hijacked and flown into Tower 2 of the World Trade center (the “WTC”). Her causes of action include an action for “Wrongful Death.”

A cause of action is a specific legal theory or civil remedy sought by a plaintiff in a COMPLAINT.

Each cause of action has ELEMENTS which a plaintiff must prove at trial.

In a lawsuit involving NEGLIGENCE, a plaintiff must allege elements of LIABILITY (if each of the below elements is proven, then a plaintiff may receive damages):

A. The existence of a duty owed by the defendant to the plaintiff – i.e., the airline owed a duty of safety to passengers;

B. A breach of that duty – i.e., a showing that the airlines did not act “reasonably” toward the passengers (the plaintiff will have to show that the defendant/airline did not take every reasonable, necessary precaution to prevent injury); and

C. The breach proximately caused harm – i.e., the airline’s conduct needed to be a substantial factor in the passengers’ deaths (the plaintiff will have to show that defendant’s breach of duty was a substantial factor in causing damages. If the defendant can show that the damages were not FORESEEABLE or that there was a SUPERSEDING CAUSE of the damages, then defendant will not be liable to the plaintiff).

These legal hurdles faced by potential plaintiffs are discussed below.

Burden of Proof in a Civil Case

We've watched enough television to know that the burden of proof in a criminal case is "proof beyond a reasonable doubt." That's an extremely high burden.

In a civil action, the plaintiff must merely show that s/he is more right than wrong, or put another way, has a burden of proving a case by a PREPONDERANCE OF THE EVIDENCE. In other words, the plaintiff must offer proof to convince a jury that s/he is at least 51 percent correct.

How much evidence is needed to win a civil verdict versus a criminal conviction? If we weighed the evidence on our SCALES OF JUSTICE, the prosecution in a criminal case would have to place a rock on the scale to tip the case in its favor, while a civil plaintiff need only place a feather on the scale to win the case.

Hypothetical Plaintiffs

Is an airline liable for the events surrounding 9-11?

Like most legal issues, there are simple questions and complicated answers -- answers which are cautiously developed as attorneys split hairs over the unique facts of each case.

Below is a list of questions which identify the most likely hypothetical plaintiffs against the airlines in a 9-11 civil action:

1. Is an airline liable for damages to the family of passengers on a 9/11 hijacked airplane? (the lawsuit filed by Mrs. Mariani)

Liability of airline to individuals on the airplane – I believe a jury could find liability for passengers on the airplane under New York's "zone of danger" test, first espoused in 1928 by Justice Cardozo in Palsgraf v. The Long Island Railroad.¹

In that case, a person carrying a small package wrapped in newspaper was running to get aboard a train which started to move. A guard on the train held the door open and reached forward to help him aboard, while another guard pushed him from behind. In the process, the person's package was dislodged. Unbeknownst to the guards, the package contained fireworks which exploded when they fell. Many feet away, Mrs. Palsgraf was standing on the railroad's platform. The explosion sent shock waves down the platform and knocked over some large scales, causing injuries to Mrs. Palsgraf.

¹ 248 N.Y. 339, 162 N.E. 99 (1928).

In analyzing the issue of liability in this Negligence action, Mrs. Palsgraf clearly showed that a railroad has a DUTY of care to its passengers.

In addition, we can identify negligent acts on behalf of the employees or agents of the railroad – pushing and pulling a passenger onto a moving train. Thus, arguably, the railroad BREACHED ITS DUTY to the plaintiff.

However, Justice Cardozo ruled in Palsgraf that the negligence of the railroad did not PROXIMATELY CAUSE plaintiff's damages. The court held that it was not FORESEEABLE that the passenger's wrapped package had fireworks, would get dislodged, explode, send vibrations down the platform, knock scales over, and injure Mrs. Palsgraf. The court said that the injuries were not in an undefined ZONE OF DANGER, and that the chain of causation was broken by a SUPERSEDING EVENT – the unlikeness of the sequence of events.

The Palsgraf case is still good law in New York, as modified by the Derdiarian case discussed below.

In the present case, some basic questions would need to be answered by the airline in the DISCOVERY PHASE of a lawsuit. In discovery, parties to a lawsuit are permitted to ask several questions and request several internal documents to prove or disprove a case.

In discovery, I would look for proof of negligence in many areas, including:

- whether the airline followed FAA regulations concerning safety and security in the airport and the airplane
- the degree of control that the airline exercised over security screening in the airport
- whether the airline has had prior incidents concerning unauthorized passengers getting into the cockpit through inadequately constructed cockpit doors

When analyzing a case, lawyers will often tell you that “the devil is in the details.” Just like in the movie, Erin Brokovich, a plaintiff has an opportunity to uncover damaging evidence, usually in the form of internal company documents. These are called SMOKING GUN DOCUMENTS.

For example, from January 1 to September 11, 2001, the F.A.A. issued 15 high alert notices or “information circulars” of possible terrorist threats to U.S. airlines. The circulars were based on information from law enforcement and intelligence sources.² Based in part on these documents and the actions of the defendant, I believe that a reasonable jury could find that the airline breached its duty to passengers boarding the

² The New York Times, May 21, 2002. The complete contents were not publicly disclosed to avoid compromising intelligence sources and methods, but the F.A.A. released summaries. In the civil lawsuits discussed herein, expect discovery requests from the plaintiffs' attorneys for production of these information circulars.

airplane. By allowing several box cutters to pass through security and installing inadequate cockpit doors, the airline's conduct was arguably a SUBSTANTIAL FACTOR in PROXIMATELY CAUSING the death of the airline passengers. First, though, I'd like to see what additional facts are obtained in the discovery process of the case. Second, I'd have to assess whether there is a public climate of bias against clients who "could've gone to the government's no-fault Fund, yet decided to drag me in for jury duty."

Third, I'd examine the client's rights carefully under the government's Fund before filing a lawsuit. The awards to each recipient could vary dramatically, since recovery of economic damages rests with examination of complicated earnings/age charts. In addition, said award is reduced by "collateral sources" such as life insurance, death benefits, and pensions. On top of the economic damages, beneficiaries receive a fixed amount of non-economic damages (for example, pain and suffering) for the death of a family member: \$250,000 for the deceased; \$100,000 for the spouse; and \$100,000 each for up to three dependents.

Since individuals have until December 2003 to file a claim under the Fund, attorneys will be weighing client options for several months to come. Obviously, time will be a factor to several families. Those needing immediate relief will likely bypass lengthy litigation options in favor of the Fund, which has a relatively quick payout schedule.

Finally, for attorneys considering lawsuits, Congress has capped the airlines' liability at \$1.5 billion per airplane. This means that even though a jury might find an airline liable, there may not be enough money for each party filing a lawsuit.

2. Is an airline liable for damages to an individual who was injured or died while in the World Trade Center on 9-11?

Liability of airline to individuals in the WTC who died or suffered physical injuries

In April 2002, the first civil lawsuit was filed by the estate of an individual who was in the WTC when the building was hit. The suit is against American Airlines and the security service used at Logan Airport in Boston, arguing similar negligence theories alleged above.

This case becomes harder to prove under a Palsgraf analysis than the Mariani case above, because of the inevitable argument that it is not foreseeable for a person to be at risk of an airplane flying into a building due to alleged negligent screening at an airport.

However, Palsgraf was modified years later in Derdiarian v. Felix Contracting Corp.³, where the New York court found that a plaintiff's case can go to a jury (a finder of facts) by "generally show[ing] that the defendant's negligence was a SUBSTANTIAL CAUSE of the events which produced the injury." (emphasis supplied). In other words, the court

³ 434 N.Y.S. 169, 414 N.E.2d 670, 51 N.Y.2d 313 (1980).

stated that if a third party intervenes (the hijackers) between the defendant's conduct (airline, security screener) and the injured person, the CAUSAL CONNECTION needed for the PROXIMATE CAUSE element is not automatically severed.

But the court added: "If the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, it may well be a SUPERSEDING ACT which breaks the causal [connection]." (emphasis supplied).

Under this analysis, I believe the plaintiff will have a more difficult time convincing a jury that an individual in the WTC has as good a case as someone on the airplane. The issue still revolves around FORESEEABILITY. Assuming that a jury determines that there was a BREACH OF DUTY, the defendants would argue that the events leading to deaths in the WTC were "far removed" from the screener's conduct or insufficient cockpit doors.

Of course, they'd make the same argument as it applies to the people on the airplane; however, there appears to be more of a CAUSAL CONNECTION with airline passengers than those present in the WTC at the time of the tragedy. In Palsgraf, if the shock of the explosion injured a passenger on the train, the court would have an easier time finding that s/he was in a so-called zone of danger when compared to Mrs. Palsgraf. By analogy, injury or death to airline passengers would be a more foreseeable consequence of negligence at an airport or aboard an airplane than to people in an office building.

Put differently, it is less foreseeable that the airline's conduct would lead to people dying in the WTC than putting their own passengers at risk of harm. It remains premature, though, to determine that the conduct was "far removed," as contemplated by Derdiarian, but it is arguably "further removed."

While ground victims have recovered damages in prior aviation crash cases, it was inevitable that the airplane would crash somewhere on the ground if an airplane malfunctioned. Using legalese, it was FORESEEABLE that people on the ground somewhere would be hurt.

In the present case, it might prove difficult convincing a jury that such individuals are entitled to recovery from American and United Airlines for the purposeful acts of terrorists. The airlines will make a credible argument that it is not foreseeable that terrorists would steer airplanes into the WTC towers.

Several issues remain beyond the hypothetical posed here. For example, the deceased in this case worked on the 93rd floor of WTC Tower 1 (attacked at 8:45a.m. and fell at 10:29a.m.), several flights above where the airplane hit that tower. Thus, she had no opportunity to escape peril. What if she was in WTC Tower 2 (hit at 9:03a.m. and collapsed at 9:50a.m.) and worked on a floor below the impact? Would the airline be liable for her death if she chose not to evacuate the building? Would security for the building be liable if it told people to stay in the building after the first tower had been hit?

These questions would lead to liability issues for other parties and even to a potential defense of COMPARATIVE NEGLIGENCE⁴ (asking a jury whether plaintiff contributed to her injuries by remaining in the building).

Obvious proof problems will emerge in such cases. The arbiters of factual disputes are the jurors sitting in judgment.

Finally, the attorney in this case cited that the family would receive nothing under the Fund due to the collateral source rule. He added that there is “no downside” for the family to file suit.⁵ However, for other people who lost a loved one in the WTC, I’d take a very close look at the Fund option before filing suit.

3. Is an airline liable for physical injuries suffered by a bystander who was not in the World Trade Center, but watched from the ground nearby as the first tower collapsed?

Liability of airline to bystanders on the ground who died or suffered physical injuries

The analysis here would be somewhat similar to #2 above (though the plaintiff is arguably further removed from the ZONE OF DANGER). In addition, the COMPARATIVE NEGLIGENCE defense might be raised for remaining in the immediate vicinity of a known hazardous area.

4. Is an airline liable for the negligent infliction of emotional distress suffered by a bystander who suffered no physical injury as he watched from the ground nearby as the first tower collapsed?

Liability of airline to bystanders on the ground who suffered emotional distress, but no physical injuries

These people were not provided for in the government’s Fund.

Under New York law, they have no viable cause of action, since one cannot recover for emotional distress without suffering an attendant physical injury, unless that person witnessed a horrifying event involving a close family member (and the witness was in the immediate vicinity of the event).

⁴ The defense of COMPARATIVE NEGLIGENCE is used to reduce a plaintiff’s award stemming from the plaintiff’s own negligence. If for example, a jury awards a plaintiff \$100,000 in damages but finds that the plaintiff was 25% negligent himself, the award gets reduced by 25% to \$75,000. In many states applying comparative negligence, if a plaintiff is found to be 50% or more negligent, that plaintiff will not recover ANY damages from a defendant.

⁵ “WTC Victim’s Kin Sues Airline,” *Newsday*, April 9, 2002

Will a case get to a jury?

In most tort actions, plaintiffs request a jury trial in an effort to plead to their case to possibly sympathetic peers, rather than to a (less likely to be swayed by emotion) judge.

However, there are several stages before, during, and after a trial that a judge can rule on a case and not present it to the jury for verdict, even if a plaintiff requests a jury trial. These decisions are based on MOTIONS⁶ to the judge by a party to the case.

1. Motion to dismiss. A judge may dismiss a Complaint **before trial** if s/he believes that the plaintiff did not properly state a viable claim, sued the wrong parties, or sued in the improper court. In ruling on this motion, the judge accepts the facts alleged in the Complaint as if they were true and does not rule on the merits of these facts. The plaintiff is not required to prove these facts when the judge hears the motion. Thus, it is rare for a Complaint to be dismissed WITH PREJUDICE (meaning that it cannot be re-filed) at this stage of a case.

2. Motion for summary judgment. Both sides routinely move for a summary judgment **before trial**. This motion is an effective tool for a defendant to have a judge rule in its favor without a jury verdict. To obtain a judgment on such a motion, a defendant would need to show the court, through affidavits and discovery, that there are no important issues of fact in dispute, and as a matter of law, the judge should rule in its favor.

3. Motion for directed verdict. This motion is made **during trial** by a party after the other party “puts on its case.” For example, after the plaintiff presents its evidence and “rests,” the defendant will make a motion for directed verdict by stating that the plaintiff has not presented a PRIMA FACIE CASE, the minimum amount of proof necessary to prove each element of a cause of action.

If the judge agrees with the moving party, then the defendant does not need to put on its case. If the judge denies the motion, the defendant puts on its case, and after resting, the plaintiff moves for a directed verdict (defendant also renews its motion).

Judges are very reluctant to grant Motions for Directed Verdict, as they want the jury to hear and rule on the facts of a case.

4. Motion for judgment notwithstanding the verdict (also known as a Motion for JNOV). We’ve all seen these motions in dramatic television shows or movies. It occurs **after trial**, when a jury renders a verdict for the plaintiff, and the defendant asks the judge to substitute his/her verdict for that of the jury’s decision. The reasons for granting a JNOV -- the jury’s verdict “shocks the conscience of the court,” or the jury did not apply the facts of the case to the law instructed by the judge.

⁶ A “motion” is a request to the judge for some type of relief in a case.

Remember, it is the judge's province to rule on legal issues and the jury's responsibility to assess the facts based on the law given by the court. This motion is granted only in extraordinary circumstances.

In the airline litigation discussed above, I believe that a motion for summary judgment will be the defendant's best shot of avoiding a jury verdict (absent a settlement of the matter before trial).

Conclusion

It is premature to definitively assess liability of the airlines in the aftermath of 9-11. First, a potential plaintiff must build a case through discovery, and then prove that an airline's conduct was negligent.

I believe that a reasonable jury:

1- would find the airlines liable for the deaths of individuals on the airplanes;

2 - would not find the airlines liable for the deaths or injuries to individuals in the World Trade Centers;

3 - would not find the airlines liable for physical injuries suffered by bystanders watching the first tower collapse; and

4 - cannot (under New York law) find the airlines liable for emotional distress (without an attendant physical injury) suffered by bystanders watching the first tower collapse.

As an alternative to litigation, the government's Fund provides sufficient relief for many individuals who lost a loved one, or were themselves injured survivors. The facts of each person's case are unique and thus, must be treated on a case-by-case basis to assess whether the Fund or litigation is the appropriate avenue.

As a nation tries to heal and seek closure, many lingering legal issues will remain unresolved for months and even years to come.

This information is provided for educational purposes only and is not offered as legal advice. Consult an attorney in your state for legal questions on this information.