



PREFLIGHT

Chairman's Message:

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Stunned. That is how I felt and I am sure many of you felt on September 11, and the days thereafter. I could not believe that we had allowed deranged people to take control of airplanes and crash them into buildings.

Sympathetic and proud. That is how I felt when I heard the news about the passengers aboard the United Airlines flight that refused to allow the terrorists to fly the airplane into a building. I was particularly heartened by the words of the passenger who called his wife on the cell-phone when she heard him say: "Let's roll."

In awe. That is how I felt when I heard the news about the firefight-

ers rushing into the burning buildings to save lives. The men and women of the New York Fire Department truly are and were heroic.

Heartened. That is how I felt when I got the email from the President of the Association of Trial Lawyers of America calling for a moratorium on lawsuits.

It is also how I felt when I received an invitation from the Georgia Trial Lawyers Association to contribute money to the "911 Heroes Fund." I understand that the economic targets set by GTLA were met.

Our Section meeting is scheduled for Friday, January 11, 2002, with a luncheon and business meeting to take place between 12:00 p.m. and 1:30 p.m. This is an election year, since the Chair serves a two year term. The membership has graciously indulged me by permitting me to serve for two complete terms, and I am grateful to have been of service

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**United Airlines Flight 175 (N612UA)
about to strike the WTC South Tower**

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to the Aviation Section. I want to do what is best for our Section, and I will leave that in your hands when we meet during the mid-year meeting of the Georgia Bar Association. In addition to our election, I would suggest that we think about actions or initiatives that can be taken by the Aviation Section of the State Bar of Georgia to alleviate human suffering and to assist people in need as a consequence of the events of September 11th.

As we look forward to 2002, we have both opportunities and challenges which must be met. I look forward to meeting with everyone who attends our mid-year meeting on Friday, January 11, 2002, at the Swissotel.

God bless America.

AA Flight 587: Wonderings about Wake Turbulence and Delamination

By Mark Stuckey

American Airlines Flight 587 departed Runway 31L at JFK Airport in New York at 9:13 AM on a flight to Santo Domingo, Dominican Republic. Approximately three minutes later, while climbing through 2,800 feet and executing the left turn on the standard departure procedure away from Brooklyn, radar contact was lost with the aircraft. The aircraft then crashed into the borough of Queens near Rockaway Beach, destroying four houses and severely damaging eight others. 260 passengers and crew died in the fiery crash, as well as 5 victims on the ground.

Of great interest and concern is the fact that the vertical stabilizer of the aircraft (an Airbus A300B4-605R) apparently separated from the fuselage approximately 2 miles from the crash site. While the loss of the stabilizer has been attributed as the "start" of the aircraft breakup (which included the loss of both engines prior to the crash), the question remains: Why would a vertical stabilizer fall off a perfectly good aircraft?

Assuming that the loss of the vertical stabilizer was the triggering event, what was the cause? First, what would exert enough force to cause this to happen? Well, the main culprit

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N612UA, the Boeing 767-222 that was hijacked and intentionally crashed into the World Trade Center South Tower



Above: Boeing 757 Flight Deck

Below: Boeing 767 Flight Deck



Flight 587: Wonderings (cont.)

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fingered by the NTSB and other experts is the wake turbulence of a Japan Airways 747 that departed just prior to Flight 587.

There has been some debate as to how long Flight 587 waited to depart after the Japan Airways flight, with times ranging from 90-120 seconds (AIM 7-3-9(a) requires 120 seconds or 4 miles of separation to avoid wake turbulence under these circumstances).

What is more disturbing is the apparent lack of separation between the Japan Airways flight and Flight 587 after departure, with the distance reportedly shrinking to .75 miles, with Flight 587 flying behind and below the Japan Airways 747, which would increase the likelihood of wake turbulence.

The flight data recorder indicated significant lateral forces prior to the crash, and the voice recorder indicates that the pilots considered these forces to be wake turbulence as well. Until the NTSB gives out further tidbits on this issue, the wake turbulence seems the most likely cause of the stress on

the Airbus 300.

But this still doesn't answer the question of why the vertical stabilizer came off. After all, the Airbus 300 is no small aircraft, with a fully loaded A300 weighing

the history of the stabilizer itself.

The A300 and A310 models use composite material and not metal in the construction of the vertical stabilizer. Unlike the military, which requires ultrasonic testing to check for defects in composite materials, commercial aircraft only have *visual* inspection requirements.

After the crash, FAA Emergency Airworthiness Directive (EAD) 2001-23-51 required the visual inspection of A300s and

A310s to check for flaws in the vertical stabilizers, despite the superficial nature of such an inspection when composite flaws could be far below the surface. Indeed, United Airlines discovered such a flaw on an A320 vertical stabilizer during a (you guessed it) voluntary *ultrasonic* inspection this month.

One of the types of flaws that can occur in composites is delamination, whereby the layers of composite material begin to split. As one could imagine, such delamination below the surface would be next-to-impossible to detect with a

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Above: Flight 587 Vertical Stabilizer Being Recovered

Below: One of the Vertical Stabilizer's Attachment Points



in at 363,800 pounds and thus being classified as a "Heavy" under the Pilot/Controller Glossary (P/CG) for Wake Turbulence separation guidelines. The plane was delivered in 1988, so it was still pretty new compared to many commercial aircraft in the skies today. So why structural failure? It may lie in the composite construction and

Aviation Case Law Update

By Chuck Young

This new feature of the Preflight Newsletter will help you keep up to date with recent cases that impact your aviation practice. If you know of or participate in a case that would be useful to other practitioners, please e-mail Mark Stuckey or me, and we will review it for inclusion in future editions.

Merritt v. Shuttle, Inc., 245 F.3d 182 (2d Cir. 2001). The Second Circuit, in a case with a complex procedural history, held that a commercial airline pilot whose license had been suspended after a near-crash on takeoff in a storm could bring a Federal Tort Claims Act ("FTCA") negligence suit against the FAA in federal district court for the FAA's failure to warn him of the storm's approach. The FAA contended that because 49 U.S.C. § 46110 vests judicial review of certain FAA, NTSB, and DOT administrative orders exclusively in the courts of appeals, the pilot could not sue the FAA in federal district court. Rather, the FAA argued, the pilot had to appeal his license suspension to the NTSB and then, if unsatisfied, had to proceed to the appropriate circuit court of appeals, and he had to take

all related actions with him; he could not file de novo litigation over issues inhering in the license suspension controversy. But the Second Circuit, reversing the district court, held that the pilot's FTCA claim did not allege injury arising from the order suspending his license; rather, that claim alleged independent injury resulting from the FAA employees' failure to provide him with accurate weather information. Thus, the judicial review provisions of 49 U.S.C. § 46110 did not preclude his negligence action. The court reasoned that its review of an NTSB order would be limited to consideration of the issues

could assert his FTCA claim would be to file suit in a federal district court, and so the Second Circuit remanded the case for further proceedings.

Manus v. American Airlines, Inc., Case No. 4:99CV00611HW (E.D. Ark. Apr. 27, 2001). In this case arising from the crash of American flight 1420 in Little Rock, Arkansas on June 1, 1999, a jury awarded a mother and her two young children a total of \$3,353,000 in compensatory damages. The passengers suffered permanent physical injuries and posttraumatic stress disorders as a result of the crash and their dramatic escape from



N334AA, the American Airlines 767-223ER that was hijacked and intentionally crashed into the World Trade Center North Tower

that the NTSB had itself considered and, because the NTSB cannot hear claims against the FAA for its role in aviation incidents or accidents, it would never hear the issue. The only way the pilot

the wreckage, and they sued American for, among other things, negligent infliction of emotional distress. At trial, the mother testified about fleeing through smoke to get out of the burning wreckage, and she described hearing the screams of trapped passengers as she and her children fled the scene. The defendants have appealed the verdict.

In re Air Crash off Point Mugu, Cal. on Jan. 30, 2000, 145 F. Supp. 2d 1156 (N.D. Cal. 2001). In this case arising from the crash of Alaska Airlines flight 261, the court held that admiralty

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Aviation Case Law Update (cont.)

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law applied because, among other things, the flight at issue linked two cities that had generally been linked by sea routes before the advent of air travel. The flight took off from Puerto Vallarta, Mexico for a scheduled landing in California, but it crashed off the California coast in the navigable waters of the United States. The court observed that admiralty jurisdiction exists in aviation accidents where (a) the alleged wrong took place on or over navigable waters, and (b) the wrong bore a significant relationship to a traditional maritime activity. Courts have construed the second part of this test to mean that admiralty jurisdiction arises where the airplane fills a role that would have been filled by a vessel but for air travel. Plaintiffs offered evidence that before air travel, Puerto Vallarta was primarily reached by ship. The application of admiralty law enables plaintiffs to bring both wrongful death and survival actions, the court stated, but plaintiffs will be unable to seek punitive damages or compensation for purely emotional distress because the Warsaw Convention bars such claims.

Dazo v. Globe Airport Security Services, 268 F.3d 671 (9th Cir. 2001). Plaintiff, a passenger ticketed to fly from San Jose to Toronto with a connection in St. Louis, sued an airport secu-



N644AA, the American Airlines 757-223 which was hijacked and intentionally crashed into the Pentagon

urity company and three airlines for negligence and breach of an implied bailment contract seeking damages for the alleged theft of a carry-on bag (with \$100,000 worth of jewelry inside) from an airport security checkpoint. The appellate court affirmed the trial court's dismissal of the complaint, holding that the passenger's flight was an international flight within the ambit of the Warsaw Convention, which applies to airlines and their agents, including the airport security company. Since the Warsaw Convention preempts state law claims, and because the

alleged conduct of the airlines and the security company did not amount to "willful misconduct" under California law so as to avoid the Convention's limit on liability, the appellate court held that the plaintiff's claim was properly dismissed and that the plaintiff was limited to a \$400 recovery for her lost luggage prescribed by the Convention.

Sky Fun 1 v. Schuttloffel, 27 P.3d 361 (Colo. 2001). The Colorado Supreme Court held in a case of first impression that the federal Pilot Records Improvement Act,

49 U.S.C. § 44936 (the "PRIA"), did not bar a defamation counterclaim filed by a corporate pilot whose former employer had sued him for negligence in piloting a company airplane. The pilot alleged that the employer had made certain disparaging verbal statements about him when another company, with which he had applied for a piloting job, called him seeking information pursuant to the PRIA. The PRIA limits liability for air carriers and persons who comply with proper requests for pilots' records, the court stated, but it went on to hold that the

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Aviation Law Update (cont.)

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statute does not preclude state law defamation claims based on defamatory verbal statements that are not based on the records supplied by the pilot's previous employer. Such statements, in the court's estimation, were not made to protect public safety in air commerce but were made to preclude the pilot's hiring by the potential new employer.

Carey v. United Airlines, 255 F.3d 1044 (9th Cir. 2001). The Ninth Circuit held that the Warsaw Convention, 49 U.S.C. § 40105, covered an airline passenger's allegation that a flight attendant had treated him badly on an international flight. The passenger had argued with the attendant about allowing his daughters, sitting in coach, to visit him in his first class seat. The passenger claimed that the argument caused him emotional distress with resulting physical symptoms, and he sued United under state law. The Ninth Circuit, affirming a magistrate judge's ruling, held that the Warsaw Convention provided the plaintiff's exclusive remedy. The court rejected the argument that the Warsaw Convention's use of the term "accident" indicated that the law was not intended to apply to intentional misconduct, citing Supreme Court cases interpreting the term to mean any unexpected or unusual event external to a passenger. The court further held that allowing airline passengers to

sue for intentional torts under local laws would defeat the Warsaw Convention's purpose of achieving uniformity of rules governing injury claims arising from international air transportation. The court then held that plaintiff failed to state a claim under the Convention because his "physical manifestations" of emotional distress did not meet the Convention's requirement of bodily injury.

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Please send any comments and suggestions for future Updates to cyoung@alston.com.

Flight 587 (cont.)

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visual inspection. What makes the ultrasonic inspection issue all the more important is that this very aircraft (N14053) had a delamination problem with the tail section prior to being put in service in 1988. Although this problem was repaired, the repair may have actually shifted the load-bearing characteristics of the vertical stabilizer, which then may have snapped when placed under enough pressure due to the wake turbulence of the Japan Airways 747. As engineers familiar with composites have noted, the standard procedure is to replace composites, not repair them. Although composites can handle certain stresses better than metal, composite failure usually involves the catastrophic shattering of the material (watch a Formula One crash and you will understand how severe this failure is).

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N591UA, the United Airlines 757-222 that was hijacked and eventually crashed in a field in Somerset, Pennsylvania after the passengers attempted to retake the plane

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Next Issue: Arthur Wolk Sues AVWeb for being called, *inter alia*, a “Butt Nugget”

Contributing writer Joel Sherlock will cover Arthur Wolk’s public criticism of Boeing fuel tanks, the nasty responses that found their way onto AVWeb’s site, and Wolk’s subsequent libel suit against AVWeb. In his Complaint, Mr. Wolk claims to have been called a “bastard,” “butt nugget”, and “bottom feeder,” among other such colorful phrases. Stay tuned!

SKYNOTES

Section Luncheon, State Bar Midyear Meeting
January 11, 2002 at 12:00-1:30 PM, Swissotel

Museum of Aviation Foundation Marathon/5K
January 19, 2002 at 8:00 AM, Robins AFB, Warner Robins; www.museumofaviation.org/marathon.htm

Lawyer Pilot Bar Association Winter Meeting
January 23-27, 2002, La Mansion del Rio, San Antonio, Texas; www.lpba.org

JALC 36th Annual Air Law Symposium
February 28-March 1, 2002; Hotel Intercontinental, Addison, Texas; www2.smu.edu/lra/jalc/symposium.htm



Arthur Wolk, Aviation Lawyer and Alleged Libel Victim

Flight 587 (cont.)

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What is also of concern is the December report of rudder problems on an A300-600 (same model as N14053) departing Lima, Peru, where the pilot reported fishtailing by the aircraft; fortunately, a safe landing was accomplished. There are also reports of “turbulence” suffered by N14053 back in 1994, which may have affected the 1988 composite repair. As in so many aviation cases, Flight 587 could very well be a combination of several factors, including wake turbulence, improper composite

repair and mechanical rudder failure.

But before you get the idea I have solved the mystery of Flight 587, only a month has passed since the crash, and many more factors may be uncovered as the NTSB investigation unfolds. The fact that the NTSB has enlisted NASA to assist them indicates the complexity of the issues and the NTSB need for additional ex-

pertise in these areas.

However, while the investigation moves forward, a comprehensive ultrasonic inspection of the Airbus fleet in America (not to mention overseas carriers, where the aircraft remain extremely popular) would likely tell us a great deal about the extent of the delamination problem—and would perhaps be a big step towards preventing another crash like Flight 587 from occurring.