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Fear of flying: A new legal Frontier

By Roger W. Clark

Fear of flying, a common phobia, can induce panic attacks, shortness of breath, heart palpitations, and dizziness. Tension builds on the way to the airport, continues as passengers board the airplane, and crescendos on take-off. Once airborne, victims pray for no turbulence, bad weather, unfamiliar noises, or unexpected movements in the airplane. Upon landing safely, they breathe a sigh of relief, realizing that their fears were about nothing.

Most of the time, their fears are needless worry. But occasionally, a flight can turn into a passenger's worst nightmare. This happened for 190 passengers who boarded Frontier Airlines Flight 1326 on the afternoon of Oct. 5, 2024. It was a beautiful day to fly, and the short flight from San Diego to Las Vegas should have been unexceptional. Except that it wasn't.

The Aviation Investigation Preliminary Report for Incident DCA-25LA001, issued by the National Transportation Safety Board (NTSB), shows that Flight 1326 was anything but short and pleasant for passengers and crew members. Initial findings, some cited below, are concerning. As the NTSB continues to examine what happened, one lawsuit has been filed against the airline by unhappy passengers (*Frierson v. Frontier Airlines*, Case No. A-24-904360-C, District Court Clark County, Nevada, filed Oct. 21, 2024) ("Frierson"), and more can be expected. How those lawsuits are resolved depends on a myriad of complexities unique to aviation law.

The flight crew experience

The NTSB reported that while fly-



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ing at cruise, the Frontier crew detected an increasingly pungent and acrid odor. The cabin soon filled with a smell like "burning rubber and/or petroleum products, such as plastics." Suspecting an electrical fire, the captain declared an emergency and began a descent into Harry Reid International Airport.

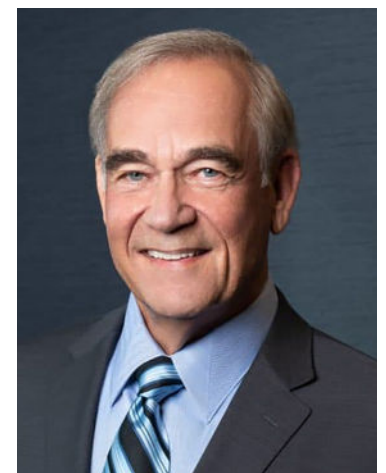
Using a special troubleshooting checklist to isolate the electrical fire, the deck crew proceeded to shut down most electrical systems, attempting to isolate and extinguish the suspected fire. With electrical systems inoperative, the pilots lost use of the primary radio and began communicating with approach control by transponder. They also lost some systems typically used to land. The crew told investigators, "[It] felt like [there was] no anti-skid."

Engine thrust reversers stopped working, and the Airbus 321 land-

ed hard. The pilots said that they were forced to brake immediately to prevent the aircraft from rolling off the far end of the runway. Without the anti-skid system, the wheels locked. The NTSB reported that "two loud bangs in quick succession [were heard] as the tires exploded about 3 seconds after touchdown. Then there was a large screen of smoke behind them and fire around the tires."

In dramatic fashion, the aircraft careened down the runway, spewing flames behind, with emergency equipment chasing it as it slowed. The ground crew extinguished the fire. After consulting with ground-based firefighters, the captain apparently made the decision to deplane passengers down stairways rather than using inflatable slides, which would likely have caused passenger injuries.

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The passenger experience

The media reported that there were no injuries. That should be news to the 190 passengers who feared for their lives. Those passengers could smell the smoke, could hear the tires blow, and could see the emergency crews on the runway. All of them suffered through a terrifying experience.

The passengers' experience was possibly made worse because of actions - or lack thereof - by the deck crew. Passengers claimed that they were never told an emergency had been declared and were left in the dark, even as they could smell smoke and see fire trucks below. When they finally arrived at the terminal, no airline representative was there to meet them.

Left to their own devices, passengers who sought information and help were reportedly rebuffed by the airline. Some of those passengers may choose never to fly again; many will likely choose carriers other than Frontier for future trips.

These survivors may develop PTSD, suffer nightmares, night sweats, and flashbacks. They may lose weight, their hair may start falling out. Their stress may result in muscle spasms, neck strains, headaches, shoulder pain, and back pain. Some passengers may also have experienced confusions from hitting their heads, arms, or legs on seats and bins around them.

Legal actions

Such stress-related symptoms may be horrific, but are they legally compensable "injuries?" Does the law recognize the physical manifestation of psychological trauma as a basis for recovery? This question is at the heart of the first lawsuit filed in the aftermath of the Frontier Airlines flight. But before a court can hear arguments on the issues, the forum question will need to be decided.

The Frierson complaint, filed by three passengers in Nevada state court, alleges that the "crash landing" was caused by Frontier's "failure to properly repair, inspect, maintain and operate the aircraft in a reasonable and safe manner." The plaintiffs will try to keep the action in state court; the defense may seek to remove it to federal court because of the complete diversity jurisdiction of the plaintiffs and defendant. (28 U.S.C. 1332)

We can expect to see additional lawsuits filed in Nevada and Cali-

fornia, and possibly Colorado, where Frontier is headquartered. For those cases that wind up in federal court, fights over venue are sure to follow, controlled by 28 U.S.C. 1404, the federal change of venue statute.

Because the cases will share at least one common issue of fact - the cause of the incident - the cases in federal court may be coordinated or consolidated for pretrial proceedings before a single district pursuant to 28 U.S.C. 1407. That law authorizes transfers "by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions."

Standards and duties

The Nevada plaintiffs allege in their complaint that Frontier, as a "common carrier under Nevada law," owed them a heightened standard of care that called for it to exercise "extraordinary, as opposed to ordinary care to its passengers."

Their allegation raises an all-too-common issue in aviation cases: Is the state common carrier standard of care preempted by federal law? The Ninth Circuit held in 2007 that standards of in-flight air safety are field-preempted by federal law, which uses the "careless and reckless" standard of 14 C.F.R. 91.13. (*Montalvo v. Spirit Airlines*, 508 F.3d 464 (9th Cir. 2007)). The duty to "operate" may, therefore, be federal in nature, contrary to the plaintiffs' allegation.

What about the duty to "repair, inspect, maintain" the aircraft? This may invoke a separate preemption analysis. The duty of repair, inspection and maintenance of commercial aircraft is governed by federal regulations, and it is non-delegable. This means that even if Frontier Airlines contracted out those tasks, the airline would still be responsible for anything the third-party vendor did or failed to do. (14 C.F.R. 121.363 (b)).

The standard of care applicable to repair, inspection and maintenance, whether it is federal or state in nature, would probably depend upon a conflict preemption analysis rather than a field preemption analysis. (See *Sikkelee v. Precision Airmotive Corp.*, 907 F.3d 701 (3rd Cir. 2018).)

International standards

At least one passenger on that un-

lucky Frontier Airlines flight may have been a foreign national making a connecting flight from Guadalajara or another city outside the United States. Even though that passenger was on a domestic leg of the flight, they would have been flying under an international contract of carriage. His or her rights and remedies would thus be subject to an entirely different standard of liability.

Under the Montreal Convention (Convention for the Unification of Certain Rules for International Carriage by Air, opened for signature May 28, 1999, T.I.A.S. No. 13,038, 2242 U.N.T.S. 350 [entered into force Nov. 4, 2003]), an international passenger does not have the burden to prove fault. He or she must only establish that an "accident" has occurred. (Article 17, Montreal Convention.)

Defining "accident," the United States Supreme Court wrote: "We conclude that liability under Article 17 . . . arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger." (*Air France v. Saks*, 470 U.S. 392 (1985)). The Frontier incident easily qualifies as an accident under the Montreal Convention.

Remedies, choice of law

What remedies are available to the Frontier passengers? Are pure emotional distress damages recoverable? What about emotional distress accompanying a minor physical injury, such as a bruise, but not directly caused by it? What about physical manifestations of emotional distress? Are those injuries recoverable?

The answer depends upon which law on remedies applies, a passenger-by-passenger inquiry. A Nevada court, whether a state court or a federal court sitting in diversity, would apply Nevada's choice of law rule. That rule states that the rights and liabilities of parties with respect to an issue in tort are governed by the local law of the state that has the most significant relationship to the occurrence and the parties. A Nevada resident returning home on the Frontier flight may therefore be subject to different law on recoverable damages than a California resident flying to Las Vegas for a short stay. The first may be subject to Nevada law; the second subject to California law.

For cases filed in California, the law applicable to the nature and type

of damages recoverable would be governed by California's choice of law rule. Known as the governmental interest test, this involves a three-step inquiry. Where there is a true outcome-determinative difference, a court must decide which state's interest would be more impaired if its policy were subordinated to the policy of the other state. Then it must apply the law of the state whose interest would be the more impaired if its law were not applied. (See *Hairu Chen v. Los Angeles Truck Centers, LLC*, No. S240245 (Cal., July 22, 2019); *Reich v. Purcell*, 67 Cal.2d 551 (1967).)

What about our hypothetical passenger from Guadalajara? His or her remedies would be limited under the Montreal Convention. Based on the U.S. Supreme Court's reasoning in *Eastern Airlines, Inc. v. Floyd* (499 U.S. 530 (1991)), that passenger would probably not be able to recover damages for pure emotional distress. If, however, minor physical injuries accompanied the emotional distress damages, even if not directly related to those physical injuries, there may still be a path to compensation. (See *Doe v. Etihad Airways*, P.J.S.C., 870 F.3d 406 (6th Cir. 2017).)

Conclusion

The passengers on Frontier Airlines Flight 1326 suffered undeniable stress. But it will be no simple process to determine who is at fault and what, if any, damages may be recovered.

The NTSB will be reviewing the incident and will eventually issue its probable cause report. Interestingly, a probable cause report is not an assignment of blame. A finding of fault will be the responsibility of a civil jury. Was the electrical fire the fault of the airplane manufacturer, the maintenance contractor, the airline? Were there failures in the flight crew's response to the fire and their operation of the plane? Did Frontier's actions put passengers' safety at risk? Was there a missed obligation to communicate with passengers while on the plane and after landing?

Most importantly, will the passengers be able to recover damages for their emotional and psychological injuries, which may not manifest in physical ways? How, if at all, can such injuries be valued and compensated? Ultimately, this is the challenging frontier presented by such complicated aviation litigation.