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The Crash of Air Philippines 541

By Robert Yates

Eight years ago — April 19, 2000 — Air Philippines Flight 541, with 131 passengers and crew members, left Manila at 5:21 a.m., flying to Davao City, on Samal Island, about 600 miles southeast of Manila.

As it approached the airport at around 7 a.m., another aircraft was on the runway. Flight 541 began to circle in low clouds, waiting for the plane on the ground to move off the runway. As it circled, Flight 541 slammed into the side of a mountain, 500 feet above sea level. The plane caught fire and disintegrated, killing everyone on board. It was the worst air disaster in the history of the Philippines.

But there is more to this story than another horrible air crash. As airplanes in the American fleets wear out — when they reach a point where the cost of overhauling the planes, which can run between \$2 million and \$8 million, is no longer worth it — they are retired to the Arizona desert. There are thousands of worn-out planes lined up in the desert waiting for a second life. From there, leasing companies purchase the planes and lease them to other, usually foreign, usually developing, airlines.

Flight 541 was a Boeing 737, a 22-year-old

plane that had been put out to pasture by Southwest Airlines, and bought by AAR Aircraft & Engine Group, a publicly traded company based in Wood Dale, Ill. AAR leased the plane to Air Philippines in January 1999 and sold the plane in April 1999 to Fleet Business Credit Corp., now a division of Bank of America, and assigned Fleet its rights under the lease.

The lawsuit against AAR and Fleet was filed in Cook County Circuit Court and, following litigation over the forum issue, including an appeal, stayed here. The lead plaintiff was a Chicago resident, Boeing's corporate headquarters are here, and AAR is in Wood Dale. Donald J. Nolan of Chicago's Nolan Law Group, who represented 47 of the plaintiffs, was appointed lead counsel. There were three other firms representing plaintiffs, all from the San Francisco Bay Area: Sterns & Walker; Bowles & Verna; and O'Reilly & Danko. Gary W. Westerberg, Christopher R. Barth, T. Patrick Byrnes, and Mark A. Deptula of Locke, Lord, Bissell & Liddell, represented the defendants.

The case settled in November 2007 for \$165 million, which, Nolan said, worked out to about \$1.5 million per victim.

Aside from the inherent interest of a huge

settlement, the case is interesting as yet another feature of globalization — in this case, the globalization of the airline industry, and the ethical and legal obligations of the companies that buy and lease the planes to airlines in countries where the safety standards are well below American and European standards and where even the culture plays a role in the safety of airlines. In the last five years, there have been more than 10 fatal commercial airline crashes involving aircraft leased to developing countries, the latest occurred on April 15 in the Democratic Republic of the Congo, killing at least 75 people.

Chicago Lawyer sat down recently with Nolan to discuss the case.

Chicago Lawyer: What were the liability issues in the case?

Nolan: There were four main issues: crew resource management, the failure to provide an enhanced ground proximity warning system under our product liability theory — and spoliation for the destruction of the wreckage — and failure to perform maintenance under negligent entrustment.



Chicago Lawyer: Let's start with crew resource management. First, what is it, then, how is that an issue?

Nolan: Prior to the crash, the FAA mandated in the U.S. that crews have crew resource management (CRM) training, and what that deals with is a culture of deference in the cockpit, where human factors engineers learned and taught, and the FAA adopted, the idea that you have to have a system of checks and balances in the cockpit.

A co-pilot might notice something of imminent danger that the pilot did not notice, and it's necessary to call that out — complete deference is not afforded to the pilot in command.

Whereas the FAA mandated that and has a directive in place for crews in the U.S. to have this CRM training, the government in Philippines did not so require.

Asian countries have a storied past with deficiencies in CRM, because it's a clash with Asian culture, with deference to seniors.

For example, there was a Singapore Air crash in October 2000, on an international flight bound for Los Angeles — international flight SQ006 — when the crew took off in a typhoon in Taipei. There, none of the crew, even though they knew that it was not an appropriate takeoff, ever checked the action of the pilot in command.

In the Air Philippines case, the pilot was

being supervised at the time of the crash by a check airman, meaning a superior on a check ride, and the check airman was one whose actions were not countered by a lower pilot, so we knew there were issues of CRM training.

Chicago Lawyer: How can the lessor be held liable for the crew's training?

Nolan: AAR never checked to see what the standards were in the Philippines, and just presumed the Philippines would be following the FAA standard, when, in fact, they were not. So, under negligent entrustment law, which deals with what someone knew and should have known [they could be held liable].

Chicago Lawyer: And your negligent entrustment theory also relates to maintenance?

Nolan: This airplane was taken off the desert floor by AAR. It was purchased from Southwest Airlines, which is a high-mileage operating fleet, and this was a [22-year-old] airplane. Southwest Airlines is high-cycle, high-time. They really work their airplanes. Southwest made a decision somewhere along the line not to continue with that airplane — a cost-benefit analysis of maintenance, upkeep, and the returns they're offered on that.

Chicago Lawyer: How much was the lease for?

Nolan: The lease was on a per-month basis. The transactions were seven-figure transactions. I think when the plane crashed they made seven figures just on the insurance. When the plane crashed they had a financial return and a profit on the hull liability clause.

Chicago Lawyer: Who's responsible for the maintenance?

Nolan: Both the lessor and the lessee. The lessor, having in the lease reserved to itself rights of inspection, and requiring that maintenance and safety be followed — under that scenario on a legal basis it can face responsibility for the loss of life. Here, this fleet was not equipped with up-to-date manuals from Boeing. AAR never ascertained whether Air Philippines was aware of what Boeing's schedule of maintenance requirements were.

AAR had it checked by a company that makes appraisals, and they were warned that this was going to be a plane that would have problems with maintenance in the future, yet they purchased it because the returns were great.

So there was a cost-benefit analysis conducted in which the financial returns — even though it was acknowledged that it was with a start-up airline in a foreign country — the returns were higher than normal and, therefore, the financial return warranted the lease. [Southwest] wrote that off, but Air Philip-



piners takes it because it's a cheaper acquisition for them. They take that [plane] and AAR knows it has increased maintenance as it goes on, but they never did the review of maintenance facilities and programs of Air Philippines. They didn't check to see if the maintenance manuals were coordinated or any of those things. The pre-lease inspection said, "You're going to have ever-increasing maintenance costs, use caution."

Chicago Lawyer: Can airplanes be brought up to speed after so many miles?

Nolan: There are metal fatigue issues that we commonly deal with. Aging and metal fatigue is a common problem in the commercial aircraft industry, and it's exacerbated in the situation of aged aircraft.

Metal fatigue issues are especially important when you've leased an airplane in an ocean environment like the Philippines, where you have accretion of salt as a corrosive factor, so taking an old airplane like this, not performing maintenance, with old parts, and then exposing it to a salt-water environment is especially difficult.

Chicago Lawyer: You've talked about the lack of training and maintenance — how does the ground warning issue relate to the crash?

Nolan: When the plane was inspected and

leased by AAR and brought to Philippines, the airplane was not equipped with an up-to-date ground proximity warning system, an enhanced ground proximity warning system, which was then available and widely sold to airlines for safety reasons.

Instead, the plane was sold with the original old, outdated ground proximity warning system, which gave much lesser warning to the pilot of impending disaster.

The plane flew into a mountain. It was coming in, there was another plane on the runway, so it had to do a missed approach.

It was circling the airport in inclement weather and flew into a mountain, and that's precisely why the enhanced ground proximity warning system would have prevented the crash. It would have given a 24-second warning to the crew, at a minimum. They almost avoided the crash — they clipped trees — but the old system only gave them a few seconds' warning.

Had this plane been equipped for a few cents more per passenger with an enhanced ground proximity warning system, the plane crash would never have taken place.

Yet AAR elected — even though the FAA had set a schedule for incorporating the enhanced ground proximity warning system into the American fleet — to place it over in the Philippines when, in fact, the outdated system was not suited for the mountainous regions of Philippines.

We took the deposition of the designer of both systems and he noted that the old system was not designed for that terrain. The enhanced system was available and being employed by other operators.

Chicago Lawyer: What was the spoliation issue?

Nolan: We, through discovery, found that the insurers had hired an insurance adjusting company in Singapore called Air Claims. After we instituted our product liability lawsuit, Air Claims went to the scene of the crash and buried the wreckage in concrete. This was paid for by the insurers. Illinois law recognizes spoliation, so we had a motion for sanctions pending at the time the case settled.

AAR and Fleet, the successor company, now part of Bank of America, both of the defendants knew or had to know that maintenance was not being performed as required on this airplane, and so, certain key elements — the component parts of the aircraft, the distance measuring equipment and the altimeter — were buried by the insurance company and that prevented us from ever looking at it, even though maintenance records show these parts had been in the shop just days before the occurrence, so that was very critical.

Chicago Lawyer: The settlement works out to about \$1.5 million for each of the

Litigation > feature

victims — how does that match with other settlements?

Nolan: When Air Philippines first made offers of settlement to Philippine families, they were offering \$20,000. Roughly six months after this crash, there was the Singapore Airlines crash. Singapore Airlines immediately offered families \$400,000, so we had a disparity in 2000 between what the London market was offering Filipinos and what they were offering other Asian families.

What we've seen take place is the globalization of how claims are valued. We have a history of low payments internationally for crashes from the London market which is being challenged, and we have seen from the \$20,000 offer to six months later the \$400,000 offer, to what this case is in terms of a settlement of \$1.5 million per decedent, a trend in international cases that is the beginning of an equalization of how claims are being handled and evaluated.

For that reason alone it's significant — for how London and U.S. insurers are going to assess premiums and approach air disasters in the future. From what I'm told, \$165 million is believed to be the largest foreign domestic settlement for Asia.

Chicago Lawyer: Aside from the size of the settlement, what is the significance, if any, of this case?

Nolan: The issue of aged aircraft being sold or leased by American companies to foreign countries is a continuing problem of international dimension, and the problem it creates is not only a disaster, but the problem of foreign countries not having the sophistication or experience to legally resolve the international disputes.

As the American fleet has aged, those planes are being dumped into foreign markets. Those aged aircraft that are recycled for foreign airlines will ultimately have Americans flying on those airplanes in domestic sit-

uations. This is a problem — aged aircraft are not only a problem in the U.S., but it's magnified when those products are brought to a foreign country not equipped to handle the loss.

When those old airplanes crash in foreign countries, they represent the worst aviation tragedy those countries have ever faced — the greatest loss of life.

On an increasing basis people are turning to courts in the U.S.; they are looking to the U.S. for the sophistication of our legal system because they are not equipped by law and precedent to attend to cases of the magnitude of an air crash disaster. Many of their laws are outdated and have not dealt with mass torts.

When you have a truly international setting, the forum of the U.S. is something they look to because we have experience in resolving mass disasters and sophisticated international tort claims. The Circuit Court of Cook County has become a leader in handling those claims, through the efforts of Law Division Judge [William] Maddux.

When Boeing moved to Chicago, it brought international focus to this courthouse for claims involving Boeing aircraft, which are in fleets worldwide. Judge Maddux has supervised a number of lawsuits with complexities unique to air disasters which have come from these foreign crashes.

Air Philippines represents one of those foreign cases. The suit was originally brought in the Circuit Court of Cook County, the defendants appealed the ruling of Judge Kathy Flanagan that this was a convenient forum, and the case came back down, where it was ultimately settled before Judge Jennifer Duncan-Brice.

There are international aspects to it with respect to how claims are resolved. It has importance for American leasing companies as a precedent because American leasing companies view the leasing of commercial aircraft — the aged American fleet — as in part a financial transaction and yet, a company like AAR, which is international as

well, provides other services. It's a leader in the industry.

We have in this case a clashing of reviewing product liability and leasing law from a legal standpoint, and how that interfaces with the financial leasing industry, and what obligations exist for a finance company that turns to leasing of aircraft. Our product liability law and negligence law for negligent entrustment view responsibility differently from how financial companies historically have looked at these issues.

The importance of the case was reflected by how London views the results of the case.

The London and American insurers are reviewing this case because, historically, premiums were assessed to lessors in a different, lesser capacity than as to airlines, so this case was closely watched by insurance markets to see how it would be resolved.

Chicago Lawyer: Beyond the insurance issues, what do you think is the broader significance of the case?

Nolan: We believe this case is significant because insurers, lessors, and operators will focus more on safety and prevention when entering into transactions than they had in the past. We also believe that there will be more safety audits conducted by lessors of operators to whom they intend to lease, and the requirements for keeping with FAA standards will more likely take place.

In this instance, there was no safety audit conducted by AAR or Fleet of Air Philippines prior to the crash to know what their own safety practices were, and never any safety audits to determine whether Air Philippines was meeting FAA standards.

As globalization takes place, this case will be one that's considered in requiring the safety audits that are common practice in U.S. airlines. I think this case will help in terms of globalizing safety for domestic foreign routes. Hopefully, cases like this will help to increase safety. ■